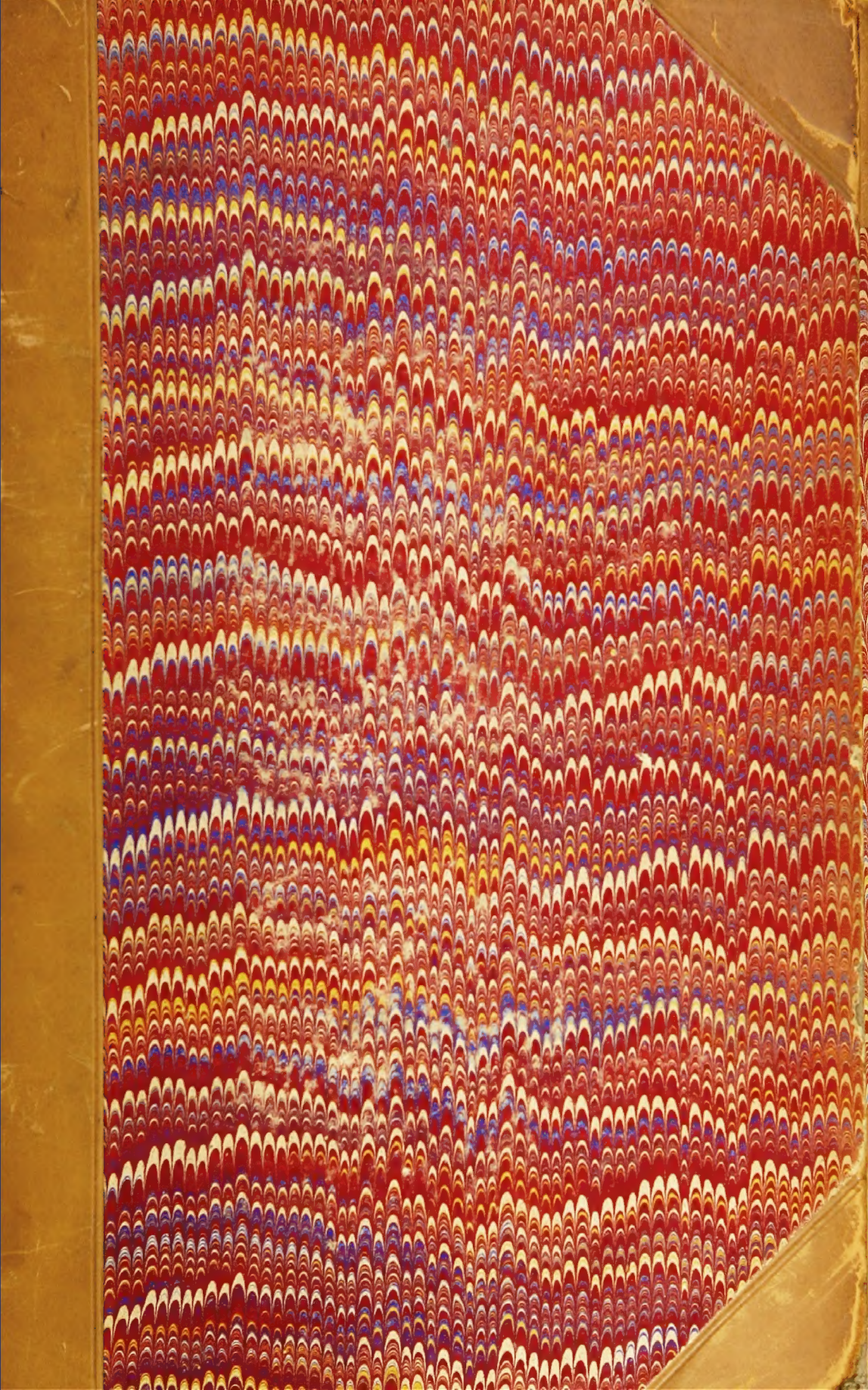
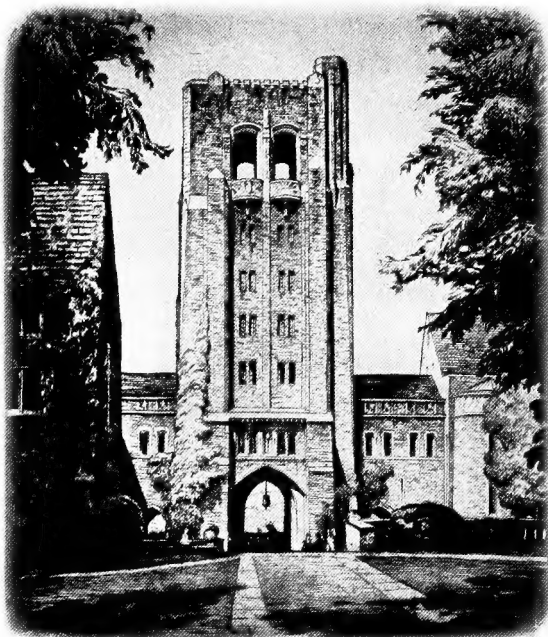




KD
674
W38
1886
Marsha



Cornell Law School Library

Marshall Equity Collection

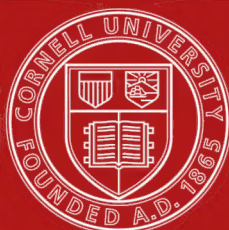
Gift of

E. J. Marshall, L. L. B. 1894

CORNELL UNIVERSITY LIBRARY



3 1924 085 504 227



Cornell University Library

The original of this book is in
the Cornell University Library.

There are no known copyright restrictions in
the United States on the use of the text.

A PRACTICAL COMPENDIUM OF EQUITY

ARRANGED AND DIGESTED

UNDER THE FOLLOWING TITLES:

VOL. I.

ACCUMULATIONS.
ANNUITIES AND RENT-
CHARGES.
APPORTIONMENT.
ASSETS.
CHARITY AND MORTMAIN.
COMPROMISES AND FAMILY
ARRANGEMENTS.
CONTRACTS.
CONVERSION.
COPYRIGHT.
DONATIO MORTIS CAUSÁ.
EASEMENTS.
ELECTION.
ESCHEAT AND FORFEITURE.
ESTATES.

EXECUTORS AND ADMIN-
ISTRATORS.
FRAUDULENT AND VOLUN-
TARY CONVEYANCES AND
SETTLEMENTS.
GUARDIAN AND WARD—
PARENT AND CHILD.
HUSBAND AND WIFE.
JOINT STOCK COMPANIES.
JOINT TENANCY—TENANCY
IN COMMON — COPARCE-
NARY.
JUDGMENTS AND DECREES.
LANDLORD AND TENANT—
LEASE.
LIMITATIONS TO SUITS.
MARRIAGE SETTLEMENTS.
MERGER.

MORTGAGES.

VOL. II.

PARTNERSHIP.
PERPETUITIES.
POWERS.
SATISFACTION.
SETTLED ESTATES AND
SETTLED LAND ACT.
TRUSTS.
USES.
VENDORS AND PURCHASERS
OF ESTATES.
VESTING AND DIVESTING
OF ESTATES AND INTE-
RESTS.
WASTE.
WILLS.

BY

WILLIAM WEBSTER WATSON, Esq.,

OF TRINITY COLLEGE, CAMBRIDGE, M.A., AND OF THE INNER TEMPLE, BARRISTER-AT-LAW.

SECOND EDITION

By **THE AUTHOR, AND B. P. NEUMAN, Esq.,**

OF THE INNER TEMPLE, BARRISTER-AT-LAW.

IN TWO VOLUMES.—VOL. I.

LONDON :

H. SWEET AND SONS, 3, CHANCERY LANE,
Law Publishers.

C. F. MAXWELL, MELBOURNE AND SYDNEY.

CARSWELL AND CO., TORONTO.

MEREDITH, RAY, AND LITTLER, MANCHESTER.

1886.

B63917

LONDON :

BRADBURY, AGNEW, & CO., PRINTERS, WHITEFRIARS.

PREFACE TO THE SECOND EDITION.

IN the preface to the first edition I stated that I had endeavoured to collect and arrange, in a concise and practical form, the Decisions and Statutes on those subjects which chiefly occupied the attention of Courts of Equity. My object was to place before the Profession a work, which I hoped might, in some degree, afford such assistance in Equity, as in Common Law Practice had been provided by Selwyn's Law of Nisi Prius and Roscoe's Digest of the Law of Evidence.

With reference to the present edition, I have especially to thank my learned friend Mr. Neuman for the valuable assistance he has given me. He has compared the whole of the text of the first edition with the authorities there cited, my object being to render the present work as accurate as possible. He has also compiled the greater part of the Index. I have also to express my thanks to Mr. Heber L. Hart, LL.B., for his valuable aid in preparing a portion of the Index.

For the selection and arrangement of all the fresh matter in the text, comprising statutes and decisions, I am alone responsible.

In the Addenda I have brought down the references to the date of the publication of the May numbers of the Reports.

W. W. W.

1, TEMPLE GARDENS,
May, 1886.

CONTENTS OF VOLUME I.

TABLE OF CASES	PAGE ix
TABLE OF STATUTES	cxvi
ADDENDA ET CORRIGENDA	cxxxv

ACCUMULATIONS	4
ANNUITIES AND RENT-CHARGES	10
APPORTIONMENT	22
ASSETS	30
CHARITY AND MORTMAIN	41
COMPROMISES AND FAMILY ARRANGEMENTS	62
CONTRACTS	67
CONVERSION	105
COPYRIGHT	125
DONATIO MORTIS CAUSÂ	136
EASEMENTS	139
ELECTION	176
ESCHEAT AND FORFEITURE	186
ESTATES	192
EXECUTORS AND ADMINISTRATORS	248
FRAUDULENT AND VOLUNTARY CONVEYANCES AND SETTLEMENTS	288
GUARDIAN AND WARD—PARENT AND CHILD	314
HUSBAND AND WIFE	323

	PAGE
JOINT STOCK COMPANIES	409
JOINT TENANCY—TENANCY IN COMMON—COPARCENARY	500
JUDGMENTS AND DECREES	516
LANDLORD AND TENANT—LEASE	526
LIMITATIONS TO SUITS	571
MARRIAGE SETTLEMENTS	609
MERGER	679
MORTGAGES	685

TABLE OF CASES.

- AARON *v.* Aaron, 1269
 Abadam *v.* Abadam, 15
 Abbis *v.* Winter, 262
 Abbiss *v.* Burney, 836, 1424, 1429
 Abbot *v.* Swarder, 1131
 Abbott, *Ex parte*, 390
 — *v.* Middleton, 141, 1299, 1314
 — *v.* Stratten, 693, 1086
 Abdy *v.* Gordon, 182
 Abel *v.* Heathcote, 876
 Abell, *Ex parte*, 827
 Aberaman *v.* Wickens, 1174
 — Ironworks *v.* Wickens, 1079
 Abercorn's, Marquis of, Case, 424
 Aberdeen R. Co. *v.* Blaikie, 457
 — Town Council *v.* Aberdeen University, 985
 Abergavenny (E.) *v.* Brace, 585
 Abernethy *v.* Hutchinson, 131
 Abinger, Ltd., *v.* Ashton, 531
 Abraham *v.* Alman, 964
 — *v.* Newcomb, 381
 Abram *v.* Cunningham, 253
 Abrams *v.* Winshup, 1367
 Abrey *v.* Newman, 1383
 Accidental, &c., Corp., *Re*, 474
 — Death, &c., Co., *Re*, 485
 Acey *v.* Simpson, 1341
 Acherley *v.* Vernon, 1201
 Ackerman *v.* Burrows, 505
 Ackland *v.* Sutley, 543, 544, 980
 — *v.* Pring, 980
 Ackroyd *v.* Smith, 554
 — *v.* Smithson, 116, 969
 Ackworth *v.* Ackworth, 929
 Acland *v.* Gravener, 751
 Acocks *v.* Phillips, 559
 A'Court *v.* Cross, 606
 Acton *v.* Acton, 1333, 1341
 — *v.* Blundell, 164
 — *v.* Crawley, 226
 — *v.* Peirce, 612
 — *v.* White, 397
 — *v.* Woodgate, 993
 Adair *v.* Shaw, 251, 267, 278, 283
 Adames *v.* Hallett, 289, 301
 Adams' Case, 421
 — Policy Trusts, *Re*, 358, 364
 — Settled Estates, *In re*, 941
 — Trusts, *In re*, 1009
 Adams, *Ex parte*, 829
 — Goods of, 1267
 — and Kensington Vestry, *Re*, 967, 1042
 v. Adams, 883, 915, 1355
 — *v.* Angell, 742
 — *v.* Barry, 598
 — *v.* Broke, 877
 — *v.* Claxton, 772
 — *v.* Clementson, 135
 — *v.* Clifton, 982
 — *v.* Gamble, 392, 393
 — *v.* Hagger, 528
 — *v.* Jones, 1312
 — *v.* Lavender, 351
 — *v.* Peirce, 1343
 — *v.* Roberts, 1194
 — *v.* Savage, 1424
 — *v.* Scott, 756
 — *v.* Swarder, 1039, 1177
 — *v.* Taunton, 1138
 — *v.* Weare, 98
 Adamson's Case, 432
 Adamson, Goods of, 1284
 — *Ex parte*, 830
 — *Re*, 249
 — *v.* Armitage, 16, 399
 Addams *v.* Ferick, 1334
 Addecott *v.* Addecott, 20
 Adderley *v.* Clevering, 237
 Addis *v.* Knight, 803
 Addison *v.* Cox, 726
 Addison's Case, 451, 485
 Adey *v.* Arnold, 687, 1003
 Adlington *v.* Cann, 961
 Adnam *v.* Cole, 43, 1297, 1335
 — *v.* Sandwich, E. of, 575
 Adsetts *v.* Hives, 688
 Adshead *v.* Willets, 1316, 1368
 Adv.-Gen. *v.* Smith, 109
 Affleck *v.* Affleck, 894
 — *v.* James, 878
 Agace, *Ex parte*, 799
 Agar *v.* Fairfax, 509
 — *v.* George, 664
 — *v.* Macklew, 824
 Agar-Ellis, *Re*, Agar-Ellis *v.* Lascelles, 323
 — *v.* Lascelles, 321, 322
 Ager *v.* P. & O. Steam Co., 131
 Agnew *v.* Pope, 1280

- Agnew & Brimelow v. Murray, 699
 Agra Bank, *Ex parte*, 489, 724, 725
 — v. Barry, 765, 766, 1155
 Agra and Masterman's Bank, *Re*, 455
 Agriculturist Cattle, &c., Co., *Id.*, 485
 — &c., Co., 733
 Aguilar v. Aguilar, 365, 379, 1395
 Aikman v. Aikman, 1260
 Ainslie v. Harcourt, 236, 238
 — v. Medlicott, 95, 332
 Aird's Estate, *Re*, 1311
 Airey v. Borham, 802
 — v. Hall, 304
 Aislabie v. Rice, 1203, 1239
 Akhurst v. Jackson, 804
 Alabaster's Case, 422, 423
 Albany's Case, 854
 Albemarle, E., v. Rogers, 1321
 Albert v. Grosvenor Invest. Co., 417
 Albert, Prince, v. Strange, 129
 Albion Life Ass. Soc., *Re*, 437, 476, 492
 — Steel, &c., Co. v. Martin, 411
 Alchin's Trusts, *Re*, 45
 Alcock v. Connop, 1084
 — *Re*, Prescott v. Phipps, 756
 — v. Sloper, 122
 Alder v. Lawless, 18
 Alderley, Lady Stanley of, v. Shrewsbury,
 E. of, 161
 Alderson v. Elgey, 778
 — v. White, 574, 687
 Aldred's Case, 162
 Aldrich v. Cooper, 39, 40, 741, 375
 Aldridge, *Ex parte*, 405
 — v. Wallscourt, *Ld.*, 1415
 Aldworth v. Robinson, 741
 Alexander, *Re*, 888
 — v. Alexander, 850, 856, 903,
 915, 916, 922, 1218, 1385
 — v. Crosbie, 673, 1102
 — v. Crosby, 1076, 1118
 — v. Cross, 1043
 — v. Crys. Pal. R. Co., 1047
 — v. Mills, 852, 854
 — v. Young, 846
 Alexandra Palace Co., *Re*, 467, 485
 Aleyn v. Belchier, 919
 Alger v. Parrott, 1406
 Alison, *Re*, 583, 595, 755
 Alison's Case, 464
 — Campbell's Case, Hippeley's
 Case, 417
 Allam, *Ex parte*, 714
 Allan v. Backhouse, 236, 237, 645
 — v. Gomme, 156
 — v. Gott, 1415, 1421
 Allchin, Goods of, 1301
 Allcock v. Moorhouse, 534, 562
 Allday v. Fletcher, 352, 377
 Allen, *Ex parte*, 569, 570
 — *Re*, 1294
 — v. Allen, 223, 538
 — v. Anderson, 182
 — v. Anthony, 1154
 — v. Bewsey, 980
 Allen v. Callow, 1337
 — v. Dundas, 1110
 — v. Farthing, 1210
 — v. Jackson, 1234
 — v. Knight, 765, 1184
 — v. Macpherson, 254, 1271
 — v. Maddock, 1268, 1299
 — v. Norris, 1010, 1014
 — v. Richardson, 1175, 1176
 — v. Seckham, 159
 — v. Southampton, *Ld.*, 723, 743, 1155
 — v. Taylor, 144
 — v. Thorp, 1406
 — v. Webster, 1387
 Allen's Case, 457
 — Estate, *Re*, 1209
 Alleyn v. Alleyn, 931
 Allfrey v. Allfrey, 808
 Allgood v. Blake, 1371, 1391
 Allhusen v. Whittell, 119, 258, 1351
 Alliance Bank v. Broom, 71
 — v. Kearsley, 793
 — of Simla v. Carey, 603
 Allison v. Monkwearmouth, 102
 Allnutt, *Re*, 661
 Alloway v. Alloway, 640
 — v. Braine, 102, 1131
 Allsopp v. Day, 713
 — v. Wheatecroft, 87
 Allum v. Fryer, 879
 Alsager, *Ex parte*, 737
 Alsop v. Bell, 33, 683
 — v. *Ld.* Oxford, 1108
 — v. Pine, 869
 Alston, *Ex parte*, 769
 — v. Trollope, 261
 Alt v. Alt, 331, 612
 Alton v. Harrison, 290
 — v. Medlicott, 21
 Alves v. Hodgson, 75
 Ambergate, &c., Co. v. Norcliffe, 465
 Ambler v. Bolton, 817
 — v. Lindsay, 250
 Ambrose v. Ambrose, 971
 — &c., Co., *Re*, 413, 414
 Ames, *In re*, 986
 — v. Cadogan, 897
 — v. Mannering, 599
 Amesbury v. Brown, 341
 Amherst's Trusts, *Re*, 1242
 Amherst v. Leeds, D. of, 591
 Amies v. Skillern, 502
 Amiss v. Hall, 990
 Amler v. Amler, 111
 Amphlett v. Parke, 117
 Amson v. Harris, 1383
 Ancaster, D. of, v. Mayer, 14, 15, 36
 Anchor Assurance Co., *Re*, 463
 Ancona v. Ancona, 719
 — v. Waddell, 1244
 Anderson's Case, 429, 432, 483
 Anderson v. Abbott, 177, 181, 182, 350
 — v. Anderson, 209, 219, 220, 388,
 393, 398, 812, 1266, 1287
 — v. Dawson, 846-847, 1406

- Anderson v. Dwyer, 24
 — v. Elsworth, 308, 309
 — v. Higgins, 1104
 — v. Kemshead, 693
 — v. Mid. R. Co., 527, 534
 — v. Oppenheimer, 171, 553
 — v. Pignot, 240, 742
 — v. Weston, 819
 Andree v. Ward, 1396
 Andrew v. Andrew, 281, 1097, 1131,
 1406, 1430
 — v. Southouse, 1369
 — v. Trinity Hall, 180
 — v. Wrigley, 587, 1161
 Andrew's Case, 473
 Andrews, *Ex parte*, 443
 — *Re*, 317, 399, *Add.*
 — v. Andrews, 300
 — v. Bousfield, 725
 — v. George, 235
 — v. Hailes, 566
 — v. Hulse, 229
 — v. Partington, 1350, 1379
 — v. Salt, 316, 323
 — v. Williams, 226
 Andrews' Will, *Re*, 242
 Andros, *Re*, 1388
 Angell v. Dawson, 1001
 Angelo, *Re*, 781
 Angermann v. Ford, 1345
 Angerstein v. Martin, 119, 1346
 Angier v. Stannard, 990
 Anglesea Co., 485
 — Coll. Co., 472, 478
 Ang.-Aus. Co. v. Br. Prov. Co., 457, 463
 Anglo-Californian, &c., Co., *Re*, 436
 Anglo-Danubian, &c., Co., *Re*, 450
 Anglo-Greek, &c., Co., 483
 — Steam Co., 469, 472
 Anglo-Italian Bank, &c., *Re*, 1060
 — v. Davies, 520
 Anglo-Moravian, &c., R. Co., Watkin, *Ex*
 parte, 482
 Annesley v. Ashurst, 991
 Antrim, Ld., v. D. Buckingham, 892
 Antrobus v. Smith, 300, 301
 Anon, 316, 321, 324, 351, 594, 617, 638,
 756, 813, 814, 1153, 1253, 1299, 1346
 Anon, or *Ex parte* Gardner, 381
 Ansley v. Bainbridge, 936
 Anson v. Potter, 990
 — v. Towgood, 80, 1092
 — Ld., v. Hodges, 1089, 1135
 Anstee v. Nelms, 577, 1306
 Anstruther v. Adair, 380, 626
 Aplin, *Re*, 184
 Aplyn v. Brewer, 256
 Appleton v. Rowley, 338, 1291
 Appletreewick, &c., Co., *Re*, 432
 Appleyard, *Ex parte*, 477
 Apreece v. Apreece, 1329, 1334
 Arbuthnot v. Norton, 730
 Aredekne v. Kelk, 157
 Archbold v. Scully, 581, 586
 Archdeacon v. Bowes, 750
 Archer, Goods of, 1273
 — v. Hudson, 306
 — v. Jegon, 1224
 — v. Kelly, 662
 Archer's Case, 1370
 Arden v. Arden, 518, 725, 774
 — v. Pullen, 553
 Ardesoife v. Bennet, 181, 185
 Arkell v. Fletcher, 1360
 Arkwright, *Ex parte*, 692
 — v. Gell, 165, 166
 — v. Newbold, 429
 Armitage, *Re*, 831
 — v. Askham, 1141
 — v. Coates, 859
 — v. Williams, 1379, 1381, 1383
 Armstrong v. Armstrong, 502, 504, 646,
 696
 — c. Burnet, 466
 — v. Courtney, 557
 — c. Eldridge, 18, 505, 506
 — c. Lewis, 795
 — v. Storer, 760
 Armytage v. Wilkinson, 1189, 1191
 — v. Armytage, 893
 Arnal, *Ex parte*, 568
 Arnald v. Arnald, 1097
 Arnold, *Re*, 1188, 1190, 1222, 1365
 — c. Arnold, 21, 1061, 1067, 1068,
 1258, 1323, 1348, 1349
 — c. Dixon, 108
 — c. Garner, 757, 985
 — v. Hardwick, 919
 — v. Kempstead, 371
 — v. Poole, Mayor of, 92
 — v. Woodhams, 399
 Arnold's Trusts, *Re*, 1223
 Arnshy v. Woodward, 558, 559
 Arrow v. Mellish, 1383
 Arrowsmith, *Re*, 1280
 Arrowsmith's Trusts, *Re*, 1193, 1228, 1354
 Arthur, Goods of, 1273
 — c. Clarkson, 304
 — c. Mackinnon, 1297
 — v. Mid. Rail. Co., 970
 — v. Wynne, 671
 Arthur Average Assoc., *Re*, 415, 484
 Arundel, Ly., v. Phipps, 298, 389, 393
 Arundell v. Arundell, 638, 672
 — v. Philpot, 922
 Ascough v. Johnson, 743
 Ash v. Ash, 1404
 Ashanore's Trusts, *Re*, 1218
 Ashburner v. Macguire, 1338
 — v. Wilson, 1298
 Ashburnham v. Thompson, 272
 Ashbury, *Ex parte*, 484
 — v. Watson, 462, 467, *Add.*
 Ashbury Rail. Car. & Iron Co. v. Riche, 417
 460, 461
 Ashby v. Ashby, 351
 — v. Blackwell, 991
 — c. Day, 258
 — c. Palmer, 106, 113
 Ashenhurst's Case, 1372

- Ashenhurst *v.* James, 744
 Asher *v.* Whitlock, 577
 Ashfield *v.* Ashfield, 538
 Ashley's Case, 431
 — *v.* Ashley, 838
 — *v.* Pocock, 262
 Ashling *v.* Knowles, 1212
 Ashmore, Goods of, 1274
 — *v.* Paley, 284
 Ashmore's Trusts, *Re*, 1214, 1215
 Ashpitel *v.* Sercombe, 413
 Ashton *v.* Ashton, 1331
 — *v.* Blackshaw, 745
 — *v.* Corrigan, 690
 — *v.* Dalton, 692, 732
 — *v.* Jones, 60
 — *v.* Langdale, L., 52
 — *v.* M'Dougall, 330, 335, 633
 — *v.* Robinson, 801
 — *v.* Stock, 590
 — *v.* Wood, 754, 1133, 1138
 Ashurst *v.* Mason, Same *v.* Fowler, 457
 Ashwell *v.* Staunton, 732
 Ashwell's Will, *Re*, 600
 Ashworth *v.* Mann, 52
 — *v.* Mounsey, 757, 1071
 — *v.* Outram, 391
 Asiatic, &c., Corporation, *Re*, 420
 Askew's Case, 435
 — *v.* Lewis, 717
 — *v.* Woodhead, 123
 Askham *v.* Barker, 893
 Aspden *v.* Seddon, Preston *v.* Same, 169
 Aspinall *v.* Duckworth, 1291, 1293
 — *v.* L. & N. W. Ry. Co., 798, 812
 — *v.* Petvin, 1365
 Astbury, *Ex parte* Richards, *Re*, 704
 Astle *v.* Wright, 805
 Astley *v.* Essex, Earl of, 576, 578, 1204
 — *v.* Micklethwait, 1220
 — *v.* Milles, 682, 683
 — *v.* Weldon, 72
 Aston, *Ex parte*, 426
 — Goods of, 1325
 — *In re*, 1011, 1013
 — *v.* Aston, 917, 1254
 — *v.* Wood, 45
 Atcherley *v.* Du Moulin, 664
 — *v.* Vernon, 106
 Atcheson *v.* Atcheson, 385
 Athenæum, &c., Soc. *v.* Pooley, 722, 1004
 Atherton *v.* Pye, 1410
 Athill *v.* Athill, 741
 Atkins *v.* Hiccocks, 1236
 — *v.* Tredgold, 808
 — *v.* Uton, 734
 — Vaughan d., *v.* Atkins, 199
 Atkinson, *Re*, 723
 — M. E. J., Goods of, 1275
 — *v.* Anderson, 1148
 — *v.* Baker, 222
 — *v.* Barton, 1410, 1411
 — *v.* Bruce, 946, *add.*
 — *v.* Grey, 38
 — *v.* Holtby, 1271, 1410, 1411
 Atkinson *v.* Littlewood, 934
 — *v.* Mackreth, 799
 — *v.* Paice, 1366
 — *v.* Smith, 73, 365
 — *v.* Turner, 1205, 1216
 Atkyns *v.* Kinnier, 72, 822
 Attenborough's Case, 711, 712, 713
 Atter *v.* Atkinson, 1270, 1300
 Atterbury *v.* Wallis, 725, 1156
 Att.-Gen. *v.* Acland, 56
 — *v.* Acton Board, 174
 — *v.* Alford, 272
 — *v.* Andrew, 50
 — *v.* Aspinall, 44
 — *v.* Backhouse, 1155
 — *v.* Bayley, 1397
 — *v.* Bowyer, 1353
 — *v.* Browne's Hosp., 47
 — *v.* Birm., Corp. of, 174
 — *v.* Blizard, 46
 — *v.* Bovill, 46
 — *v.* Bunce, 47
 — *v.* Brackenbury, 900, 902
 — *v.* Bradford Canal, Proprs., 172
 175
 — *v.* Brandreth, 46
 — *v.* Braybrooke, 1147
 — *v.* Bright, 1393
 — *v.* Bristol, Mayor of, 589
 — *v.* Brunning, 34, 109
 — *v.* Bushby, 44
 — *v.* Caldwell, 51, 53
 — *v.* Chapman, 265
 — *v.* Chester, Bp. of, 55
 — *v.* Christchurch, Oxford, 1061
 — *v.* Christ's Hosp., 589, 1201
 — *v.* Clack, 1010
 — *v.* Clapham, 47
 — *v.* Clarendon, E. of, 1041
 — *v.* Clarke, 43
 — *v.* Clements, 330
 — *v.* Cock, 42
 — *v.* Cockermonth Local Board, 174
 — *v.* Colney Hatch Asylum, 172
 — *v.* Comber, 43
 — *v.* Crispin, 1197, 1379
 — *v.* Crofts, 188, 738
 — *v.* Dangars, 987, 1003
 — *v.* Davies, 55
 — *v.* Day, 214, 1090
 — *v.* Dillon, 1269
 — *v.* Dixie, 47
 — *v.* Dorking Guardians, 174
 — *v.* Doughty, 162
 — *v.* Dowling, 1146
 — *v.* Downing, 196, 961
 — *v.* Doyley, 46, 864, 1407
 — *v.* Dudley, Ld., 1042
 — *v.* Ewelme Hospital, 1113, 1176
 — *v.* Fishmongers' Co., 41
 — *v.* Fletcher, 505
 — *v.* Floyer, 1147, 1149
 — *v.* Foundling Hospital, 47
 — *v.* Fullerton, 543
 — *v.* Gaunt, 47

- Att.-Gen. *v.* Gill, 1370
 — *v.* Glyn, 45, 60
 — *v.* Goulding, 55
 — *v.* Gr. E. R. Co., 461, 465
 — *v.* Gr. N. R. Co., 461, 465
 — *v.* Graves, 51
 — *v.* Grote, 1305, 1333
 — *v.* Haberdashers' Co., 44
 — *v.* Hackney Local Board, 163, 163
 — *v.* Hall, 54
 — *v.* Hamilton, 875, 876
 — *v.* Hardy, 696
 — *v.* Harley, 51, 1336, 1337
 — *v.* Herrick, 45
 — *v.* Hineman, 55
 — *v.* Holbrook, 1345
 — *v.* Holford, 109
 — *v.* Hotham, Ltd., 532
 — *v.* Ironmongers' Co., 44, 45
 — *v.* Jones, 197
 — *v.* Kell, 46
 — *v.* Kingston, Mayor of, 172
 — *v.* Köhler, 283
 — *v.* Lawes, 42, 43
 — *v.* Leeds Corp., 166, 174
 — *v.* Lewin, 228
 — *v.* Liverpool, Mayor of, 990
 — *v.* Llandaff, Bp., 45
 — *v.* Lloyd, 1310
 — *v.* Lomas, 109
 — *v.* Lonsdale, 44, 164, 178
 — *v.* Lucas, 330
 — *v.* Magdalen Coll., 47, 588, 589, 1037
 — *v.* Malkin, 218
 — *v.* Mangles, 109
 — *v.* Marlborough, D. of, 1248, 1253
 — *v.* Marg. Prof. Camb., 44
 — *v.* Matthias, 152
 — *v.* Mill, 50
 — *v.* Milner, 1196
 — *v.* Mitchell, 1147
 — *v.* Moore, 56
 — *v.* Mullay, 330
 — *v.* Northumberland, D. of, 43
 — *v.* Nichol, 159
 — *v.* Painters' Co., 44
 — *v.* Parkin, 180
 — *v.* Parnther, 1263
 — *v.* Partington, 349
 — *v.* Pearson, 43, 47
 — *v.* Potter, 1343
 — *v.* Pottinger, 1260
 — *v.* Poulton, 21
 — *v.* Price, 43, 1408
 — *v.* Rance, 45
 — *v.* Read, 330
 — *v.* Robins, 1341, 1342
 — *v.* Rowe, 1259
 — *v.* St. Cross. Hosp., 47
 — *v.* Sands, 189
 — *v.* Severne, 330
 — *v.* Sherborne School, 46
 — *v.* Simcox, 109
 — *v.* Smythe, 1147
- Att.-Gen. *v.* Smythies, 24
 — *v.* Stamford, Mayor of, 46
 — *v.* Stephens, 96, 543, 581, 961
 — *v.* Stepney, 43
 — *v.* Stewart, 50
 — *v.* Sturgo, 46
 — *v.* Tancred, 44, 50
 — *v.* Terry, 164
 — *v.* Thames, Conservators of the, 164
 — *v.* Todd, 43
 — *v.* Tomkins, 282
 — *v.* Tomline, 531
 — *v.* Trin. Hall, Cam., 50
 — *v.* Upton, 1146
 — *v.* United Kingdom Elec. Tel. Co., 174
 — *v.* Vigor, 897, 1262, 1288, 1353
 — *v.* Wax Chandlers' Co., 1201
 — *v.* Webster, 44
 — *v.* Whorwood, 377, 669
 — *v.* Wilkins, 1185
 — *v.* Wilkinson, 899
 — *v.* Williams, 54
 — *v.* Wilson, 1003
 — *v.* Wiltshire, 1323
 — *v.* Yelverton, 1146
 — *v.* York, Archbp. of, 47
 Attorneys and Solicitors Act, *Re*, 1870, 89
 Attree *v.* Attree, 1320
 — *v.* Have, 52
 Attwater *v.* Attwater, 21, 1218, 1240, 1333, 1366
 Attwood *v.* Alford, 16
 — *v.* Small, 96, 1059, 1136
 Atwaters *v.* Birt, 849, 886
 Atwood *v.* Maude, 804
 Aubin *v.* Holt, 102, 795
 Aubrey *v.* Brown, 338, 382
 Audsley *v.* Horn, 1390
 Ault *v.* Goodrich, 815, 824
 Austen *v.* Boys, 816, 817
 — *v.* Halsey, 326, 1236
 — *v.* Taylor, 616, 617, 623
 Auster *v.* Powell, 284
 Austerberry *v.* Corp. Oldham, 595, 1166
 Austin *v.* Austin, 316
 — *v.* Austin, 389
 — *v.* Bank of England, 960
 — *v.* Boyce, 389
 — *v.* Llewellyn, 585
 — *v.* Mead, 137
 — *v.* Tawny, 1043
 Austin's Case, 422
 Australian, &c., Co. *v.* Marzetti, 78
 Austr. St., &c., Co. *v.* Mounsey, 450
 Australasia, Bank of, *v.* Breillat, 449
 — Nat. Bank of *v.* United, &c., Co., 739, 749, 750, 756
 — Lon. Chart. Bank of, *v.* Lempriere, 394
 Auworthy *v.* Johnson, 549
 Avarne *v.* Brown, 1074, 1101, 1129
 Aveline *v.* Melhuish, 1008
 Aveling *v.* Knipe, 501, 1051

- Avelyn *v.* Ward, 1204, 1208, 1331, 1332
 Averall *v.* Wade, 741
 Avern *v.* Lloyd, 839
 Avery *v.* Griffin, 1034
 — *v.* Langford, 87, 822
 Ayerst *v.* Jenkins, 312, 329, 626, 628
 Ayles *v.* Cox, 784, 1062
 — Trusts, *Re*, 1386
 Aylesford, E., *v.* Morris, 689, 1033
 Ayllett *v.* Ashton, 393, 1135
 Ayliffe *v.* Murray, 985
 — *v.* Tracy, 613
 Aylward *v.* Kearney, 306
 Aylwin's Trusts, *Re*, 854, 1243
 Aynsley *v.* Glover, 154, 157, 159, 160
 Ayres *v.* Willis, 178
 Ayscough *v.* Savage, 18

 BABBAGE *v.* Coulburn, 810, 1060
 Baber's Trusts, *Re*, 994
 Bacchus *v.* Gilbee, 1238
 Back *v.* Kett, 182
 — *v.* Stacey, 159
 Backhouse *v.* Bonomi, 166, 167
 — *v.* Charlton, 763
 — *v.* Wells, 1393
 Bacon *v.* Bacon, 271
 — *v.* Clark, 270, 273
 — *v.* Clerk, 649
 — *v.* Cosby, 177, 1384, 1390
 — *v.* Ford, 519
 — *v.* Proctor, 8
 Badcock, *Re*, 108
 Baddeley *v.* Baddeley, 303
 Badeley *v.* Vigurs, 1179
 Baden *v.* Css. of Pembroke, 1097
 Badger *v.* Gregory, 1223
 — *v.* Loyd, 1429
 — *v.* Shaw, 718, 745
 Badham *v.* Mee, 853
 Badrick *v.* Stevens, 1333, 1338
 Bage, *Ex parte*, 1039
 Bagenal *v.* Bagenal, 649
 Baggett *v.* Meux, 396, 398
 Baglan Hall Coll. Co., *Re*, 477
 Bagley *v.* Mollard, 1386, 1387
 Bagnall *v.* Carlton, 413
 — *v.* Villar, 746
 Bagot, *Re*, 107
 — *v.* Bagot, 224, 1248, 1249, 1251,
 1252, 1417
 — *v.* Legge, 1296
 — *v.* Oughton, 366, 1417
 Bagott *v.* Oughton, 868
 Bagshaw, *Ex parte*, 463
 — *v.* E. Un. R. Co., 461
 — *v.* Spencer, 624, 979
 Bagster *v.* Fackerell, 117
 Bagwell *v.* Dry, 1352
 Bahia, &c., Co., *Re*, Tritton, *Re*, 411
 Bailey, Goods of, 1273
 — *Re*, 1013
 — *v.* Appleyard, 153
 — *v.* Collett, 1081
 — *v.* Lloyd, 673, 897

 Bailey *v.* Macaulay, 410
 — *v.* Richardson, 681, 742, 1154
 — *v.* Sweeting, 1056
 Bailie *v.* Jackson, 1232
 Bailis *v.* Gale, 1369
 Baillie *v.* Butterfield, 1335, 1336
 — *v.* McKewan, 693, 773
 — *v.* Treharne, 503
 Baily, *Re*, 33
 — *v.* Boulton, 15
 — *v.* Taylor, 132
 Bain *v.* Fothergill, 1124
 — *v.* Sadler, 264, 995, 1378
 Bainbridge, *Re*, 826
 — *v.* Bainbridge, 1326
 — *v.* Blair, 985, 986
 — *v.* Cream, 1198
 — *v.* Kinnaird, 1135
 — *v.* Moss, 63
 — *v.* Smith, 888
 Bainbridge *v.* Browne, 308
 Baines *v.* Lumley, 581
 Bainton *v.* Ward, 37
 Baird's Case, 475
 Baker, *Re*, 272
 — *Re*, Leaman, 269
 — *v.* Batt, 1264, 1301
 — *v.* Bradley, 306, 308, 397
 — *v.* Denning, 1273
 — *v.* Farmer, 1340
 — *v.* Hall, 348, 349, 1351
 — *v.* Hanbury, 1291
 — *v.* Harris, 770
 — *v.* Loader, 309
 — *v.* Martin, 261, 986, 1345
 — *v.* Metrop. R. Co., 1344
 — *v.* Monk, 309, 1131, 1177
 — *v.* Parson, 981
 — *v.* Sebright, 1254
 — *v.* Sutton, 53
 — *v.* Tucker, 833, 1401
 — *v.* Tynte, 524
 — *v.* Wall, 1370, 1393
 — *v.* Wetton, 595
 — *v.* White, 218, 979, 980
 Balchen *v.* Scott, 252
 Baldwin *v.* Baldwin, 385
 — *v.* Rogers, 1378
 Baldwin's Case, 453
 Bale *v.* Newton, 297, 305
 Balfour *v.* Cooper, 649
 — *v.* Welland, 1138, 1163
 Ball *v.* Ball, 321
 — *v.* Burnford, 298
 — *v.* Coggs, 101
 — *v.* Coutts, 326
 — *v.* Cullimore, 535
 — *v.* Harris, 31, 697, 1161
 — *v.* Montgomery, 334, 381, 673
 — *v.* Ray, 173
 Ballard *v.* Dyson, 155, 156
 — *v.* Tomlinson, 163, 172, 173
 — *v.* Way, 1063
 Balls *v.* Strutt, 990
 Balls' Trusts, *Re*, 658

- Balm v. Balm, 1380
 Balmain v. Shore, 824
 Balmanno v. Lumley, 1135
 Bamford v. Shuttleworth, 1123
 — v. Turnley, 173
 Banbury, *Ld.*, v. Briscoe, 1109
 — Peerage Case, 1383
 — v. White, 713
 Bandon, *Ld.*, v. Beecher, 1093
 Bangor, &c., Co., 485
 Bank of Australasia v. Flower, 820
 Bankart v. Bowers, 73
 — v. Houghton, 175
 — v. Tennant, 557
 Banks v. Despencer (*Ly.*), 213, 624, 1247
 Banks v. Gibson, 794
 — v. Goodfellow, 1264
 — v. Scott, 108
 — v. Thornton, 1288
 Bannatyne v. Barrington, 1151
 Banner v. Berridge, 587, 588, 606
 — v. Lowe, 23
 Bannerman v. Clarke, 1082, 1141
 Bannerman's Estate, *Re*, 15
 Barber, *Ex parte*, 807
 — , Goods of, 1282
 — , *Re*, 277, 1018, 1265, 1405, *Add.*
 — v. Barber, 675, 1293
 — v. Tebbit, 1344
 — v. Wood, 1307
 Barber's Case, 424
 — Settled Estates, *Re*, 123
 Barclay, *Ex parte*, 704, 715
 — v. Maskelyne, 1280
 — v. Raine, 555
 — v. Wainwright, 1337
 Bardswell v. Bardswell, 967
 Barff, *Ex parte*, 263
 Barfield v. Loughborough, 816
 Barford v. Street, 846
 Bargate v. Shortridge, 436, 452
 Bargent v. Thomson, 549
 Barham v. Thanet, E. of, 1417
 Baring v. Dix, 813
 — v. Nash, 508
 Barker, *Re*, 108, 512
 — *In re*, 1147
 — v. Barker, 274, 1214, 1215
 — v. Cox, 1128
 — v. Greenwood, 979
 — v. May, 34
 — v. N. Staff. R. Co., 1047
 — v. Peile, 1011
 — v. Rayner, 1338
 — v. Richardson, 148, 798
 — v. Smark, 1172
 — v. Venables, 1141
 Barker's Trusts, *Re*, 1013
 Barksdale v. Gilliat, 1345
 Barkshire v. Grubb, 143, 147, 157
 Barkworth v. Young, 614
 Barling v. Bishop, 290, 292
 Barlow v. Bateman, 1245
 — v. Gains, Morris v. Islip, 739
 — v. Osborne, 1091, 1093
 Barlow v. Rhodes, 142, 157
 — v. Salter, 1397
 — v. Teal, 540
 Barnaby v. Tassell, 1323, 1356
 Barnacle v. Nightingale, 1315
 Barnard v. Bagshaw, 1005
 — v. Bywater, 692, 767
 — v. Cave, 80
 — v. Ford; Carrick v. Ford, 381
 — v. Pumfrett, 258, 265
 Barned's Bank, *Re*; Contract Corp., *Ex parte*, 442
 Barnes v. Addy, 983
 — v. Allen, 1199, 1430
 — v. Barnes, 317
 — v. Jennings, 1208, 1356
 — v. Loach, 143, 158
 — v. Patch, 1403
 — v. Pinkney, 727
 — v. Robinson, 378
 — v. Southsea R. Co., 1047
 — v. Thrupp, 518
 — v. Vincent, 1271
 — v. Wood, 1034, 1127
 Barnett v. Barnett, 1190, 1336
 Barnett, *Ex parte*, 727
 — v. Blake, 189, 1241
 — v. Sheffield, 265
 — v. Tugwell, 1387
 — v. Weston, 765, 770
 — v. Wilson, 893
 Barnett's Case, 423, 462, 482, 483
 Barnfather v. Jordan, 1038
 Barnhart v. Greenshields, 1150, 1154
 Barnwell v. Iremonger, 37, 1418
 Barr v. Carter, 252
 Barrack v. McCulloch, 289, 391, 972
 Barrell, *Ex parte*, 1085
 — v. Sabine, 687, 1042
 Barret v. Beckford, 669
 — v. Blgrave, 102
 Barrett v. Hartley, 689, 985, 986
 — v. Wilkins, 1280
 — v. Wyatt, 992
 Barrett's Case, 458
 Barrington, *Re*, 278
 — v. Liddell, 8, 9
 — v. O'Brien, 649
 — v. Tristram, 1348, 1379
 Barrington's Settlement, *Re*, 998
 Barrow, *Ex parte*, 791
 — v. Barrow, 181, 377, 383, 385, 632
 — v. Griffith, 697
 Barrow's Case, 432, 473, 485, 1150
 Barrow-in-Furness, &c., Co., *Re*, 477
 Barrs v. Fewkes, 282, 969, 1302, 1407
 — v. Jackson, 254
 Barr's Trusts, *Re*, 723
 Barry v. Butlin, 1264, 1301
 — v. Croskey, 96
 — v. Harding, 1325
 — v. Nesham, 791
 Barstow v. Kilvington, 674
 Bartholomew, *Re*, 1193
 — v. Harris, 889

- Bartle v. Wilkin, 779
 Bartleman v. Murchison, 1216
 Bartlett, *Ex parte*, 322
 — v. Bartlett, 724, 727
 — v. Franklin, 737
 — v. Gillard, 934
 — v. Green, 220
 — v. Pickersgill, 970
 — v. Rees, 761
 — v. Salmon, 1136, 1139
 — v. Tuchin, 1122
 — v. Wells, 69
 Bartley v. Bartley, 849
 Barton, *Ex parte*, 718
 — v. Barton, 1240
 — v. Briscoe, 398
 — v. Cooke, 1330
 — v. Gainer, 243
 — v. Hassard, 276
 Barton's Trusts, 1326
 — Will, *Re*, 504
 Bartram v. Whichcote, 876
 Barwell v. Barwell, 310, 1041
 Barwick v. English J. S. Bank, 96, 458
 — v. Reade, 729
 Basan v. Brandon, 1338
 Baseley v. Baseley, 326
 Basevi v. Serra, 380
 Basham, *In re*, 1005
 Baskcomb v. Beckwith, 1061, 1068
 Basket v. Skeel, 781
 Basnett v. Moxon, 513
 Bassett v. Bassett, 873
 — v. Nosworthy, 1185, 1186
 Bassil v. Lister, 6
 Bastard v. Proby, 623
 Bastow & Co., *Re*, 480
 Batchelor v. Middleton, 594, 738
 Bate, *Ex parte*, 830
 — v. Hooper, 992
 — v. Robins, 815
 Bateman v. Bateman, 845
 — v. Davis, 886, 1001
 — v. Foster, 1350
 — v. Gray, 1380
 — v. Hotchkin, 1248, 1249
 — v. Pennington, 1266
 — v. Pinder, 607
 — v. Ross, 404
 Bates v. Dandy, 348, 352
 — v. Heard, 627
 — v. Johnson, 772, 1004
 Bath, E. of, v. Bradford, E. of, 992
 Bath's Case, 461
 Bathurst v. Errington, 1029, 1299
 — v. Murray, 325
 Bathurst's Estates, P., *Re*, 1009
 Batsford v. Kebbill, 1214
 Batstone v. Salter, 972
 Battersea Park Acts, *Re*, 107
 Battishill v. Reed, 146, 152
 Battley v. Faulkner, 604
 Baumann v. James, 1056
 Baxendale v. M'Murray, 171
 Baxter, *Re*, 834, 1020, 1191
 Baxter v. Bower, 1183
 — v. Connolly, 102
 — v. Dyer, 1278
 — v. Losh, 1412
 — v. Portsmouth, E., 69
 — v. West, 814
 Baxter's Trusts, *Re*, 836, 1193
 Bayham v. Guy's Hospital, 234
 Bayley v. Bishop, 17, 1196
 — v. Boulcott, 304
 — v. Fitzmaurice, 534
 — v. G. W. R. Co., 147, 156
 — v. Morris, 200
 Bayley's Settlement, *Re*, 861
 Baylies v. Baylies, 991
 Baylis v. Att.-Gen., 1303
 — v. Le Gros, 548
 Bayliss v. Sayer, 1275
 Bayne v. Crowther, 16
 Baynham v. Guy's Hospital, 672
 Baynton v. Collins, 364
 Bayspoole v. Collins, 299
 Bazeley v. Forder, 69
 Beachcroft v. Beachcroft, 1357
 Beadel v. Perry, 159
 — v. Pitt, 530, 545
 Beak v. Beak, 137
 Beale v. Beale, 861
 — v. Caddick, 820
 — v. Symonds, 187, 737
 Beales v. Crisford, 1324, 1390
 Bean v. Griffiths, 1202
 Beard v. Webb, 789
 — v. Westcott, 838, 1429
 Beardman v. Wilson, 532, 564
 Bearpark v. Hutchinson, 222
 Beasley's Trusts, *Re*, 1227
 Beattie v. Ebury, Ltd., 459
 Beaty v. Curson, 1018
 Beauchamp, Ltd., v. G. W. R. Co., 1050
 — E., v. Winn, 97, 98
 Beauchlerk v. Mead, 106
 Beaufort, D. of, v. Berty, 317, 320
 — v. Glynn, 1121, 1132, 1135
 Beaufoy, *Re*, 122
 Beaujolais Wine Co., 490
 Beauman v. Stock, 1412
 Beaumont's Trusts, *Re*, 110
 Beaumont, *Re*, 54
 — v. Carter, 612
 — v. Fell, 1304
 — v. Oliveira, 44, 57, 58
 — v. Reeve, 71
 — v. M. of Salisbury, 978
 — v. Squire, 1237
 Beavan v. Att.-Gen., 1331
 — v. Hastings, Ltd., 249
 — v. M'Donnell, 69, 696, 789, 1038
 — v. Oxford, Ltd., 296, 519, 524
 Beaver v. Nowell, 1391, 1412
 Bebb v. Bunny, 1082
 — v. Penoyre, 1319
 Beck, *In re*, 947
 — v. Burn, 1194
 — v. Kantorowicz, 411

- Beck's Case, 422
 — *Trusts, Re*, 1223
 Beckett *v.* Buckley, 738
 — *v.* Howe, 1275
 — *c.* Leeds, Corp. of, 1105
 — *c.* Mid. R. Co., 161
 — *c.* Sutton, 515
 Beckford *v.* Tobin, 1348, 1350
 — *v.* Wade, 587
 Beckham *v.* Drake, 84
 Beckley *v.* Newland, 90, 729
 Beckton *v.* Barton, 1230
 Beckwith *v.* Beckwith, 1222
 Bective, Ctss., *v.* Hodgson, 6, 110, 116, 118, 205
 Becton *v.* Barton, 927
 Beddoes *v.* Pugh, 919
 Bedford, D. of, *v.* Abercorn, M., 616, 619, 878
 — — *v.* Br. Museum, 94, 550, 1183
 — *c.* Backhouse, 777
 — *c.* Bedford, 1420
 — *c.* Deakin, 819
 — R. Co. *c.* Stanley, 112, 1044
 Bedson's Trusts, *Re*, 1243
 Beech *v.* Keep, 302
 — *v.* Vincent, St., Ltd., 9
 Beecher *v.* Major, 970
 Beer *v.* Bear, 26, 536
 — *c.* Tapp, 987
 Beere *v.* Hoffmeister, 919
 Beeston *v.* Booth, 1342
 — *c.* Weate, 165
 Beevor *v.* Luck, 740, 742
 Begbie *v.* Crook, 976
 — *c.* Fenwick, 715
 Behn *v.* Burness, 95
 Belaney *v.* Belaney, 679, 1290, 1310, 1319
 Belding *v.* Read, 715
 Belk *v.* Slack, 1225
 Bell *v.* Ahearne, 721
 — *v.* Blyth, 729
 — *v.* Cade, 837
 — *v.* Carter, 487
 — *c.* Clarke, 670
 — *c.* Cundall, 1185
 — *c.* Fothergill, 1281
 — *c.* Holtby, 212
 — *c.* Mid. R. Co., 141, 154
 — *v.* Phyn, 806, 1317
 — *c.* Stocker, 336
 — *v.* Timiswood, 251
 — *v.* Turner, 1090
 — *v.* Walker, 131
 Bell's Case, 433
 Bell's and other Cases, Albert Co., *Re*, 484
 Bellairs *v.* Bellairs, 1234, 1359
 — *v.* Tucker, 429
 Bellamy, *Re*, 1267
 — *Re*, Elder *v.* Pearson, 346
 — *v.* Brickenden, 733, 749
 — *v.* Metropolitan Board of Works, 984, 1161
 — *v.* Sabine, 65, 94, 1152
 Bellasis *v.* Compton, 971
 — *v.* Uthwatt, 923, 930
 W.—VOL. I.
- Bellasis' Trusts, *Re*, 303, 966
 Bellis's Trusts, *Re*, 1353, 1414
 Bellringer *v.* Blagrove, 93
 Benbow *v.* Townsend, 962, 971
 Bence *v.* Gilpin, 231, 976
 Bending *v.* Bending, 371
 Bendyshe, *Re*, 377
 Benfieldside Local Board *c.* Conssett Iron Co., 170
 Bengough *v.* Walker, 930
 Benham *v.* Gray, 805
 — *c.* Keane, 522, 519, 776
 Benham's Trusts, *Re*, 1114, 1227
 Benn *v.* Benn, 1223
 Bennet, *Ex parte*, 1039, 1041
 — *c.* Batchelor, 282
 — *v.* Bennet, 972
 Bennett, *Re*, 915
 — *c.* Aburrow, 898
 — *c.* Barnard, 597
 — *c.* Bennett, 1218, 1245, 1390
 — *v.* Colley, 235, 238
 — *v.* Cooper, 729
 — *v.* Houldsworth, 180, 931
 — *v.* Ireland, 528, 546
 — *v.* Lytton, 279
 — *v.* Marshall, 1303
 — *v.* Merriman, 64, 1356
 — *c.* Rees, 1133
 — *c.* Tankerville, E., 220, 1097, 1371
 — *c.* Womack, 530, 546, 551
 — *v.* Wyndham, 696
 Bennett's Trusts, 1195
 Bennison *v.* Cartwright, 150, 154
 Bensley *v.* Burdon, 1181
 Benson *v.* Benson, 1103, 1281
 — *v.* Maude, 1346
 — *v.* Whittam, 965
 Bent *v.* Cullen, 16, 17
 Bentham *v.* Wiltshire, 879
 — Mills Spinning Co., *Re*, 435
 Bentinck *v.* Duke of Portland, 836
 Bentley, *Ex parte*, 477
 — *c.* Craven, 1037, 1039, 1061, 1117, 1137
 — *v.* Foster, 131
 — *v.* Mackay, 303, 312
 — *v.* Oldfield, 1414
 Benwell *v.* Inns, 87
 Benyon *v.* Benyon, 677, 1336
 — *v.* Cook, 689
 — *v.* Maddison, 1197
 Beresford, *Ex parte*, 423
 — *v.* Armagh, Archbp., 392
 — *v.* Beresford, 671
 — *v.* Browning, 797, 823
 Berkeley *c.* Dauh, 1101
 — *c.* Swinburne, 1191, 1378, 1380
 Berkeley Peerage, 1115
 Berkeley's Will, Earl of, *Re*, 224
 Berk. School, *Ex parte*, 47
 Berkley *v.* Berkley, 961
 — *v.* Hardy, 70
 Birmingham *v.* Burke, 597
 — *v.* Sheridan, 438

- Bernal *v.* Bernal, 1260, 1372
 Bernard *v.* Minshull, 908, 964, 965
 — *v.* Mountague, 1193
 Bernasconi *v.* Atkinson, 1311, 1312
 Berney *v.* Sewell, 750, 751
 Berridge *v.* Ward, 1105
 Berrington *v.* Evans, 597
 Berrisford *v.* Milward, 769
 Berry, *Ex parte*, 299
 — *v.* Berry, 1376
 — *v.* Briant, 965
 — *v.* Hebblethwaite, 762
 — *v.* Morse, 936
 — *v.* Usher, 265
 — *v.* White, 867
 — *v.* Young, 1122, 1167
 Bertie *v.* Abingdon, E., 217
 Besant, *Re*, 322
 — *v.* Cox, 1210
 — *v.* Wood, 402, 403
 Besch *v.* Frolich, 814
 Bescoy *v.* Pack, 1325
 Besley *v.* Besley, 1175, 1176
 Bessemer Steel & Ordnance Co., *Re*, 492
 Bessey *v.* Windham, 292
 Bestall *v.* Bunbury, 393
 Best *v.* Drake, 1132*
 — *v.* Hammond, 1049, 1074
 — *v.* Stonehewer, 1408
 Best's Case, 421
 — Settlement Trusts, *Re*, 659
 Beswick *v.* Orpen, 263
 Bethell *v.* Abraham, 1010
 — *v.* Green, 37
 Bethlehem Hospital, *In re*, 1045
 Bethune *v.* Kennedy, 121
 Bettini *v.* Gye, 72
 Betts *v.* Burch, 72
 — *v.* Doughty, 1271
 — *v.* Gt. E. R. Co., 1049
 Bevan *v.* Att.-Gen., 1333
 — *v.* Habgood, 746, 868
 — *v.* Lewis, 798
 — *v.* Waterhouse, 1326
 Beverley *v.* Beverley, 333
 Beville's, *De Case*, 476, 477
 Bewick *v.* Whitfield, 1251
 Bewley *v.* Atkinson, 150
 — *v.* Carter, 1069, 1093, 1137
 Beynon *v.* Gollins, 268
 Bibbens *v.* Potter, 1299
 Bibby *v.* Carter, 168
 — *v.* Thompson, 966
 Bick *v.* Motley, 1005
 Bickerton *v.* Burrell, 1051, 1121
 Bickett *v.* Morris, 163
 Bickford *v.* Parsons, 562
 Bickham *v.* Cruttwell, 1416
 Bickley *v.* Guest, 853, 854
 Bicknell *v.* Hood, 527
 Biddles *v.* Biddles, 965
 — *v.* Jackson, 327
 Biddulph, *Ex parte*, 799, 1005
 — *v.* Biddulph, 110, 113
 — *v.* Lees, 1246
 Biddulph *v.* Williams, 969
 Bide *v.* Harrison, 1327
 Biederman *v.* Stone, 438, 488
 Bielefield *v.* Record, 1231
 Biffin *v.* Bignell, 401
 Bigg *v.* Strong, 1058
 Bigg's Case, 444
 Bigge *v.* Bigge, 1281
 Biggleston *v.* Grubb, 937
 Biggs *v.* Gordon, 1088
 — *v.* Peacock, 515, 878
 — *v.* Terry, 324
 Bigland *v.* Huddleston, 177
 Bignold, *Ex parte*, 452
 — *v.* Giles, 18, 1366
 — *v.* Waterhouse, 809
 Bilborough *v.* Holmes, 820
 Bill *v.* Cureton, 292, 311, 313
 — *v.* Kinaston, 247
 Billage *v.* Southee, 306, 307
 Billings *v.* Sandon, 1212
 Billingsley *v.* Critchet, 652
 — *v.* Wills, 1214
 Billson *v.* Crofts, 1242, 1244
 Binckes *v.* Pash, 158
 Bingham *v.* Bingham, 97, 1177
 — *v.* Woodgate, 199
 Binks *v.* Ld. Rokeby, 1096
 Binnington *v.* Harwood, 750, 751
 Binns *v.* Nichols, 598, 1349
 Birch, *Re*, 272, 1239
 — *v.* Birch, 1285
 — *v.* Dawson, 1327
 — *v.* Ellames, 1150
 — *v.* Sherratt, 19
 — *v.* Wade, 864, 964
 Birch Wolfe *v.* Birch, 1250, 1252
 Birchell, *Ex parte*, 315
 Bird *v.* Bird, 676
 — *v.* Birds Patent, &c., Co., 493
 — *v.* Blossie, 612
 — *v.* Boulter, 1058, 1087
 — *v.* Eggleton, 1050
 — *v.* Fox, 1076, 1153
 — *v.* Gt. E. R. Co., 532
 — *v.* Higginson, 533
 — *v.* Maybury, 965
 — *v.* Peagrum, 391, 346
 — *v.* Wood, 1406
 Birds *v.* Askey, 40
 — *v.* Betty, 1006
 Bird's Trusts, *Re*, 675
 Birkett, *Re*, 56
 — *v.* Hibbert, 326
 Birks *v.* Birks, 1267
 — *v.* Micklethwait, 1003
 Birley *v.* Birley, 860
 Birmingham *v.* Kirwan, 370
 — &c., Co., *Ex parte*, 489
 — Can. Co. *v.* Cartwright, 832
 — Corporation of, *v.* Allen, 168
 Biron *v.* Mount, 994
 Birt, Goods of, 1285
 — *v.* Bountinez, 408
 Birtwhistle *v.* Vardell, 1368

- Bisdee, *Ex parte*, 691, 693
 Bishop, *Ex parte*, 630
 — *v. Cappel*, 1408
 — *v. Church*, 797
 — *v. Countess of Jersey*, 800
 — *v. Howard*, 533
 — *v. Sharp*, 1264
 — *v. Wall*, 1263
 Bishop's Waltham R. Co., *Re*, 521
 Bissell's Trusts, *Re*, 723
 Bisset *v. Burgess*, 38
 Bizzey *v. Flight*, 1268
 Blachford *v. Woolley*, 848
 — *v. Worsley*, 1349
 Black *v. Capstick*, 804
 — *v. Jobbing*, 1269, 1282
 — & Co.'s Case, 483
 Blackborough *v. Davis*, 249, 286
 Blackburn *v. Smith*, 1121, 1122, 1123
 — *v. Stables*, 617, 623
 — B. Soc. *v. Cunliffe & Co.*, 453
 Blacker *v. Webb*, 1383
 Blacket *v. Lamb*, 184
 Blackett *v. Bates*, 100, 101
 — *v. Bradley*, 169
 Blackford *v. Davis*, 739
 Blackie *v. Clark*, 675, 1327
 Blacklow *v. Laws*, 390, 1083, 1090, 1100,
 1138
 Blackman, *Re*, 1304
 Blackmore *v. Yates*, 453
 Blackwell, *Re*, 250
 — *v. Bull*, 1365
 Blackwell's Trusts, *Re*, 1225
 Blackwood *v. The Queen*, 254
 Blagden *v. Bradbear*, 1053, 1056
 Blaggrave *v. Blaggrave*, 978
 — *v. Coore*, 1290, 1339
 Blagrove *v. Bradshaw*, 1204, 1245
 Blague *v. Gold*, 1307
 Blaiberg, *Ex parte*, 713, 716
 Blaiklock *v. Grindle*, 178, 184, 891
 Blair *v. Bromley*, 799
 Blake, *Ex parte*, 662
 — *v. Blake*, 223, 912, 973, 1274
 — *v. Bunbury*, 991
 — *v. Foster*, 594
 — *v. Harvey*, 761
 — *v. Izard*, 712
 — *v. Knight*, 1275
 — *v. Leigh*, 323
 — *v. Luxton*, 223
 — *v. Peters*, 1253
 Blake's Case, 429
 Blake Chares, Estate of, 1385
 Blakely, &c., Co., *Re*, 453, 455
 Blakeley *v. Brady*, 302, 304
 Blakemore, *Re*, 1190
 Blakemore's Settlement, *Re*, 837
 Blakeney *v. Blakeney*, 966
 Blakesley, *Re*, 689
 — *v. Whieldon*, 530
 Blamire *v. Geldart*, 1194, 1197
 Blanchard, *Re*, 1012
 Blanchet *v. Foster*, 334
 Bland *v. Dawes*, 389
 — *v. Williams*, 836, 1219, 1229
 Blandford, M., *v. Dss. of Marlborough*,
 865
 — *v. Thackerell*, 1027
 Blandy *v. Widmore*, 669
 Blann *v. Bell*, 120, 121
 Blarclay *v. Raine*, 1109
 Blason *v. Blason*, 284, 1382
 Bleakley *v. Smith*, 1054, 1057
 Bleckley, Goods of, 1283
 Blencowe, *Ex parte*, 1003
 Blenkinsopp *v. Blenkinsopp*, 290
 Blennerhassett *v. Day*, 591, 1042
 Blewett *v. Jenkins*, 228
 Blewitt, Goods of, 1285
 — *Re*, 211, 213
 — *v. Roberts*, 16, 18
 Bligh, *Re*, 317
 — *v. Darnley*, 39
 Blight *v. Hartnoll*, 16, 891, 892, 914, 1246,
 1363
 Bliss *v. Collins*, 29
 — *v. Hall*, 170
 Blissett *v. Daniels*, 812
 Blithe's Case, 334
 Blockley *v. Blockley*, 284
 Blogg *v. Johnson*, 272
 Blois *v. Hereford*, 626
 Blomfield *v. Eyre*, 317
 Bloomar, *Re*, 509
 Bloomer *v. Spittle*, 1164
 — *v. Union, &c., Co.*, 451
 Blore *v. Sutton*, 873, 894, 1054
 Blossie *v. Ld. Clanmorris*, 1137
 Blount *v. Bestland*, 348, 350
 — *v. Burrow*, 136
 — *v. Harris*, 716
 — *v. Hipkins*, 1334
 Blower *v. Morret*, 1341, 1342
 Blower's Trusts, *Re*, 1303, 1376
 Bloxam *v. Favre*, 1259
 — *v. Met. Ry. Co.*, 460, 464
 Bloxham's Case, 421
 Blundell, *Re*, 41
 — *v. Chapman*, 1317
 — *v. Gladstone*, 1311
 — *v. Stanley*, 682
 Blyth, *Ex parte*, 828
 — *v. Carpenter*, 728
 Blyth's Case, 432
 — Trusts, *Re*, 1046
 Blythe *v. Granville*, 662, 663
 Board *v. Board*, 577
 Boatwright *v. Boatwright*, 261
 Boddington, *In re*, 1200
 — *Re*, 1234, 1313
 — *v. Abernethy*, 1025
 Boddy *v. Dawes*, 1349
 Boden, *Re*, 784
 Bodenham *v. Hoskyns*, 983
 — *v. Pritchard*, 1308
 Bodmin, L.y., *v. Vandenbendy*, 1186
 Boehm *v. Wood*, 586, 1132, 1135
 Bogg *v. Mid. Ry. Co.*, 528

- Bogue *v.* Houlston, 135
 Bold *v.* Hutchinson, 331, 615
 — *v.* Rayner, 80
 Boldero *v.* Lon., &c., Co., 291
 Bolding *v.* Lane, 597, 602
 Bolger *v.* Mackell, 1193
 Bolingbroke *v.* Hinde, 760
 Bolitho *v.* Hillyar, 64, 1211
 Bolland, *Ex parte*, 714
 — — Clint, *Re*, 630
 Bolognesi's Case, 489
 Bolton, *Re*, 1388, *Add.*
 — *v.* Bolton, 143, 157
 — *v.* Corp. of Liverpool, 1157
 — London School Board, 1076
 — Ben. Loan Soc., *Re*, 499
 Bonbonus, *Ex parte*, 796
 Bond, *Ex parte*, 654
 — *v.* England, 1417
 — *v.* Gibson, 798
 — *v.* Kent, 1172
 — *v.* Milbourn, 816
 — *v.* Rosling, 533
 — *v.* Simmons, 350, 385
 — *v.* Taylor, 408, 891
 — *Re*, Cole *v.* Hawes, 967
 Bone *v.* Pollard, 974, 1051
 Bonfield *v.* Hassell, 301, 335, 1242
 — *v.* Smith, 797
 Bonham *v.* Newcomb, 487
 Bonner, *Re*, 1377
 — *v.* Bonner, 39, 381, 1338
 Bonnett *v.* Sadler, 83
 Bonnewell *v.* Jenkins, 1055
 Bonney *v.* Ridgard, 587
 Bonser *v.* Bradshaw, 1271
 — *v.* Kinnear, 964
 Booker, *Ex parte*, 461
 — *v.* Allen, 926, 936, 1280
 Boosey *v.* Fairlie, 132, 133
 — *v.* Gardener, 1246
 Booth *v.* A'Beckett, 871
 — *v.* Alcock, 144
 — *v.* Alington, 506, 911
 — *v.* Booth, 268, 1190, 1236
 — *v.* Carter, 55
 — *v.* Coulton, 20, 21
 — *v.* Pollard, 101
 — *v.* Smith, 13
 — *v.* Turle, 80
 — *v.* Warrington, *Ld.*, 606
 Bootle *v.* Blundell, 645, 1415, 1416
 — John, Goods of, 1270
 Boraston's Case, 991, 1192, 1197, 1213
 Boreham *v.* Bignall, 1288
 Borlase *v.* Borlase, 1281
 Borough of Hackney Newspaper Co., *Re*, 451
 Borrell *v.* Haigh, 1299
 Borrowes *v.* Ellison, 584
 Bortoft *v.* Wadsworth, 1223
 Borton *v.* Borton, 350
 Bos *v.* Helsham, 1060, 1175, 1176
 Boson *v.* Statham, 56
 Boss *v.* Godsall, 998
 Bostock *v.* Floyer, 271, 983, 990
 — *v.* Smith, 370
 Boswell *v.* Coaks, 1040, 1093, *Add.*
 — *v.* Dillon, 616
 — *v.* Mendham, 1138
 Bothamley *v.* Sherson, 1329, 1330, 1331, 1334
 Bothomly *v.* Fairfax, 38
 Bott *v.* Smith, 290
 Bottomley's Case, 445, 448, 465
 Boucicalt *v.* Chatterton, 133
 — *v.* Delafield, 133
 Boughey *v.* Moreton, 1283
 Boughton *v.* Boughton, 1359, 1413
 — *v.* James, 6, 838, 917
 — *v.* Jewell, 1077
 — *v.* Knight, 1264
 Boulcott *v.* Boulcott, 1286
 Boulter, *Re*, 703
 Boulton, *Ex parte*, 723
 — *v.* Beard, 1206
 — *v.* Pilcher, 1206
 Bourdillon *v.* Roche, 799
 Bourne *v.* Bourne, 111, 757
 — *v.* Buckton, 8, 9
 — *v.* Fosbrooke, 243
 — *v.* Mayor of Liverpool, 1044
 Boursot *v.* Savage, 1003, 1155
 Bourton *v.* Williams, 754
 Bousfield *v.* Hodges, 1036, 1091
 Boutts *v.* Ellis, 137
 Bouverie *v.* Bouverie, 1224
 Bovey *v.* Smith, 849, 892
 Bowden *v.* Layland, Gibbs *v.* Layland, 269
 Bowen *v.* Barlow, 1354
 — *v.* Brecon, &c., *R. Co.*, 455
 — *v.* Evans, 1093
 — *v.* Lewis, 1392, 1396
 Bower *v.* Cooper, 1070, 1061, 1163
 — *v.* Hill, 155
 — *v.* Peate, 167
 — *v.* Smith, 665
 — *v.* Swadlin, 809
 Bowers *v.* Bowers, 1209, 1210, 1211
 — *v.* Littlewood, 237
 Bowes *v.* Croll, 528
 — *v.* E. L. W. Co., 873
 — *v.* Hope Ass. Co., 470
 — *v.* Law, 1166
 Bowker *v.* Bull, 741, 771
 Bowles' Case, 1250
 Bowman *v.* Hyland, 1083
 — *v.* Reeve, 40
 Bown *v.* Stenson, 1117, 1133
 Bowra *v.* Wright, 509
 Bowring *v.* Shepherd, 439
 Bowser *v.* Colby, 546, 693
 — *v.* Maclean, 228
 Bowyer *v.* Woodman, 601
 Box, *Re*, 1334
 — *v.* Barrett, 176, 179
 — *v.* Box, 382
 — *v.* Jackson, 345, 347, 353, 354
 Boxall *v.* Boxall, 253
 Boyce *v.* Boyce, 1297

- Boyce v. Hanning, 882
 Boycot v. Cotton, 648, 649, 863
 Boyd v. Boyd, 284
 — v. Brookes, 262, 264
 — v. Pawle, 233
 — v. Petrie, 759
 Boyd's Settled Estates, *Re*, 942
 — Estate, *In re*, 997, 1000
 Boydell v. Golightly, 243, 1375
 Boyes v. Bedale, 1258, 1388
 — v. Cook, 902
 — *Re*, 57
 Boyle, *Ex parte*, 429
 — v. Bettws, &c., Co., 752
 — v. Bishop of Peterborough, 911
 Boyman v. Gutch, 1137
 Boynton v. Boynton, 184, 370, 374, 375
 Boys v. Morgan, 1362
 — v. Williams, 1305, 1331
 Bozon v. Williams, 768, 1153
 Brabant v. Wilson, 231
 Braburn v. Morris, *Morris v. Bradburn*,
 156, 772, 773
 Brace v. Marlborough, Duchess of, 770-771
 — v. Wehnert, 100
 Brackenburg v. Brackenburg, 312, 961
 — v. Gibbon, 1428
 Bradbourne v. Botfield, 73
 Bradbury v. Dickens, 817
 — v. Hotten, 130, 131, 135
 Braddock, Goods of, 1275
 Braddon v. Farrond, 282
 Bradford, E., v. Romney E., 674, 675
 — Bank Co. v. Briggs, 771, *Add.*
 — v. Belfield, 754
 — v. Brownjohn, 236, 237, 238
 — v. Young, 254, 1260, 1261
 Bradish v. Gee, 113
 Bradlaugh v. Newdegate, 88
 Bradley v. Barlow, 1231
 — v. Bury, 890
 — v. Cartwright, 1393, 1394
 — v. Peixoto, 206, 216, 1241
 — v. Riches, 769, 774, 1156
 — v. Wescott, 845, 847
 Bradley v. Heath, 258
 Bradshaw, *Ex parte*, 1020
 — v. Bradshaw, 315, 1131, 1312
 — v. Fane, 876
 — v. Thompson, 1298
 Brain v. Brain, 1278
 Brake, Goods of, 1313
 Bramwell v. Halcomb, 131
 — v. Lacy, 549
 Brand v. Hammersmith, 173
 Brandling v. Plummer, 1061
 Brandon v. Aston, 1381
 — v. Brandon, 748, 752, 1046
 — v. Robinson, 1241, 1242
 Brandon's Trusts, *Re*, 317
 Branley v. S. E. R. Co., 75
 Brantom v. Griffiths, 712
 Brassey v. Chalmers, 509, 875
 Bray v. Bree, 914
 — v. Bree or Hammersley, 858
 Bray v. Stevens, 1414
 Braybrooke, *Ld.*, v. Att.-Gen., 892, 1149
 — v. Inskip, 1101, 1353
 Brayne v. Rees, 20
 Braythwayte v. Hitchcock, 533
 Brazier v. Hudson, 252
 Breadalbane, M. of, v. Chand, M. of, 674
 Brearcliff v. Dorrington, 524, 728
 Brecon, Mayor of, v. Seymour, 771
 Bree v. Holbeck, 606
 — v. Perfect, 1231
 Breech Loading Co., *Re*, 725
 Breed's Will, *Re*, 641, 652
 Breedon v. Breedon, 1162
 — v. Tugman, 1215
 Bremer v. Freeman, 282
 Brennan v. Moran, 1335
 Brentford and Isleworth Tram. Co., *Re*, 499
 Brentwood, &c., Co., *In re*, 1172
 Brereton v. Hutchinson, 261, 589
 Breton v. Mockett, 1328
 — v. Woolven, 303
 Brett v. Clowser, 1087, 1178
 — v. East India, &c., Co., 101
 — v. Forcer, 380
 — v. Horton, 1383
 — v. Rigden, 1291
 Brett's Case, 474
 Brettel v. Williams, 798
 Brette v. Burdett, 697
 — *Re*, Jollands v. Burdett, 397
 Brewer, *In re*, 1047
 — v. Broadwood, 93, 1127
 — v. Brown, 1063
 — v. Swirles, 395, 1007
 Brewin v. Brewin, 652
 Brewis, Goods of, 1268
 Brewster v. Angell, 879
 Brice v. Bannister, 694
 — v. Brice, 184
 — v. Stokes, 256, 984, 1007
 Brickenden v. Williams, 909, 910
 Bricker v. Whatley, 503
 Briden v. Hewlett, 1405
 Bridge v. Abbott, 286, 1407
 — v. Beadon, 726
 — v. Bridge, 302
 — v. Yates, 502
 Bridgeman v. Dove, 1327, 1415, 1416
 Bridger v. Huett, 1116
 — v. Rice, 93
 — v. Savage, 87
 Bridger's Case, 422
 — Neill's Case, 474
 Bridges v. Longman, 550, 558, 696, 881,
 1137, 1138, 1139
 — v. Robinson, 1089
 — v. Strachan, 1280
 Bridgman v. Gill, 608, 1005
 — v. Green, 308, 309
 Bridgnorth v. Collins, 5
 Bridle, *Re*, 1339
 Bridport Old Brewery Co., *Re*, 487
 Brier v. Evison, 271
 Brierly v. Kendall, 706

- Brigg v. Brigg, 658
 Briggs's Case, 428
 Briggs, *Ex parte*, 430
 — v. Chamberlain, 57, 354
 — v. Jones, 766
 — v. Oxford, E. of, 1252, 1253
 — v. Penny, 964
 — v. Sharp, 120
 — v. Upton, 659, 1406
 — v. Wilson, 261, 608
 Bright, *Re*, 726
 — v. Larcher, 20, 32, 598
 — v. Legerton, 589, 1007
 — v. North, 986
 — v. Tyndall, 1019
 — v. Walker, 148, 151, 152
 Bright's Settlement, *Re*, 724
 Bright-Smith, 1360, 1361
 Brighton Arcade Co. v. Dowling, 483
 — Hotel Co., 469, 470
 Brighty v. Norton, 735, 737
 Brigstocke v. Brigstocke, 225
 — v. Smith, 606
 Brindley v. Mulloney, 401
 — v. Partridge, 989
 Brine v. Ferrier, 1335
 Bringloe v. Goodson, 851, 913
 Brinkley v. Hann, 94, 1034
 Brisbane v. Dacres, 64
 Briscoe v. Briscoe, 185
 Bristed v. Wilkins, 524
 Bristol Corp. v. Westcott, 552
 Bristow v. Boothby, 914
 — v. Bristow, 1337, 1348
 — v. Sequeville, 75
 — v. Skirrow, 910, 1090
 — v. Warde, 183, 856
 — v. Wood, 1138
 Bristowe v. Needham, 752
 Britain v. Rossiter, 1058
 Brit. & Amer. Tel. Co. v. Colson, 421,
 1056
 Br. Farmer Comp., *Re*, 432
 Br. Guard, &c., Co., *Re*, 495
 Br. Mus. v. White, 44, 50, 51
 Br. Mutual, &c., Co. v. Smart, 265, 266
 Br. Seamless Paper Box Co., *Re*, 495
 Brittlebank v. Goodwin, 261, 589
 Britten v. Britten, 382
 Broad v. Munton, 1070, 1074
 — v. Selfe, 689
 Broadbent, *Ex parte*, 825
 — v. Barlow, 769
 — v. Morris, 1389, 1397
 — v. Ramsbotham, 165
 — v. Varley, 723
 Broadmead v. Wood, 860
 Broadwood's Settled Estates, *Re*, 112, 215,
 942
 Brock v. Bradley, 1208
 Brocklehurst v. Jessop, 599
 Brocklesbury, *Re*, 1018
 Broder v. Saillard, 171, 173
 Brodie v. Barry, 181, 182, 993—1258
 — v. St. Paul, 988, 1056, 1087
 Brodrick v. Brown, 887, 888
 Brograve v. Winder, 1265
 Brome v. Berkley, 644
 Bromfield v. Crowder, 1205, 1216
 Bromley v. Brunton, 137
 — v. Goodere, 108
 — v. Jefferies, 619, 1054
 — v. Kelly, 999
 — v. Wright, 1194
 Brook, *Ex parte*, 570
 — E. v. Bulkeley, 1151
 — v. Badley, 51
 — v. Brook, 75, 923
 — v. Garrod, 1043
 Brooke v. Anon., 1133, 1134
 — Ld. v. Warwick, E. of, 1327, 1339
 — v. Brooke, 389, 391
 — v. Haynes, 251
 — v. Lewis, 1193
 — v. Mostyn, Ld., 63
 — v. Pearson, 636
 — v. Rooke, 1414
 — v. Rounthwaite, 1066
 Brookes v. Drysdale, 531
 Brookman v. Hales, 239, 895
 — v. Smith, 1207, 1401
 Brookman's Trusts, *Re*, 670
 Brooks, *Ex parte*, 719
 — v. Keith, 664
 Broom v. Broom, 806
 Broome v. Monck, 176, 1097, 1099
 Brophy v. Bellamy, 651
 Brotherhood's Case, 444
 Brotherton v. Bury, 1212
 — v. Hatt, 773, 1156
 Broughton v. Broughton, 985
 — v. Hutt, 82
 Brown, *Ex parte*, 715
 — *Re*, 249
 — v. Bamford, 396
 — v. Barkham, 1372, 1373
 — v. Bateman, 531, 712
 — v. Black, 439
 — v. Brine, 88
 — v. Brown, 114, 177, 182, 183, 403,
 404, 1000, 1270, 1286, 1326,
 1342
 — v. Burdett, 1289
 — v. Casamajor, 965, 966, 1350
 — v. Carter, 310
 — v. Clark, 382
 — v. Clarke, 377
 — v. Cole, 737
 — v. Dale, 959
 — v. Dawson, 933
 — v. De Tastet, 749, 802, 818
 — v. Elton, 376
 — v. Farndell, 284
 — v. Gellatly, 119, 120, 122, 824
 — v. Gordon, 607, 823, 824
 — v. Higgs, 904, 923
 — v. Hotson, 79
 — v. How, 900
 — v. Kennedy, 307, 312
 — v. Lockhart, 737

- Brown *v.* Metropolitan Soc., 735
 — *v.* Nisbett, 856, 893
 — *v.* Oakshott, 506, 805
 — *v.* Peck, 1202
 — *v.* Pocock, 857
 — *v.* Quilter, 546, 548
 — *v.* Raban, 530
 — *v.* Raindle, 503, 1035
 — *v.* Rawlins, 199
 — *v.* Rigg, 1230
 — *v.* Robins, 167, 163
 — *v.* Rutherford, 605
 — *v.* Rye, 1136
 — *v.* Selwin, 1301
 — *v.* Sewell, 781
 — *v.* Smith, 654, 1260
 — *v.* Stead, 742
 — *v.* Tanner, 728
 — *v.* Temperley, 1349
 — *v.* Thompson, 18
 — *v.* Trumper, 544, 548, 566
 — *v.* Wales, 542
 — *v.* Whiteway, 979
 — *Bailey & Dixon, Re*, 479, 480
 — *Baily & Co., Re*, 421
 — *Shipley & Co. v. Kouth*, 694
 — *and Sibly's Contract*, 907, 914
 Brown's Case, 425, 426, 476
 — *Settlement, Re*, 882
 — *Trust, In re*, 915, 916
 — *Trust Estate, Re*, 873
 — *Trusts*, 725, 1384, 1387
 — *Will, In re*, 949, 953, 1203, 1238
 Browncker *v.* Bagot, 242
 Browne, *Re*, 323
 — *v.* Aymot, 26
 — *v.* Browne, 237, 1219
 — *v.* Cavendish, 993, 994
 — *v.* Collins, 268
 — *v.* Cork, Bp. of, 594
 — *v.* Cross, 591
 — *v.* Groombridge, 1341, 1381, 1416
 — *v.* Hammond, 1198, 1295, 1379
 — *v.* Hope, 1291
 — *v.* Paull, 655
 — *v.* Rainsford, 1223
 — *v.* Savage, 721, 726, 765
 — *v.* Stoughton, 6
 — *v.* Tighe, 234
 — *v.* Warner, 544
 Browne's Will, *Re*, 17, 662
 Browning *v.* Wright, 1165
 Brownlie *v.* Campbell, 96
 — *v.* Russell, 701
 Brownrigg *v.* Pike, 1271
 Brownson *v.* Lawrence, 37, 1418
 Brownsword *v.* Edwards, 1317
 Bruce, *Ex parte*, 691
 — *v.* Bruce, 894, 898, 1260
 — *v.* Deer Presbytery, 45
 — *v.* Garden, 721
 Brudenell *v.* Elwes, 850—859, 917
 Bruen *v.* Bruen, 928, 929, 1191
 Bruin *v.* Knott, 654
 Brumfit *v.* Morton, 1063, 1153
 Brummel *v.* Prothero, 1415
 Brunridge *v.* Brunridge, 992
 Brunskill *v.* Caird, 226
 Brunt *v.* Brunt, 1281
 Brunton *v.* Hall, 155
 Brunton's Claim, 1004
 Bryan *v.* Clay, 38
 — *v.* Collins, 7
 — *v.* Twigg, 18
 Bryant *v.* Busk, 1096, 1109, 1140
 — *v.* Lefever, 162
 Bryden *v.* Willett, 1395, 1397
 Brydges *v.* Brydges, 197
 — *v.* Stephens, 1248
 Bryon *v.* Metr. Saloon Omnibus Co. 450, 465
 Bubb *v.* Padwick, 1229
 — *v.* Yelverton, 87, 1255
 Bubbers *v.* Harby, 251
 Buccleuch, D. of *v.* Wakefield, 169
 Buchan's Case, 433
 Buchanan *v.* Andrew, 168
 — *v.* Hamilton, 1011
 — *v.* Harrison, 116, 203, 204, 1319
 — *v.* Poppleton, 1076, 1111
 Buck *v.* Shippam, 994
 Buckell *v.* Blenkhorn, 888, 922
 Buckhurst Peerage, 1031
 Buckland *v.* Hall, 529
 — *v.* Papillon, 528, 529, 530
 — *v.* Pocknell, 1172
 Buckle *v.* Mitchell, 296
 Buckley, *Ex parte*, 797
 — *v.* Barber, 250, 823
 — *v.* Howell, 877
 Buckley's Trusts, *Re*, 652, 1163
 Buckmaster *v.* Harrop, 1052, 1059, 1098
 — *v.* Russell, 606
 Bucks, E. of, *v.* Drury, 632, 633
 — *v.* Hobart, 683
 Buckton *v.* Hay, 859
 Buckworth *v.* Buckworth, 651
 Budd *v.* Marshall, 546
 Budd's Case, 443
 Budge *v.* Gummow, 999
 Buffar *v.* Bradford, 1292, 1389, 1390
 Bugden *v.* Bignold, 1152
 Bugg, *Ex parte*, 434
 Bugg's Case, 433
 Bulkeley *v.* Wilford, 307
 Bull *v.* Birkbeck, 233
 — *v.* Comberbach, 1374
 — *v.* Hutchens, 1074, 1145, 1152
 — *v.* Pritchard, 1213, 1219
 Bullard *v.* Shutt, 1081
 Bullen *v.* Denning, 543
 — *v.* Sharp, 788, 793
 Buller *v.* Hornby, 663
 — *v.* Plunkett, 725
 — *v.* Waterhouse, 297
 Bullers *v.* Dickinson, 158
 Bullin *v.* Fletcher, 1099
 Bullmore *v.* Wynter, 1313
 Bullock *v.* Bennett, 1233, 1237, 1262, 1378
 — *v.* Crockett, 804

- Bullock *v.* Dodds, 189, 190
 — *v.* Dommitt, 548
 — *v.* Downes, 502, 1404, 1405
 — *v.* Fladgate, 912
 — *v.* Menzies, 386
 — *v.* Thorne, 297
 — *v.* Wheatley, 271
 Bullpin *v.* Clarke, 393
 Bulmer *v.* Hunter, 628
 — *v.* Jay, 1406
 Bulmer's Case, 443
 Bulteel, *Ex parte*, 691
 — *v.* Plummer, 903, 904, 920
 Bulwer *v.* Astley, 226
 Bunbury *v.* Bunbury, 969
 — *v.* Fuller, 573
 — *v.* Lloyd, 674
 — *v.* Winter, 689
 Bund *v.* Green, 1404
 Bunn *v.* Bunn, 289
 — *v.* Markham, 138
 Bunn's Case, 422
 Bunny *v.* Hopkinson, 1180
 Bunting *v.* Marriott, 52, 55
 — *v.* Sargent, 49
 Burbey *v.* Burbey, 1310, 1377
 Burbidge *v.* Burbidge, 1328
 Burchell *v.* Clark, 531
 Burchett *v.* Woolward, 1203
 Burden, *Re*, 253
 — *v.* Burden, 272, 277, 802
 — *v.* Jane, Goods of, 1271
 Burdett *v.* Spilbury, 889
 Burdick *v.* Garrick, 273, 608
 Burdon *v.* Barkus, 790, 805, 807, 819
 — *v.* Dean, 377, 380
 Burdus *v.* Dixon, 1353
 Burge *v.* Brutton, 985
 Burges *v.* Lamb, 1253, 1254
 — *v.* Mawbey, 217, 908, 930
 Burgess *v.* Boctefeur, 548
 — *v.* Burgess, 1344
 — *v.* Robinson, 1203
 — *v.* Vinnicombe, 1262
 — *v.* Wheate, 186, 187, 188, 189,
 197, 737, 986, 988
 Burgess' Case, 430
 Burgh *v.* Langton, 761
 Burgoyne *v.* Fox, 647
 Burke *v.* Annis, 1368
 — *v.* Jones, 33, 994
 — *v.* Lynch, 594
 Burkinshaw *v.* Nicolls, 432
 Burleigh *v.* Pearson, 673, 918
 Burles *v.* Popplewell, 279
 Burleton *v.* Humfrey, 1239
 Burley *v.* Evelyn, 116
 Burls *v.* Burls, 1270, 1282
 Burn *v.* Boulton, 608
 — *v.* Burn, 797, 798
 — *v.* Carvalho, 694
 Burnaby *v.* Eq. Riv. Int. Soc., 504
 Burnell *v.* Brown, 1064, 1139
 Burnes *v.* Pennell, 458, 459
 Burnet *v.* Coby, 220
 Burnet *v.* Mann, 284, 286, 380, 885
 Burnett *v.* Kinaston, 351, 352
 Burney *v.* Macdonald, 57
 Burnham *v.* Bennett, 350, 892
 Burrell *v.* Baskerfield, 110
 — *v.* Dodd, 199
 — *v.* Egremont, E. of, 598, 683, 684
 — *v.* Smith, 34
 Burridge *v.* Brady, 1341
 — *v.* Row, 670, 671
 Burrough *v.* Philcox, 922, 923
 — *v.* Skinner, 1088, 1123
 Burroughes *v.* Browne, 1088
 Burroughs *v.* Cranston, 737
 — *v.* McCreight, 573, 587, 588
 — *v.* Oakley, 1117, 1118
 Burroughs, Lynn and Sexton, *In re*, 1119
 Burrow, *Re*, 1387
 — *v.* Scammell, 1066
 Burrowes *v.* Gore, 587
 — *v.* Lock, 95, 1140
 Burrow's Trusts, *Re*, 1288
 Burrows *v.* Cottrell, 1338
 — *v.* Walls, 268
 Burt *v.* Hellyar, 1403
 — *v.* Sturt, 7, 8, 9
 Burton *v.* Collingwood, 1267
 — *v.* Dearnley, E. of, 324
 — *v.* Gray, 691
 — *v.* Mount, 122
 — *v.* Newberry, 1269, 1280
 — *v.* Powers, 1367
 — *v.* Sturgeon, 659
 — *v.* Wigley, 810
 Bury *v.* Allen, 800, 804
 — *v.* Bedford, 817
 — *v.* Phillpot, 1116
 Busby *v.* Greenslate, 218
 — *v.* Salter, 918
 Buseck, Goods of, 1259
 Bush *v.* Cowan, 900
 — *v.* Locke, 1375
 Bush's Case, 432
 Bushell *v.* Bushell, 777, 1152
 Bushier *v.* Thompson, 199
 Busk *v.* Adams, 916
 — *v.* Aldam, 976
 Bustard's Case, 1104
 Butchart *v.* Dresser, 796, 815
 Butcher, *Ex parte*, 274, 294
 — *v.* Butcher, 661, 856, 911
 — *v.* Lawrence, 293
 Bute, Marquess of, *Re*, 1019
 — *v.* Cunyngname, 741
 — *v.* Ryder, 236, 245, 982
 Butler *v.* Bushnell, 1405
 — *v.* Butler, 364, 1001, 1362, *Add.*
 — *v.* Carter, 589, 1006
 — *v.* Cumpston, 394, 1007
 — *v.* Duncomb, 644, 648, 650
 — *v.* Freeman, 315, 324, 1351
 — *v.* Gray, 923
 — *v.* Knight, 65
 — *v.* Visct. Mountgarrett, 1115
 — *v.* Mullvihill, 94

- Butler v. Stratton, 1408
 Butler's Will, 112, 1046
 Butt v. Imp. Gas Co., 162
 Butt's Case, 254
 Buttanshaw v. Martin, 212, 398, 990, 991
 Buttemere v. Hayes, 1052
 Butterfield v. Butterfield, 218
 — v. Heath, 298
 Butterworth v. Harvey, 1230
 — v. Robinson, 130, 131
 Button v. O'Neill, 716
 Buxton, *Ex parte*, 564
 — v. Buxton, 269
 — v. Lister, 794
 Bwlch, &c., Co. v. Baynes, 430, 458, 466
 Byam v. Byam, 389, 673, 849, 886, 1014
 — v. Munton, 116
 — v. Sutton, 19, 681
 Byde v. Byde, 929
 Byerley v. Prevost, 713
 Byne v. Blackburn, 965
 — v. Currey, 1388
 Byng v. Byng, 1305, 1327, 1389
 Byrd, Goods of, 1274
 Byrne v. Norcott, 270
 — v. Van Tienhoven and Co., 1055
 Byrom v. Brandreth, 1324, 1325
 Bythesea v. Bythesea, 1232
 Bywater, *Re*, 1302
 — v. Clarke, 1300

 CABALLERO v. Henty, 1154
 Cable v. Cable, 1405
 Cadbury v. Smith, 265, 598, 1313
 Caddick v. Cook, 760
 — v. Skidmore, 1056
 Cadell v. Palmer, 832, 913, 1027
 Cadett v. Earle, 1000
 Cadge, Goods of, 1285, 1362
 Cadiz Waterw. Co. v. Barnett, 471
 Cadie v. Moody, 754
 Cadman v. Horner, 95
 Cadogan v. Palagi, 1325
 Cadywold, *Re*, 1277
 Cafe v. Bent, 121, 1010
 Cage v. Acton, 335
 Cahill v. Cahill, 401, 404, 1034
 Caine, *Re*, 340
 Calcraft v. Roebuck, 1081
 Caldecott, *Ex parte*, 294, 995
 — v. Brown, 224
 — v. Caldecott, 119
 Caldicot v. Smith, 283
 Caldwell, *Ex parte*, 724
 — v. Fellowes, 503
 Cal. R. Co. v. Belhaven, Ltd., 170
 — v. Helensburgh, 412
 — v. Sprot, 145, 167, 170
 Calisher v. Forbes, 726
 Calisher's Case, 482
 Calley v. Richards, 1157
 Calmady v. Calmady, 375
 Calverley v. Williams, 1129
 Calvert v. Armitage, 53, 57
 — v. Godfrey, 1034, 1138

 Calvert v. Johnson, 393
 — v. Sebbon, 1344
 — v. Sebright, 1180
 Camberwell, &c., Soc. v. Holloway, 1062, 1101
 Cambridge v. Rous, 840, 1210, 1212, 1352
 Camden v. Benson, 1091
 — Mss. v. Batterbury, 528
 — v. Murray, 983
 Cameron, *Re*, 1414
 — *Re*, Nixon v. Cameron, 275
 Camfield v. Gilbert, 1319
 Camoys, Ltd., v. Best, 1010
 — v. Blundell, 1312
 — v. Gladstone, 1311
 Campbell v. Allgood, 1253
 — v. Bainbridge, 661, 662
 — v. Beaufoy, 282
 — v. Bouskell, 1315, 1389, 1391
 — v. Brownrigg, 1330
 — v. Campbell, 264, 505, 928, 931
 — v. Compagnie Générale, &c., 490
 — v. Fleming, 1136
 — v. French, 380, 1280
 — v. Graham, 1329, 1346
 — v. Harding, 242, 1396
 — v. Holyland, 762
 — v. Homes, 921
 — v. Hooper, 696
 — v. Ingilby, 177, 181, 182, 632
 — v. Leach, 867, 869—871, 894, 903
 — v. Lewis, 555, 1179
 — v. Lucy, 1271
 — v. Mackay, 524
 — v. Netterville, Ltd., 1238
 — v. Prescott, 1322, 1324
 — v. Radnor, E., 50
 — v. Sandys, 910
 — v. Scott, 131
 — v. Walker, 1040
 — v. Wilson, 148
 Campbell's Case, 419, 454
 — & Hippisley's Case, 423, 452, 464
 — Policies, *Re*, 660
 — Trusts, *Re*, 961, 1014
 Campden Charities, *Re*, 45
 Campion v. Cotton, 629
 Candler v. Candler, 102, 795
 — v. Tillett, 268
 Cane, *Re*, 304
 Canham v. Fisk, 145, 147, 165
 Cann, *Re*, 714
 — v. Cann, 64, 1175, 1176
 Cannan v. Hartley, 565
 Cannel v. Buckle, 612, 619
 Canning v. Canning, 509, 1369
 Cannon v. Johnson, 512
 — v. Trask, 446
 — v. Villars, 156
 Cannon's Case, 484
 Cant, *Re*, 107
 Cant's Estate, *Re*, 1043
 Cantley, *Re*, 1354

- Cape Breton Co., *Re*, 411, 413, 475
 — *v. Fenn*, 482
 Capel *v. Girdler*, 679
 — *v. Wood*, 235
 Capel's Case, 695
 Cape's Executors' Case, 437
 Capital Fire Ins. Assoc., *Re*, 469
 Caplin, *Re*, 864, 900
 Capon's Trusts, *In re*, 905
 Capper's Case, 441
 Capper *v. Spottiswoode*, 1172
 — *v. Terrington*, 780
 Capps *v. Norwich & S. W. R. Co.*, 1131
 Capron *v. Capron*, 28
 Cardigan *v. Curzon Howe*, 946
 — *E. of, v. Montague*, 869, 870, 871
 Cardross' Settlement, *In re*, 886
 Careless *v. Careless*, 1303
 Carew, *Re*, 727
 — *v. Arundell*, 690
 — *v. Cooper*, 729
 Carew's Case, 414
 — *Estate, Re*, 93, 1093
 Carey *v. Doyne*, 732
 — *v. Goodinge*, 265
 Cargill *v. Bower*, 429
 Carlen *v. Drury*, 436
 Carleton *v. Leighton*, 729
 Carlisle B. Co. *v. Thompson*, 779
 Carlyon *v. Lovering*, 166, 170
 — *v. Truscott*, 892, 1162
 Carmichael *v. Carmichael*, 250
 — *v. Gee*, 19
 Carmichael's Case, 422
 Carne *v. Long*, 56
 — *v. Roch*, 1373
 Carpenter *v. Dunsmore*, 222
 — *v. Parker*, 1180
 Carpmael *v. Powis*, 1156
 Carr, *Ex parte*, 331
 — *v. Atkinson*, 915
 — *v. Carr*, 1326
 — *v. Eastbrooke*, 381, 934
 — *v. Errol, E. of*, 244, 1029, 1427
 — *v. Foster*, 153, 154
 — *v. Living*, 965, 1243
 — *v. Taylor*, 379, 626
 Carriage, &c., Assoc., *Re*, 426, 480, 483
 Carrick *v. Errington*, 1197
 Carrington *v. Evans*, 403
 — *Ld.*, *v. Payne*, 1280
 — *v. Wycombe R. Co.*, 1050
 Carrodus *v. Sharp*, 1081, 1140
 Carroll *v. Darcy*, 597
 Carron Co. *v. Hunter*, 1334
 Carruthers, *Ex parte*, 694
 Carte *v. Carte*, 1241, 1288
 Carter, *Ex parte*, 714, 740
 — *v. Barnadiston*, 646, 979, 981
 — *v. Bentall*, 1395, 1398
 — *v. Carter*, 665, 765, 766, 767, 773,
 887, 894, 913, 1184, 1241
 — *v. Haswell*, 7, 58, 116
 — *v. Sanders*, 266
 — *v. Sebright*, 233
 Carter *v. Taggart*, 26, 384, 908
 — *v. Wake*, 761
 — *v. Williams*, 551, 556, 1166
 Carteret, *Ld.*, *v. Paschal*, 626
 Cartledge, *Re*, 1199
 — *v. Radbourn*, 64
 Cartmell's Case, 456
 Cartwright *v. Cartwright*, 401, 1202
 — *v. Vawdry*, 1387
 Caruthers *v. Caruthers*, 634, 637
 Carver *v. Bowles*, 184, 916, 926
 — *v. Richards*, 893, 895
 Carwardine *v. Carwardine*, 979, 1027
 Cary *v. Abbott*, 41, 43
 — *v. Fadin*, 129
 — *v. Hills*, 250, 261
 — *v. Kearsley*, 132
 — *v. Longman*, 130
 Casamajor *v. Strode*, 1089
 Casborne *v. Scarfe*, 226, 736
 Case *v. Drosier*, 833
 Casmore, Goods of, 1273
 Cass *v. Waterhouse*, 1177
 Cassell *v. Stiff*, 134
 Cassels *v. Stewart*, 802, 822
 Casson *v. Dade*, 1276
 — *v. Roberts*, 1085, 1088
 Castellan *v. Hobson*, 439
 Castellain *v. Preston*, 1095
 Castello's Case, 442
 Casterton *v. Sutherland*, 856, 857, 923
 Castle *v. Castle*, 965
 — *v. Downton*, 716
 — *v. Fox*, 1290, 1305, 1332, 1340
 — *v. Gillett*, 1414
 — *v. Wilkinson*, 1034, 1127
 Caswall, *Ex parte*, 896
 Cater, *Re*, 310
 — *v. Palmer*, 1039
 Cath. Pub. Co., 452
 Cathrow *v. Eade*, 519, 1109
 Catley *v. Sampson*, 737
 Catling *v. King*, 1053
 Cato *v. Thompson*, 80, 1067, 1103, 1128
 Caton *v. Caton*, 332, 612, 613, 614, 1057,
 1283
 — *v. Rideout*, 391
 Catt *v. Howard*, 797
 — *v. Tourle*, 551, 1166, 1168
 Catt's Trusts, *Re*, 1207, 1235
 Cattell *v. Corral*, 1101
 Cattley *v. Arnold*, 26, 232, 508
 Cattlin *v. Brown*, 833, 834, 837, 838, 839,
 840, 1424
 Cattrall, *Re*, 1267
 Caulfield *v. Macguire*, 225, 226
 Cavan, *Ly. v. Pulteney*, 182
 Cavander *v. Bulteel*, 818, 1065, 1154
 Cave *v. Cave*, 326, 764, 891, 1155, 1185
 — *v. Hastings*, 1057
 — *v. Holford*, 1277
 — *v. Roberts*, 283, 284, 286
 Cavendish *v. Cavendish*, 920, 1036, 1326
 — *v. Greaves*, 803
 — *v. Mercer*, 1350

- Cavey *v.* Ledbitter, 173
 Cawood *v.* Thompson, 54
 Cawthorne, *Re*, 1018
 Cawthron, Goods of, 1267
 Cecil *v.* Landon, 1017
 Cercle Rest. Co. *v.* Lavery, 471
 Chadwick *v.* Broadwood, 381
 — *v.* Doleman, 860
 — *v.* Heatley, 992
 — *v.* Maden, 1039
 — *v.* Marsden, 165, 543
 — *v.* Trower, 167
 — *v.* Turner, 776, 777, 1107
 Chadwin, *Ex parte*, 1340
 Challen *v.* Shippam, 989
 Challenger *v.* Sheppard, 1368
 Challinor, *Ex parte*, 714
 Challis *v.* Casborn, 771
 Challis's Case, Somerville's Case, 423
 Chalmer *v.* Bradley, 587, 976
 Chalmers *v.* North, 659
 — *v.* Storill, 184, 371
 Chamberlain, *Ex parte*, 1046
 — *Re*, 122
 — *v.* Chamberlain, 384
 — *v.* Hutchinson, 909
 — *v.* Lee, 1106, 1127
 — *v.* Napier, 904
 — *v.* White, 647
 Chamberlayne *v.* Brockett, 56
 — *v.* Chamberlayne, 1370
 Chambers, *Ex parte*, 654
 — *Re*, 854
 — *v.* Crabbe, 306, 334
 — *v.* Gaussen, 234
 — *v.* Goldwin, 689, 743, 748
 — *v.* Howell, 824
 — *v.* Kingham, 679
 — *v.* Manchester, &c., Co., 453
 — *v.* Minchin, 256
 — *v.* Taylor, 200, 208
 Champion *v.* Rigby, 1042
 Champney *v.* Davy, 53, 908
 Chancellor, *Re*, 120
 Chancey's Case, 934
 Chandler *v.* Howell, 52
 — *v.* Pocock, 106, 110, 113, 912
 Chandless *v.* Price, 246
 Chandos (Duke of) *v.* Talbot, 1086, 1190, 1196
 Chapel House Coll. Co., *Re*, 470
 Chaplin, *Ex parte*, 718
 — *v.* Chaplin, 11, 929, 930
 — *v.* Young, 749, 750, 1039
 Chaplin's Trusts, *Re*, 1294
 Chapman *v.* Biggs, 399
 — *v.* Blissett, 1424
 — *v.* Bradley, 329, 626, 628
 — *v.* Brown, 55
 — *v.* Chapman, 691, 1406
 — *v.* Esgar, 35
 — *v.* Gatecombe, 194
 — *v.* Gibson, 893, 895
 — *v.* Gilbert, 1315
 — *v.* Hart, 1323, 1339
 Chapman *v.* Knight, 712, 717
 — *v.* Reynolds, 1325
 — *v.* Shepherd, 490
 — *v.* Shepherd, Whitehead *v.* Izod, 439
 — and Barker's Case, 433
 — and Hobbs, *Re*, 242
 Chapman's Case, 420, 484
 Chappell *v.* Boosey, 126
 — *v.* Davidson, 130
 — *v.* Gregory, 530
 — *v.* Sheard, 130, 131
 Chappell's Case, 441, 457
 Charge *v.* Goodyer, 1377
 Charing Cross, &c., Bank, *Ex parte*, 714
 Charles *v.* Finchley Board, 174
 Charlesworth *v.* Jennings, 814
 Charleton *v.* Charleton, 1253
 Charlton *v.* Att.-Gen., 1146, 1147
 — *v.* Coombes, 1157, 1234
 — *v.* Durham, E., 256
 — *v.* Hay, 413
 — *v.* Hindmarsh, 1274, 1275
 — *v.* Rendall, 625
 — *v.* West, 935
 Charman *v.* Charman, 1278
 Charter *v.* Charter, 1303, 1305, 1312, 1313
 — *v.* Trevelyan, 1042
 Chasemore *v.* Richards, 162, 164
 — *v.* Turner, 607
 Chaston *v.* Seago, 1229
 Chatteris *v.* Young, 314, 1337
 Chatterton *v.* Cave, 126, 131
 Chattock *v.* Muller, 1039
 Chave *v.* Farrant, 935
 Chawner's Will, *Re*, 1138
 Chaworth *v.* Beech, 1331
 — *v.* Hooper, 1349
 Chaytor's Settled Estates Act, *In re*, 945, 950, 955
 Cheale *v.* Kenward, 423
 Chedworth *v.* Edwards, 1004
 Cheeke *v.* Lisle, Ltd., 621
 Cheese *v.* Lovejoy, 1282
 Cheeseman *v.* Price, 812, 814
 Cheltenham R. Co. *v.* Daniel, 435
 Cherry *v.* Boulton, 263
 — *v.* Mott, 45, 57
 Chesman *v.* Nainby, 102
 Chesshyre *v.* Biss, 742
 Chester *v.* Chadwick, 858
 — *v.* Chester, 1359
 — *v.* Painter, 1346
 — *v.* Powell, 553
 — *v.* Urwick, 1301
 — *v.* Willan, 503
 Chesterfield's Trusts, Earl of, 121
 Chesterfield, &c., Co. *v.* Hawkins, 70
 Chesworth *v.* Hunt, 717
 Chetham *v.* Hoare, 590
 Chetwynd *v.* Chetwynd, 317
 — *v.* Fleetwood, 177
 Chevaux *v.* Aislabie, 1194
 Chichester *v.* Coventry, 924, 927, 928, 929, 931, 933

Chichester *v.* Donegall, Marq. of, 703
 Chidell *v.* Galsworthy, 716
 Chidgley *v.* Whitby, 1348
 Chidley *v.* Lee, 935
 Child *v.* Douglas, 1182
 — *v.* Giblett, 1210, 1212
 — *v.* Thorley, 697
 Childers *v.* Childers, 312, 961, 978
 Childs, *Re*, 829
 — *v.* Monins, 258
 Chilliner *v.* Chilliner, 71, 616
 Chillington Iron Co., *Re*, 447
 China, Imp. Bank of, 490
 — &c. *v.* Hindustan,
 Bank of, 493
 Chinnery *v.* Evans, 596, 599, 602
 Chinnock *v.* Mss. Ely, 92, 1055
 — *v.* Sainsbury, 101
 Chipchase *v.* Simpson, 390
 Chippendale, *Ex parte*, 452, 798, 986
 Chissum *v.* Dewes, 102, 704
 Chitty *v.* Parker, 115
 Cholmely *v.* Cholmely, 375
 — *v.* Oxford, Countess of, 739
 Cholmondeley *v.* Ashburton, *Ld.*, 1404
 — *v.* Clinton, 89, 90, 586, 587,
 591, 594, 672, 740, 1375
 — *v.* Meyrick, 647, 922
 Chorley, *Ex parte*, 722
 Chorlton *v.* Craven, 1390
 Chown *v.* Parrott, 65
 Chowne *v.* Baylis, 189, 290, 722
 Christchurch (Oxford), Dean of, *v.* Buck-
 ingham, D. of, 232
 Christian, Goods of, 1274
 — *v.* Devereux, 598, 1344
 — *v.* Field, 737
 Christmas *v.* Whinyates, 1281
 Christie, *Ex parte*, 830
 — *v.* Gosling, 245, 246
 — *v.* Ovington, 1160
 Christophers *v.* Sparke, 596
 — *v.* White, 985
 Christopherson *v.* Naylor, 1354, 1355
 Christ's Hospital *v.* Budgin, 972
 — *v.* Grainger, 833
 Christy *v.* Courtenay, 34, 972, 974
 Chritchett *v.* Taynton, 1376
 Chubb *v.* Stretch, 336
 Chudleigh's Case, 1024
 Church, *Re*, 189, 190
 — *v.* Brown, 530, 559, 1165
 — *v.* Kemble, 184
 — *v.* Mundy, 230, 1359
 — *v.* Tyacke, 1222
 — Build. Soc. *v.* Barlow, 54
 — *v.* Coles, 50
 Churchill *v.* Churchill, 184, 916
 — *v.* Denny, 663
 — *v.* Dibben, 885
 — *v.* Marks, 1241
 — *v.* Shepherd, 662
 Churchman *v.* Harvey, 644, 648, 895
 — *v.* Ireland, 182
 Churton *v.* Douglas, 816, 817, 821

Chynoweth's Case, 443, 474
 Cigala's Trusts, *In re*, 1145, 1146
 Citizen's Bank of Louisiana *v.* First Nat.
 Bank of New Orleans, 95
 City & County Bank, *Re*, 471
 — Investment Co., *Re*, 493
 City of London *v.* Richmond, 1131
 — Brew. Co. *v.* Tennant, 159,
 161, 162
 Clache's Case, 1411
 Clack *v.* Carlon, 985
 — *v.* Holland, 671
 Clanricarde, *Ld.*, *v.* Henning, 1042
 Clapham *v.* Shillito, 96
 Clarendon, E., *v.* Hornby, 509
 Clarges *v.* Albemarle, *Dss.*, 375
 Clark, *Re*, 1378, 1410, 1412
 — Goods of, 1273
 — *v.* Burgh, 343, 352, 367
 — *v.* Clark, 37, 1041
 — *v.* Cogge, 144
 — *v.* Cuckfield Union, 78
 — *v.* Girdwood, 675
 — *v.* Henry, 1211
 — *v.* Hoskins, 688, 1006
 — *v.* Hougham, 606
 — *v.* Leach, 791, 811
 — *v.* Malpas, 309, 1177
 — *v.* May, 1159
 — *v.* Randall, 1265
 — *v.* Sewell, 933, 1348
 — *v.* Seymour, 876
 — *v.* Smith, 234, 872
 — *v.* Taylor, 46
 — *v.* Thorp, 317
 Clark's Trusts, *Re*, 56, 1225
 Clarke, *Re*, 28, 316, 569
 — Goods of, 1273
 — *v.* Abbot, 770, 773
 — *v.* Arden, 229
 — *v.* Bathe, 137
 — *v.* Berkeley, 1237
 — *v.* Bickers, 797
 — *v.* Blake, 857, 1380, 1382
 — *v.* Browne, 1331, 1338
 — *v.* Butler, 1279, 1332
 — *v.* Chamberlin, 212
 — *v.* Clark, 159, 160
 — *v.* Clarke, 1380
 — *v.* Clayton, 509
 — *v.* Colls, 657, 1318
 — *v.* Cooke, 378
 — *v.* Dickson, 94
 — *v.* Elliott, 1095
 — *v.* Franklin, 106, 118, 373
 — *v.* Green, 355
 — *v.* Hart, 445, 812
 — *v.* Hilton, 1362
 — *v.* Jessop, 647
 — *v.* Lubbock, 1210
 — *v.* Mackintosh, 1059
 — *v.* Ormonde, 279
 — *v.* Palmer, 766, 767
 — *v.* Panopticon, 696
 — *v.* Parker, 1238, 1239

- Clarke *v.* Price, 101
 — *v.* Royle, 1138
 — *v.* Roy. Panop., 1137
 — *v.* Roystone, 81
 — *v.* Scripps, 1281
 — *v.* Wallace, 1141
 — *v.* Willott, 296
 — *v.* Wilson, 1131
 — *v.* Wright, 620, 656, 657
 Clarke's Case, 432
 — Trusts, *Re*, 398, 757
 Clarkson *v.* Edge, 102, 822
 — *v.* Hanway, 93, 308
 — *v.* Henderson, 732
 Clavering *v.* Clavering, 1251
 — *v.* Ellison, 1201, 1202, 1203, 1246
 — *v.* Yorke, 137
 Clay *v.* Rufford, 1133
 Clay and Tetley, *In re*, 880, 881
 Claydon *v.* Green, 1119
 Claypole, Rector of, *Ex parte*, 1045
 Clayton *v.* Cookes, 230
 — *v.* Corby, 151, 152
 — *v.* Illingworth, 529
 — *v.* Lowe, 1211
 — *v.* Nugent, 1306
 — *v.* Wilton, *Ld.*, 621, 656
 Clayton's Case, 608
 Cleather *v.* Twisden, 799, 800
 Cleave *v.* Jones, 608
 Cleaver *v.* Spurling, 1245
 Clegg, *Re*, 1316
 — *v.* Edmonson, 102, 802, 812
 — *v.* Fishwick, 238, 802
 — *v.* Rees, 993, 994
 — *v.* Rowland, 260, 868
 Cleland's Case, 432, 477
 Clement *v.* Cheesman, 137
 — *v.* Maddick, 130
 Clements *v.* Hall, 812
 — *v.* Matthews, 715
 — *v.* Norris, 802
 — *v.* Scudamore, 205
 — *v.* Welles, 102, 551, 1143
 — *v.* Wells, 556
 Cleobury *v.* Beckett, 1280
 Clephane *v.* Edinburgh, *Prov. of*, 46
 Clere's Case, 903
 Clergy, &c., *Corp.*, *In re*, 997
 — *Soc.*, *Re*, 1304
 Clerk *v.* Wright, 1058
 Clerke *v.* Clerke, 251
 Clifford *v.* Arundell, 20
 — *v.* Beaumont, 1237
 — *v.* Clifford, 677, 682, 900
 — *v.* Koe, 1389
 — *v.* Turrell, 81
 Clifton *v.* Burt, 40
 — *v.* Cockburn, 63, 64
 — *v.* Goodbun, 1387
 Clinie *v.* Wood, 704
 Clinan *v.* Cooke, 1058, 1059
 Clinch *v.* Financial *Corp.*, 463, 464, 493
 Cline's Estate, *Re*, 28
 Clinton *v.* Hooper, 366
 — *Ly.*, *v.* Seymour, *Ld.*, 650
 Clinton's Trusts, *Re*, 662, 663
 Clissold, *Re*, 1014
 Clitheroe Estate, *In re*, 945, 955
 Clive *v.* Beaumont, 1055
 — *v.* Carew, 247, 395, 398
 — *v.* Clive, 29, 1334
 — *v.* Fin. *Assoc.*, 488
 Clogstoun *v.* Walcott, 897
 Close, *Ex parte*, 712
 — *v.* Wilberforce, 563.
 Clough *v.* Bond, 268, 272, 983
 — *v.* Clough, 890, 891, 906
 — *v.* French, 38
 — *v.* Lambert, 301, 401
 Cloves *v.* Awdry, 900
 Clowes *v.* Beck, 1141
 — *v.* Higginson, 80, 91
 Clubb *v.* Hutson, 87
 Clulow, *Re*, 7, 8, 9, 26
 Clutterbuck *v.* Clutterbuck, 1416
 Coal Consumers' *Assoc.*, *Re*, 479
 Coape *v.* Arnold, 219
 Coard *v.* Holderness, 969, 1289, 1320
 Coates *v.* Coates, 262, 1345
 — *v.* Hart, 1317, 1411
 Cobbett *v.* Brock, 307
 — *v.* Woodward, 130
 Cochran *v.* Graham, 669
 Cochran *v.* Green, 263
 — *v.* Matthews, 688
 — *v.* Robinson, 260
 — *v.* Willis, 97, 1177
 Cock *v.* Cock, 404
 — *v.* Cooke, 1267
 — *v.* Richards, 631
 Cockayne *v.* Harrison, 1327
 Cockburn, *Ex parte*, 70
 — *v.* Edwards, 599, 756
 — *v.* Peel, 997
 Cockcroft, *Re*, 1098
 — *v.* Sutcliffe, 919
 Cockell *v.* Bacon, 753
 — *v.* Taylor, Collett *v.* Preston, 89
 — *v.* Taylor, 1177
 Cocker *v.* Quayle, 1001, 1007
 Cockerell, *A.*, *Ex parte*, 340
 — *v.* Barber, 1344, 1346
 — *v.* Cholmeley, 877, 1007, 1254
 — *v.* Essex, *Earl of*, 244, 1339, 1346
 Cocking *v.* Pratt, 63, 97
 Cockroft *v.* Black, 264
 Cocks *v.* Manners, 56
 Cocksedge *v.* Cocksedge, 401
 Cockshott *v.* Cockshott, 1365
 Codling *v.* Johnson, 142
 Codrington *v.* Codrington, 177
 — *v.* Foley, 644, 649
 — *v.* Lindsay, 177
 — *v.* Parker, 751
 Coe, *Re*, 1013
 Coe's Trusts, *Re*, 886, 1009, 1243
 Coffin *v.* Coffin, 1253

- Coffin *v.* Cooper, 894, 920, 1127, 1135
 Cofield *v.* Pollard, 902
 Cogan *v.* Duffield, 620
 Cogswell *v.* Armstrong, 7, 58, 116, 1359
 Coham *v.* Coham, 315
 Colborne *v.* Colbridge, *Ex parte*, 453
 Colburn *v.* Simms, 132
 Colby *v.* Gadsden, 102, 1064, 1118, 1131
 Colclough *v.* Sterum, 1093
 Cole *v.* Fitzgerald, 1327
 — *v.* Globe, 1395
 — *v.* Kernot, 715
 — *v.* Miles, 1161
 — *v.* Muddle, 276
 — *v.* Scott, 1290
 — *v.* Sewell, 508, 509, 839, 882, 1222,
 1423, 1424, 1425, 1429
 — *v.* Sherard, 1113
 — *v.* Turner, 1414
 — *v.* Wade, 850, 864
 — *v.* White, 1058
 — *v.* Willard, 934, 935
 Colebeck *v.* Girdlers' Comp., 147
 Coleby *v.* Coleby, 1418
 Colegrave *v.* Dias Santos, 1086
 — *v.* Manby, 235, 237, 238, 1288
 Coleman *v.* Croker, 292
 — *v.* Foster, 532
 — *v.* Jarrow, *In re*, 1293
 — *v.* Jones, 180, 181
 — *v.* Seymour, 1384
 — *v.* Winch, 771, 772
 Coles, Goods of, 1267
 — Will, *Re*, 15
 — *v.* Bristowe, 438, 440
 — *v.* Pilkington, 533, 1283
 — *v.* Sims, 1166, 1182
 — *v.* Trecothick, 1041, 1131
 Collard *v.* Sampson, 888
 Colledge *v.* Horn, 606
 Collen *v.* Wright, 1087
 Colleton *v.* Garth, 375, 637, 1339
 Collett *v.* Collett, 1239
 — *v.* Thompson, 1123
 Colley's Trusts, 1190
 Collie, *Re*, 805, 830
 Collier *v.* McBean, 978, 1137, 1138
 — *v.* Mason, 1060, 1131
 — *v.* Squire, 1406
 — *v.* Walters, 978, 980
 Collinge, *Ex parte*, 829
 Collingridge *v.* R. Ex. Assur., 1095, 1178
 Collingwood, *Re*, 784
 — *v.* Berkeley, 411
 — *v.* Faice, 1373
 — *v.* Row, 107
 — *v.* Russell, 697
 — *v.* Stanhope, 862
 Collins, *Ex parte*, Lees, *Re*, 1200
 — *v.* Archer, 1185
 — *v.* Blantern, 86
 — *v.* Burton, 292
 — *v.* Collins, 121, 824, 1054, 1060, 1325
 — *v.* Jackson, 805
 — *v.* Lamport, 728
 Collins *v.* Lewis, 37
 — *v.* Locke, 88
 — *v.* Plumb, 1166
 — *v.* Plummer, 216
 — *v.* Wakeman, 116
 Collinson, *In re*, 1229
 — *v.* Collinson, 912
 — *v.* Lister, 275
 — *v.* Pattick, 303
 Collinwood *v.* Row, 1098
 — *v.* Stanhope, 861
 Collis *v.* Robins, 1415
 Collison *v.* Lister, 269
 Colliss *v.* Hector, 627
 Collum, *Ex parte*, 445, 478
 Collyer *v.* Ashburner, 21, 1349
 — *v.* Fallon, 730
 — *v.* Isaacs, 715
 Colman *v.* Sarel, 300
 — *v.* St. Albans, D., 745
 Colmore *v.* Tyndall, 978
 Colombine *v.* Penhall, 290, 628
 Col. Bank *v.* Whinney, 718, 722, 724
 Colonial Trusts Cor., *Re*, 454, 455, 481
 Colston *v.* Morris, 323, 1346
 Coltsmann *v.* Coltsmann, 1397, 1423, 1427
 Colvin *v.* Fraser, 1282, 1283
 Colyear *v.* Mulgrave, Ctss., 70
 Colyer *v.* Finch, 765, 1185
 Combe *v.* Hughes, 7
 Combe's Case, 850
 Comber *v.* Graham, 845
 Comfort *v.* Brown, 218, 1393
 Coming, *Ex parte*, 693
 Commis *v.* Scott, 1053
 Commissioners of Char. Don. *v.* Wybrants,
 587, 589
 Com. Pub. Works *v.* Harby, 726
 Commons *v.* Marshall, 869
 Comport *v.* Ansten, 1190
 Compton *v.* Bloxham, 1271, 1344
 — *v.* Richards, 144
 — *Ld. v.* Oxenden, 681, 682
 Conduitt *v.* Soane, 1346
 Conelly *v.* Steer, 717
 Coney *v.* Bennett, 520
 Coningham *v.* Plunkett, 301
 Connell, *Ex parte*, 805
 Conning, *Ex parte*, Steele, *Re*, 712
 Connor *v.* Martin, 348
 Conolan *v.* Leyland, 364
 Conolly *v.* M'Dermott, 921
 Conron *v.* Conron, 1414
 Consol. &c., Co. *v.* Riley, 727
 Cons. Col. Bank *v.* Whinney, 723
 Cons. Platt *v.* Mendell, 761
 Const *v.* Harris, 803
 Constable *v.* Bull, 1299
 — *v.* Constable, 28
 Contract Corporation, *Ex parte*, 420, 456,
 485, 490
 Conway *v.* Conway, 649
 — *v.* Vernon, 1322
 Conyngham *v.* Conyngham, 975
 Coode, Goods of, 1261

- Cook, *Ex parte*, 827, 829
 — *Re Strachan*, 983
 — *v. Addison*, 1005
 — *v. Bath, Mayor, &c.*, of, 155, 157
 — *v. Collingridge*, 750, 819, 821, 825
 — *v. Cook*, 1391
 — *v. Dawson*, 32, 880
 — *v. Field*, 90
 — *v. Fowler*, 732
 — *v. Gerrard*, 1321
 — *v. Gregson*, 34, 38
 — *v. Greves*, 63
 — *v. Hart*, 760
 — *v. Jaggard*, 1320, 1360
 — *v. Lambert*, 1267, 1273
 — *v. Parsons*, 1273
 — *v. Russell*, 522
 — *v. Wright*, 63
 Cook's Settled Estates, *Re*, 942, 997
 Cooke, *Ex parte*, 635
 Cooke *v. Benbow*, 801
 — *v. Blake*, 980
 — *v. Chilcott*, 1166
 — *v. Cholmondeley*, 226
 — *v. Clayworth*, 94
 — *v. Cooke*, 305
 — *v. Crawford*, 754
 — *v. Dealey*, 107
 — *v. Farrand*, 849
 — *v. Forbes*, 172
 — *v. Fuller*, 398, 407
 — *v. Green*, 1105
 — *v. Lamotte*, 306
 — *v. Mirehouse*, 1316
 — *v. Saltan*, 779, 1113
 — *v. Stationers' Co.*, 58, 1352
 — *v. Tombs*, 1057
 — *v. Turner*, 1245
 — *v. Williams*, 408
 — *v. Wilton*, 771
 Cooke's Contract, *In re*, 1139
 Cookney *v. Anderson*, 74, 960
 Cookson *v. Bingham*, 506
 — *v. Cookson*, 111, 113, 791, 806
 Coombe, *Ex parte*, 691
 Coomber *v. Howard*, 545
 Coombes *v. Brookes*, 1013
 Coombs, Goods of, 1273
 — *v. Queen's Proctor*, 1263
 Coomer *v. Bromley*, 800
 Coomes *v. Elling*, 346
 Coope *v. Cresswell*, 266, 604
 Cooper, *Ex parte*, 713, 718, 806, 868
 — Goods of, 1263
 — *Re*, 854
 — to Harlech, *Re*, 877, 920
 — and Allen to Harlech, 1147
 — *v. Beckett*, 1275, 1284
 — *v. Cartwright*, 742, 1159
 — *v. Carter*, 1006
 — *v. Cooper*, 176, 179, 181, 183, 637,
 919, 920, 932, 1210, 1211, 1217,
 1381
 — *v. Crabtree*, 173
 — *v. Day*, 1338
 Cooper *v. Emery*, 1077, 1102, 1109
 — *v. France*, 202, 507
 — *v. Gostling*, 1044
 — *v. Greene*, 342
 — *v. Hubbuck*, 153, 158, 175
 — *v. Jarman*, 100, 275
 — *v. Kynock*, 218, 978
 — *v. Laroche*, 859
 — *v. Macdonald*, 214, 338, 340, 397,
 853, 865, 924, 926, 1014
 — *v. Martin*, 890, 912
 — *v. Phibbs*, 97, 1176
 — *v. Prichard*, 1005
 — *v. Reilly*, 751
 — *v. Thornton*, 1343
 — *v. Trewby*, 1147
 — *v. Waldegrave*, 75
 — *v. Wells*, 388
 — *v. Whittingham*, 127
 — *v. Woolfitt*, 256
 — *v. Wormald*, 614
 — *v. Wyatt*, 1242
 Cooper's Trusts, *Re*, 1351
 Co-operative, &c., Soc. and Kershaw, 1372
 Coote *v. Boyd*, 1337
 — *v. Coote*, 1416
 — *v. Judd*, 128
 — *v. Lowndes*, 1418
 — *v. O'Reilly*, 1252
 — *v. Whittington*, 250, 261
 Cope *v. Cope*, 673
 — *v. De la Warr, E.*, 1031
 — *v. Rowlands*, 86
 Copland *v. Toulmin*, 802, 820
 Copley *v. Copley*, 929, 932
 Coppard *v. Allen*, 1006
 Coppin *v. —*, 348
 — *v. Coppin*, 1292, 1341, 1347
 — *v. Fernyhough*, 1104, 1288
 — *v. Gray*, 396
 Corbet *v. Corbet*, 633
 — *v. Tottenham*, 316
 Corbet's Case, 217
 Corbett, *Ex parte*, 569
 — *v. Maidwell*, 643
 — *v. Plowden*, 746
 Corbett's Trusts, *Re*, 1222
 Corbishley's Trusts, *Re*, 1227
 Corbyn *v. French*, 55, 1292
 Cordal's Case, 979, 981
 Corder *v. Morgan*, 754, 1139
 Cordingley *v. Cheesbrough*, 1079
 Cordwell *v. Mackrill*, 616
 Cork *v. Baker*, 611
 — &c., *R. Co.*, *Re*, 453
 Corlass, *Re*, 1382
 Corley *v. Stafford, Ltd.*, 615, 675
 Cormack *v. Copous*, 1401, 1402
 Corneck *v. Wadman*, 1227
 Cornell *v. Hay, &c.*, 413
 Cornewall *v. Cornewall*, 37, 1327
 Cornfoot *v. Fowke*, 96, 1178
 Cornford *v. Elliott*, 51
 Cornforth *v. Smithard*, 606
 Cornish *v. Clarke*, 290, 291

- Cornish *v.* Cleife, 541
 Cornwallis', *Ld.*, Case, 189
 Cornwell *v.* Keith, 664
 Corpe *v.* Overton, 788
 Corrance *v.* Corrance, 676
 Correspondence, &c., *Co. v. Saunders*, 128, 130
 Corrie, *Re*, 1395
 Corsellis *v.* Patman, 762
 Corser *v.* Cartwright, 1162
 Cort *v.* Sagar, 704
 — *v.* Winder, 1228
 Cory *v.* Cory, 65
 — *v.* Gericken, 634, 1007
 Coryton *v.* Helyar, 1315
 Cosens *v.* Bognor R. Co., 1173
 Cosnahan *v.* Grice, 136, 137
 Cosser *v.* Collinge, 1152
 — *v.* Radford, 994
 Costabadie *v.* Costabadie, 966
 Costello's Case, 443
 Coster *v.* Coster, 385
 Cotching *v.* Bassett, 141, 159
 Cothay *v.* Sydenham, 1153
 Cottam *v.* E. C. R. Co., 991
 Cotter *v.* Layer, 894, 895, 906, 1097
 — *v.* M. R. Co., 1047
 Cotterell *v.* Stratton, 780
 Cottingham *v.* Fletcher, 968
 Cotton, *Ex parte*, 691, 717
 — *Re*, 652, 653
 — *v.* Clark, 987
 — *v.* King, 334
 Cotton's Trustees and Lon. School Board,
In re, 882
 Cottrell *v.* Cottrell, 953, 1165, 1278
 — *v.* Finney, 739
 — *v.* Watkins, 1109
 Couch *v.* Stratton, 669
 Coulson *v.* Allison, 312
 — *v.* Coulson, 220
 Counter *v.* Macpherson, 527, 1095
 County Life Ass. Co., 452
 Court *v.* Buckland, 116
 Courtauld *v.* Legh, 153
 Courtenay *v.* Williams, 262, 1315
 — *v.* Wright, 14, 721
 Courtier *v.* Oram, 1429
 Courtney *v.* Ferrers, 671
 — *v.* Taylor, 687
 Courtois *v.* Vincent, 317
 Cousins, *In re*, 768, *Add.*
 — *v.* Phillips, 565, 680
 — *v.* Schroder, 1195, 1220
 Coutts *v.* Ackworth, 183, 311
 Coventry *v.* Barclay, 803, 807
 — *v.* Coventry, 661, 1011, 1416
 — *v.* L. B. & S. C. R. Co., 1050
 — and Dixon's Case, 425, 495
 Coverdale *v.* Eastwood, 612
 — *v.* Lewis, 1269
 Cowan *v.* Milbourn, 88
 Coward and Adams' Purchase, *Re*, 406
 Cowbridge, *Re*, 738
 — R. Co., *Re*, 520
 Cowdry *v.* Day, 688, 732
 Cowgill *v.* Oxmantown, *Ld.*, 1138
 Cowles *v.* Gale, 1119
 Cowley *v.* Hartstonge, 111
 — *v.* Wellesley, 1248
 Cowling *v.* Higginson, 155, 156
 Cowman *v.* Harrison, 967
 Cowper *v.* Mantell, 902
 — *v.* Scott, 235, 1191
 Cowx *v.* Foster, 401, 863, 897
 Cox *v.* Barnard, 301
 — *v.* Bennett, 1290
 — *v.* Bishop, 693
 — *v.* Bockett, 1242
 — *v.* Chamberlain, 900, 903, 1139
 — *v.* Champneys, 689
 — *v.* Coventon, 1152
 — *v.* Davie, 54
 — *v.* Dolman, 588, 601, 602
 — *v.* Fonblanque, 1244
 — *v.* Hickman, 788, 791, 792, 793, 809
 — *v.* Land & Water Journal Co., 130
 — *v.* Middleton, 91
 — *v.* Parker, 186, 189, 986, 1207
 — *v.* Watson, 759
 — *v.* Willoughby, 791
 Cox's Case, 434
 — Trusts, *Re*, 28
 Coxe *v.* Bassett, 32
 — *v.* Day, 872, 892
 Coysegame, *Ex parte*, 378, 379
 Crabb *v.* Crabb, 962, 973, 974
 Crabtree *v.* Bramwell, 114
 — *v.* Poole, 1151
 Cracknall *v.* Janson, 295, 312
 Cradock *v.* Cradock, 503
 — *v.* Owen, 188, 281
 — *v.* Piper, 985, 1092
 Cragg *v.* Taylor, 433, 525
 Craggs *v.* Gray, 690
 Craig *v.* Phillips, 413
 Crallan *v.* Oulton, 995
 Cramer *v.* Bird, 464
 — *v.* Moore, 657, 661
 Cramp *v.* Playfoot, 55, 1297
 Crampton *v.* Varna R. Co., 78, 1059
 Cranley *v.* Hale, 282
 Craven *v.* Brady, 1242
 Crawford, *Ex parte*, 713
 — *v.* Salter, 719
 Crawford, *Re*, 1407
 — *v.* Cocks, 797
 — *v.* Hamilton, 813
 — *v.* Toogood, 1120
 Crawhall's Trusts, *Re*, 1226
 Crawley *v.* Crawley, 7
 Crawley's Case, 423
 Crawshaw *v.* Crawshaw, 1363
 Crawshay *v.* Collins, 818, 823, 824, 826
 — *v.* Maule, 790, 813, 819
 Creaton *v.* Creaton, 879
 Credit Co., *Re*, 446
 — *v.* Pott, 714
 Credland *v.* Potter, 774
 Cree *v.* Somervail, 430, 462
 Creed *v.* Creed, 21, 1333

- Creed *v.* Perry, 353
 Cregreen *v.* Willoughby, 1275
 Cremorne *v.* Antrobus, 1327
 Crenver Min. Co. *v.* Williams, 762
 Cresswell, *Re*, 1199
 — *v.* Cresswell, 55, 1265
 — *v.* Dewell, 998, 1007
 — *v.* Haines, 1141
 Creswick *v.* Gaskell, 1230
 Creuze *v.* Hunter, 321
 Crewe *v.* Dicken, 1138
 Creyke *v.* Dawes, 662
 Creyke's Case, 445, 474
 Crickett *v.* Dolby, 1346, 1349, 1350
 Crickmer's Case, 432
 Cripps *v.* Davis, 606
 — *v.* Jee, 687
 — *v.* Reade, 1179
 — *v.* Wolcott, 1222, 1223
 Crisp *v.* Platel, 703
 Crockett *v.* Crockett, 966
 Crockford *v.* Alexander, 1132
 Croft *v.* Croft, 1275
 — *v.* Lyndsey, 272
 Crofts *v.* Fenge, 690
 — *v.* Haldane, 160
 — *v.* Middleton, 218, 1181
 Croggan *v.* Allen, 280
 Croker *v.* Hertford, Marq. of, 1269
 — *v.* Martin, 297
 Crommelin Estate, *Re*, 869
 — *v.* Crommelin, 1237, 1238
 Crompe *v.* Barrow, 856, 917
 Crompton *v.* Jarratt, 194, *Add.*
 — *v.* Sale, 933
 Crone *v.* Odell, 1389
 Crook *v.* Hill, 1388
 — *v.* Seaford, 78
 — *v.* Whiteley, 1376
 Crooke *v.* De Vandes, 502
 — *v.* Watt, 284, 286
 Crookes *v.* Whitworth, 514
 Crookhaven Mining Co., 485, 489
 Croome *v.* Lediard, 80, 1139, 1140
 Cropton *v.* Davies, 1366, 1368
 Crosbie *v.* Guion, 813
 — *v.* McDowal, 71, 1269
 — *v.* Tooke, 529
 Croseley *v.* Clare, 1408
 Croskill *v.* Bower, 815
 Crosland, *Re*, 1230
 Cross, *Re*, 524, 586, 587, 728, 1007
 — *v.* Kennington, 33, 1411
 — *v.* Sprigg, 331
 — *v.* Wilks, 1319
 Crosse *v.* Lawrence, 1075, 1086
 Crosser *v.* Maxwell & Co., 715
 Crosskill *v.* Bower, 985
 Crossley *v.* City of Glasgow Life Assurance Co., 83, 721
 — *v.* Elworthy, 291, 294
 — *v.* Lightowler, 144, 146, 157, 170, 172
 — *v.* Maycock, 1055
 Crossman *v.* Bevan, 845
 W.—VOL. I,
- Crosthwaite *v.* Dixon, 507
 Crouch *v.* Waller, 404
 Croughton *v.* Blake, 1112
 Croughton's Trusts, *Re*, 398
 Crowder *v.* Clowes, 1337, 1338
 — *v.* Stone, 1207, 1222
 Crowe *v.* Ballard, 1136
 — *v.* Crisford, 121
 Crowe's Trusts, *In re*, 1021
 Crowther *v.* Crowther, 317, 584
 — *v.* Evans, 1223
 — *v.* Thorley, 415
 Croxon *v.* Lever, 760
 Croxton *v.* May, 384
 Crozier *v.* Crozier, 915, 917, 1197, 1206, 1212, 1394
 Cruikshank *v.* Duffin, 275
 Crumlin Viaduct Works, *Re*, 472
 Crump *v.* Lambert, 172
 — *v.* Norwood, 220
 Cruse *v.* Barley, 116, 117, 1218, 1221
 — *v.* Howell, 1293
 — *v.* Paine, 440
 — *v.* Nowell, 755, 1070
 Crusoe *v.* Bugby, 552
 Crutchley *v.* Jerningham, 1089, 1131
 Cruttwell *v.* Lye, 102, 817, 821
 Cruwys *v.* Colman, 1403, 1405
 Cubitt *v.* Smith, 100
 Cud *v.* Rutter, 1125
 Cuff *v.* Hall, 890
 Cull *v.* Showell, 179
 Cull's Trust, *In re*, 1018
 Culley *v.* Taylerson, 583
 Cullin, *Re*, 313, 656, 657
 Cullingworth *v.* Lloyd, 994
 Cullwick *v.* Swindell, 704
 Culsha *v.* Cheese, 1359
 Cumberford's Case, 868
 Cumming, *Re*, 784
 Cumming, *Re*, 378
 — *v.* Forrester, 190
 Cummins *v.* Cummins, 252
 — *v.* Fletcher, 740
 Cuninghame *v.* Anstruther, 892, 896, 919
 Cuninghame's Case, 433
 Cunliffe *v.* Brancker, 1025, 1219, 1423
 Cunningham, *Ex parte*, 1260
 — *v.* Antrobus, 350
 — *v.* Butler, 1309
 — *v.* Foot, 587
 — *v.* Moody, 338
 — *v.* Murray, 1383
 Cunyngham's Settlement, *Re*, 859
 Curlewis *v.* Mornington, 605
 Curling *v.* Austin, 879, 1066, 1095, 1134
 — *v.* Flight, 1133, 1134
 Curling's, Hespeler's, and Walshe's Cases, 425
 Curnick *v.* Tucker, 967
 Currant *v.* Jago, 973
 Currie *v.* Larkins, 1232
 — *v.* Nind, 296, 297, 905, 1138
 — *v.* Pye, 51, 58, 1336
 Currie's Case, 424

- Curriers' Co. *v.* Corbett, 144, 158, 160
 Cursham *v.* Newland, 1411
 Curson *v.* Belworthy, 1177
 Curteis *v.* Kenrick, 901
 — *v.* Wormald, 118
 Curtis, *Re*, 387, 655
 — *v.* Auber, 715
 — *v.* Buckingham, Ms., 1132
 — *v.* Curtis, 321, 374
 — *v.* Fulbrook, 879
 — *v.* Price, 211, 219, 222, 292, 978
 — *v.* Rippon, 315
 Curtis's Case, 441
 Curzon *v.* Curzon, 1028
 Cust *v.* Middleton, 1321
 Cutbush *v.* Cutbush, 274
 Cutler, *Re*, 383, 384
 Cutto *v.* Gilbert, 1279, 1285
- DACIE *v.* John, 810
 Da Costa *v.* Keir, 1209
 Dacre *v.* Patrickson, 187, 281, 286, 1416
 D'Adhemar *v.* Bertrand, 1012, 1014
 Dady *v.* Hartridge, 37
 Dafforne *v.* Bolt & Goodman, 220
 Dagenham Dock Co., *Re*, 72, 1132
 Dagley *v.* Tolferry, 1343
 Daglish, *Ex parte*, 715
 Dakin *v.* Cope, 275
 — *v.* Whimper, 296
 Dakins *v.* Berisford, 390
 Damer *v.* Portarlington, E., 703
 Dames and Wood, *In re*, 1084
 Dalby *v.* In. and Lon. Ass. Co., 722
 Dale *v.* Lister, 1128
 — & Co., *Ex parte*, 608
 Daley *v.* Desbouverie, 1238
 Dalgleish's Settlement, *Re*, 1012, 1021
 Dallow, *Re*, 1268
 D'Almaine *v.* Boosey, 131
 — *v.* Moseley, 969, 1138, 1320
 Dalrymple *v.* Hall, 658
 Dalton, *Re*, 635
 — *v.* Angus, 167
 Daly *v.* Beckett, 868, 869
 — *v.* French, 644
 Daly's Settlement, *Re*, 888
 Dancer *v.* Crabb, 1282
 Dance *v.* Goldingham, 900, 1036, 1073
 Dand *v.* Kingscote, 155
 Dane *v.* Kirkwall Ly., 696
 D'Angibau, *Re*, 844
 — Andrews *v.* Andrews, *In re*,
 657, 886
 Daniel *v.* Adams, 1034, 1035
 — *v.* Anderson, 142, 152
 — *v.* Arkwright, 859, 895
 — *v.* Dudley, 846, 1406
 — *v.* Gosset, 1227
 — *v.* Gracie, 544
 — *v.* Newton, 655
 — *v.* North, 148
 — *v.* Sinclair, 97, 733
 — *v.* Ubley, 1240
- Daniel *v.* Warren, 122
 — Doe d., *v.* Woodroffe, 209
 Daniel's Settlement Trusts, *Re*, 675
 Daniell, Goods of, 1268
 — *v.* Daniell, 1313
 Daniell's Case, 478
 Daniels *v.* Davidson, 1094
 — *v.* Davison, 1151, 1154
 Dann, *Ex parte*, 718
 Danvers *v.* Clarendon, E., 1374, 1375
 Darbey *v.* Whitaker, 102, 824, 1054, 1060
 Darbison *v.* Beaumont, 1372
 Darby *v.* Darby, 806
 — *v.* Smith, 719
 Darcy, *Re*, 315, 317
 D'Arcy *v.* Maddock, 632
 Dardier *v.* Chapman, 349
 Dare *v.* Tucker, 1077, 1167
 Darke *v.* Martyn, 290, 998
 — *v.* Williamson, 696
 Darley *v.* Darley, 388
 — *v.* Langworthy, 1280
 Darlington *v.* Hamilton, 1062, 1063, 1071,
 1073
 — *v.* Pulteney, 887
 Darnley, E., *v.* Lon. Ch. & Dov. R. C
 79, 80
 Darston *v.* Oxford, Ld., 262
 Dartmouth, E., *v.* Spittle, 590
 Darvall *v.* Terry, 290, 706
 Dashwood *v.* Bulkeley, Ld., 1238
 — *v.* Jermyn, 613
 — *v.* Peyton, 178, 1365
 Daubeney *v.* Cockburn, 292, 313, 848, 895,
 921
 D'Augilar *v.* Drinkwater, 1238
 Daun *v.* City of Lon. Brew. Co., 771
 Davall *v.* New River Co., 986
 Davenport *v.* Bishop, 621
 — *v.* Coltman, 117, 1320
 — *v.* Davenport, 624, 1247
 — *v.* Hinchcliffe, 670
 — *v.* Oldis, 1411
 Davers *v.* Dewes, 282
 Davey *v.* Durrant, 755
 — — Smith *v.* Durrant, 754
 — *v.* Ward, 651
 — *v.* Wietlisbach, 510
 David's Estate, *Re*, 1045
 — Trust, *Re*, 845, 846, 856, 899,
 1113
 Davidson, *Ex parte*, 129
 — *v.* Dallas, 1222, 1229, 1378,
 1380
 — *v.* Foley, 1197
 — *v.* Gardiner, 1034
 — *v.* Illidge, 33
 — *v.* Kimpton, 1222
 — *v.* Wood, 395
 Davie *v.* Drury, 537
 Davies, *Ex parte*, 1397
 — *Re*, 784, 1274
 — *v.* Ashford, 114
 — *v.* Bush, 1341, 1416
 — *v.* Cooper, 1050, 1131

- Davies *v.* Davies, 306, 617, 622, 633, 654, 667, 898
 — *v.* Fisher, 834, 836, 837, 1215
 — *v.* Fowler, 36, 1330, 1348
 — *v.* Games, 806
 — *v.* Goodhew, 111
 — *v.* Hodgson, 395, 817, 821, 992
 — *v.* Huguenin, 854, 861
 — *v.* Lowndes, 209, 1245
 — *v.* Marshall, 144, 158, 159
 — *v.* Morgan, 1331
 — *v.* Nicolson, 1347
 — *v.* Otty, 80, 962
 — *v.* Rees, 711, *Add.*
 — *v.* Sear, 143
 — *v.* Thorns, 899
 — *v.* Thornycroft, 343
 — *v.* Vernon, 703
 — to Jones and Evans, 879
 Davies' Trusts, *Re*, 910
 — Will, *Re*, 1383
 Davis, Goods of, 1274
 — *v.* Angel, 990, 1012, 1203, 1237, 1239
 — *v.* Barrett, 682, 744
 — *v.* Bennett, 1391
 — *v.* Burton, 713
 — *v.* Chanter, 250
 — *v.* Dysart, E., 1109
 — *v.* Goodman, 716
 — *v.* Harford, 873
 — *v.* Haycock, 440
 — *v.* Jenkins, 47
 — *v.* Kirk, 203
 — *v.* Leo, 1251
 — *v.* Marlborough, D. of, 729, 730
 — *v.* May, 750
 — *v.* Morier, 64
 — *v.* Norton, 1246
 — *v.* Shepherd, 528, 1164
 — *v.* Spurling, 268
 — *v.* Symonds, 1141
 — *v.* Thomas, 688
 — *v.* Tollemache, 1034, 1181
 — *v.* Treharne, 168
 — *v.* Turvey, 510
 — *v.* Uphill, 65, 920
 — *v.* Usher, 714
 Davison *v.* Gent, 565
 — *v.* Stanley, 565
 Davys *v.* Boucher, 927
 Daw *v.* Terrell, 692
 Dawes *v.* Betts, 1134, 1155
 — *v.* Creyke, 665
 — *v.* Scott, 1416
 — *v.* Tredwell, 661, 662
 Dawes' Case, 445, 488
 — Trusts, *Re*, 1224
 Dawkins *v.* Penrhyn, Ld., 216, 574, 587
 — *v.* Tatham, 1345
 Dawson *v.* Bank of Whitehaven, 369
 — *v.* Bourne, 389
 — *v.* Brinckman, 1075
 — *v.* Clarke, 281, 282, 969, 1005
 — *v.* Dawson, 926
 — *v.* Jay, 324
 Dawson *v.* Kearton, 38
 — *v.* Killet, 1196
 — *v.* Massey, 306
 — *v.* Massey-Oliver, 1202, 1203, 1238, 1380
 — *v.* Paver, 1152
 — *v.* Prince, 348
 — *v.* Small, 56, 1371, 1391—1399, 1430
 — *v.* Smith, 833
 — *v.* Thompson, 326
 — *v.* Thorne, 281
 — *v.* Whitehaven, Bank of, 736
 Day *v.* Day, 17, 325, 633, 756, 1317, 1334
 — *v.* Luhke, 1119
 — *v.* Merry, 1253
 — *v.* Newman, 1131
 — *v.* Radcliffe, 1230
 — *v.* Trig, 1309, 1361
 — *v.* Wells, 97
 Dayrell *v.* Hoare, 869
 Deacon *v.* Colquhoun, 971
 — *v.* Smith, 668
 Dean *v.* Allen, 258
 — *v.* Gibson, 1323, 1325
 — *v.* Handley, 1209
 — *v.* MacDowell, 803
 — *v.* Thwaite, 590
 Deane *v.* Test, 1229
 Dear, *Ex parte*, 806
 Dearle *v.* Hall, 723
 Dearman *v.* Wyche, 597
 Dearne *v.* Soutten, 336
 De Beauvoir *v.* De Beauvoir, 111, 1373
 Debenham *v.* Mellon, 68
 Debeze *v.* Mann, 927, 928
 De Bode's Case, 75
 De Brassac *v.* Martyn, 103
 De Caux *v.* Skipper, 741, *Add.*
 De Cordova *v.* De Cordova, 259, 270
 De Crespigny *v.* De Crespigny, 1334
 Deerhurst, Ld., *v.* D. of St. Albans, 839
 Deeth *v.* Hale, 113
 Deffis *v.* Goldschmidt, 1382
 De Garagnol *v.* Liardet, 1222
 De Geer *v.* Stone, 109
 De Gendro *v.* Kent, 1326
 De Grey *v.* Richardson, 201, 338, 339
 De Havilland *v.* De Saumarez, 501, 615, 623
 De Hoghton *v.* Money, 89, 292
 Deighton's Settled Estates, *Re*, 1224
 Delacherois *v.* Delacherois, 1321
 De Lancey, *Re*, 109, 111
 Delane *v.* Delane, 971
 Delapole *v.* Delapole, 1250
 De la Saussoye, Goods of, 1279, 1280
 De la Vega *v.* Vianna, 75
 Delfe *v.* Delamotte, 132
 Delhasse, *Ex parte*, Megevand, *In re*, 792
 Delmar's Case, 441
 Delmare *v.* Robello, 1303, 1304
 De Lusi's Trust, *Re*, 909
 Delves *v.* Delves, 1093
 De Maimbray *v.* Metcalf, 772

- De Manneville *v.* Crompton, 331, 332, 334
De Mattos *v.* Gibson, 729
De Medina *v.* Norman, 1122
Dempsey *v.* Lawson, 1279
Denby, *Re*, 1344
Dench *v.* Dench, 1284
Dendy *v.* Nicholl, 558
— *v.* Simpson, 1105
Denham, &c., Co., *Re*, 455, 767
Denning *v.* Ware, 38, 300, 301
De Nicholls *v.* Saunders, 746
Denn *v.* Bagshaw, 1221, 1423
Denne *v.* Light, 1066
Dennett *v.* Pass, 13
Dennis, *Re*, 222
Denny *v.* Hancock, 1064, 1068
Dent *v.* Allcroft, 54
— *v.* Auction Mart Co., 159, 160, 162
— *v.* Bennett, 306, 307
— *v.* Clayton, 370
— *v.* Dent, 224
— *v.* Lon. Tram. Co., 467
Dent's Case, 477, 478
— Forbes Case, 432
Denton *v.* Davies, 962
— *v.* Denton, 991, 1253
— *v.* Donner, 688
— *v.* Macneil, 429
— *v.* Mannors, 54
D'Epineuil, Count, *Re*, 715
De Pass's Case, 443
De Pradel, Goods of, 1263
Depree *v.* Bedborough, 1085
Derbshire *v.* Home, 251, 398
Derby Mun. Estates, *In re*, 1045
Dering *v.* Kynaston, 664
De Ribeyre *v.* Barclay, 799
De Rochefort *v.* Dawes, 742
De Roo *v.* Foster, 69
De Rosaz, *Re*, 250
De Ruvinge's Case, 424, 426, 495
Desbody *v.* Boyville, 1236
De Serre *v.* Clarke, 664, 858
Deshais, Goods of, De Vigny, Goods of, 1261
De Tastet *v.* Shaw, 264
De Themines *v.* Bonneval, 41, 46
Detmarr *v.* Met. Prov. Bank, 306
De Trafford *v.* Tempest, 1364
Devaynes *v.* Noble, 799, 820, 1326
— *v.* Robinson, 696, 1006
Deverell *v.* Ld. Bolton, 1140
Devine *v.* Holloway, 584
De Visme, *Re*, 972, 1082
— *v.* De Visme, 1082
— *v.* Mellish, 1408
Devonshire, D. of, *v.* Eglin, 141
Devoy *v.* Devoy, 974
Dewar *v.* Brooke, 1214
— *v.* Maitland, 185
De Weever *v.* Rochfort, 655
Dewell, Goods of, 1274
— *v.* Tuffnell, 1091
De Winton *v.* Brecon, Mayor of, 753
De Witte *v.* De Witte, 1390
D'Eyncourt *v.* Gregory, 256, 1029, 1090, 1245
D'Huart *v.* Harkness, 887
Diamond Fuel Co., *Re*, 469, 472
Dias *v.* De Livera, 503
Dicconson *v.* Talbot, 878, 1050
Dick *v.* Lacy, 1408
Dickens, *Ex parte*, 531
Dickenson *v.* Mort, 858
— *v.* Dodds, 1055
— *v.* Teasdale, 587, 599, 844, 879
Dicker *v.* Angerstein, 757
Dickin, *Ex parte*, 828
— *v.* Edwards, 21
— *v.* Hamer, 369, 1250
Dickins *v.* Marshal, 1369
Dickinson *v.* Burrell, Stourton *v.* Burrell, 89
— *v.* Dickinson, 614
— *v.* Dillwyn, 660, 665
— *v.* Gd. Junc. Can. Co., 164
— *v.* Stidolph, 1268
— *v.* Valpy, 794
Dicks *v.* Brooks, 135
— *v.* Lambert, 281, 1325
— *v.* Yates, 130
Dickson, *Re*, 652, 653
— *v.* Hook, 399
— *v.* Robinson, 371
— *v.* Swansea R. Co., 455, 722
Dickson's Case, 487
— Trusts, 1207, 1235, 1245, 1246
Digby *v.* Crabbs, 732, 744
— *v.* Legard, 117
Dighton *v.* Withers, 741, 762
Dilkes, Goods of, 1275
— *v.* Broadmead, 266, 1347
Dilley *v.* Matthews, 1313, 1386
Dillon *v.* Coppin, 300, 301
— *v.* Mountcashell, Ly, 320
— *v.* Parker, 176, 184, 185
Dimes *v.* Gr. Junc. Canal Co., 228
— *v.* Scott, 119
Dimmoch *v.* Atkinson, 381
Dimmock *v.* Hallett, 1061, 1062, 1064, 1070
Dimond *v.* Bostock, 1293
Dimsdale *v.* Dimsdale, 65, 310
Dingwell *v.* Askew, 906, 1338
Dinham *v.* Bradford, 802, 808, 821
Dinn *v.* Grant, 1174
Diplock *v.* Hammond, 694
Dipple *v.* Corles, 304
Direct Spanish Telegraph Co. *v.* Shepherd, 546
Disderi, *Re*, 424
Disney *v.* Cross, Eyre *v.* Parker, 1333
Di Sora *v.* Phillips, 76
Ditton, *Ex parte*, 569
Dix *v.* Burford, 268, 976, 992, 1343
— *v.* Reed, 1344
Dixie *v.* Wright, 107
Dixon, *Ex parte*, 830
— *Re*, 250

- Dixon *v.* Baty, 576
 — *v.* Dixon, 392, 1406
 — *v.* Gayfere, 576, 1172
 — *v.* Muckleston, 691, 765
 — *v.* Olmins, 389
 — *v.* Peacock, 224, 225
 Dixon's Case, 444
 Dobbyn *v.* Adams, 886
 Dobell *v.* Hutchinson, 1057, 1062, 1122
 Doble *v.* Manley, 761
 Dobson, *Re*, 1267
 — *v.* Bowness, 1318
 — *i.* Collis, 77
 — *v.* Land, 733, 749, 778, 779
 Docker *v.* Somes, 272, 985
 Docwra *v.* Faith, 1160
 Dod *v.* Dod, 617
 Dodd *v.* Holme, 167
 Dodds *v.* Hills, 1004
 Dodkin *v.* Brunt, 1012
 Dodson *v.* Sammell, 260, 279
 Doody *v.* Higgins, 1373, 1374
 Doe *v.* Allcock, 1316
 — *v.* Allen, 550, 558, 1301, 1304
 — *v.* Amey, 528, 534
 — *v.* Andrews, 1114
 — *v.* Angell, 573, 581
 — *v.* Applin, 1393
 — *v.* Ashburner, 527
 — *v.* Ashley, 1309
 — *v.* Baker, 559
 — *v.* Ball, 289
 — *v.* Bancks, 558
 — *v.* Bannister, 1372
 — *v.* Barber, 535
 — *v.* Barnard, 577
 — *v.* Barthrop, 980
 — *v.* Beauchlerk, *Ld.*, 1204
 — *v.* Beaufort, *D. of*, 535
 — *v.* Beckett, 566, 581, 583
 — *v.* Bell, 533
 — *v.* Benjamin, 527
 — *v.* Bennett, 1354
 — *v.* Bettison, 870, 872
 — *v.* Bevan, 552
 — *v.* Biggs, 979
 — *v.* Bingham, 578
 — *v.* Bird, 892
 — *v.* Birkhead, 1226, 1410
 — *v.* Blackburn, 202
 — *v.* Blakeway, 578
 — *v.* Bolton, 979
 — *v.* Bottreill, 296
 — *v.* Bousfield, 228
 — *v.* Bower, 1308
 — *v.* Brabant, 1207, 1294
 — *v.* Bramston, 576, 584
 — *v.* Brazier, 1366
 — *v.* Britain, 853
 — *v.* Brown, 1301
 — *v.* Burdett, 888
 — *v.* Burnsall, 1393
 — *v.* Burrough, 873
 — *v.* Burt, 542
 — *v.* Burville, 1411
 Doe *v.* Cafe, 980, 1026
 — *v.* Calvert, 867, 868
 — *v.* Carter, 535, 580
 — *v.* Catomore, 1112
 — *v.* Cavan, *Lr.*, 867
 — *v.* Chaffey, 1373
 — *v.* Chamberlaine, 1095
 — *v.* Chapman, 1320
 — *v.* Charlton, 1390
 — *v.* Clark, 232, 527
 — *v.* Clayton, 1369
 — *v.* Coleman, 1368
 — *v.* Collins, 543, 1305
 — *v.* Collis, 1392
 — *v.* Colyear, 1370
 — *d.* Comberbach *v.* Perryn, 1422
 — *v.* Cooke, 577
 — *v.* Coombes, 582
 — *i.* Cooper, 1393
 — *v.* Courtenay, 867
 — *v.* Cox, 534, 535
 — *v.* Cranstoun, *Ld.*, 1361
 — *v.* Creed, 870
 — *v.* Crisp, 1204
 — *v.* Cundall, 1368
 — *v.* Dacre, 1198
 — *v.* David, 559
 — *v.* Davidson, 1105
 — *v.* Davies, 1116, 1275
 — *v.* Day, 753, 867
 — *v.* Dewsbury, 1401
 — *v.* Dorvell, 618
 — *v.* Dring, 1319
 — *v.* Dyeball, 577
 — *v.* Earles, 1320
 — *v.* Edlin, 1294
 — *v.* Ellis, 1396
 — *v.* Elvey, 220, 1393
 — *v.* Evans, 189, 552, 1269
 — *v.* Ewart, 979, 1396, 1397
 — *v.* Eyre, 596, 597, 916, 1242, 1430
 — *v.* Fleming, 1404
 — *v.* Fonnereau, 219
 — *v.* Forwood, 565, 867
 — *v.* Fossick, 1360
 — *v.* Foster, 527
 — *v.* Fricker, 1368
 — *v.* Frost, 1375, 1404
 — *v.* Fyldes, 1300
 — *v.* Gallin, 1390, 1402
 — *v.* Galloway, 1164
 — *v.* Garrod, 1390
 — *d.* Gibbons *v.* Pott, 704
 — *v.* Giles, 753
 — *v.* Gladwin, 547, 553
 — *v.* Glover, 1240
 — *v.* Goff, 220, 221
 — *v.* Goldsmith, 220
 — *v.* Goodier, 735
 — *v.* Gower, 581
 — *v.* Grazebrook, 869
 — *v.* Greening, 1305
 — *v.* Groves, 577
 — *v.* Guest, 551
 — *v.* Gwinnell, 374

- Doe v. Halcombe, 869
 — v. Halley, 1402
 — v. Hampson, 1105
 — v. Hardy, 1301
 — v. Harris, 56, 975, 976, 1281
 — v. Harvey, 220, 867, 870
 — c. Haslewood, 1206
 — v. Heneage, 1209
 — v. Hicks, 980, 1279
 — v. Hiscocks, 1302, 1303, 1304, 1306
 — v. Hole, 870, 871
 — c. Holmes, 1367
 — v. Holtom, 1301, 1305
 — v. Homfray, 978
 — v. Horrocks, 583
 — v. Howell, 1429
 — v. Hulse, 582
 — v. Huntington, 199
 — v. Hurrell, 1319, 1320
 — v. Huthwaite, 1312
 — v. Ingleby, 559
 — v. Ironmonger, 980
 — v. Jackson, 1095
 — v. Jenkins, 538
 — v. Jersey, E., 1305
 — v. Jessep, 1317
 — v. Johnson, 1397
 — v. Joinville, 1298
 — v. Jones, 47, 240, 558
 — v. Kennard, 566
 — v. Knowls, 1384
 — v. Laming, 220, 221
 — v. Langdon, 240
 — v. Langton, 1306
 — c. Lawley, 583
 — c. Leeds, &c., Co., 1095
 — v. Lewis, 334, 845
 — v. Lightfoot, 597
 — v. Liversedge, 579
 — v. Lock, 543, 868, 870, 871, 872
 — v. Lucan, 1321
 — v. Lucraft, 1401
 — v. Ludlam, 1360
 — v. Luxton, 222
 — v. Lyde, 1397
 — v. Lyford, 1308, 1309
 — v. Manning, 296
 — v. Martin, 200, 369, 907, 908, 1189,
 1305, 1308
 — v. Martyr, 296
 — v. Massey, 566, 597
 — v. Matthews, 871
 — c. Meyler, 871
 — v. Milborne, 887
 — v. Mills, 1265
 — v. Milward, 565
 — v. Morgan, 1427, 1428
 — v. Moore, 580, 1205, 1217
 — d. Morecraft v. Meux, 558
 — v. Morse, 535, 871
 — v. Mouldsdale, 240, 578
 — v. Mulgrave, Ld., 1400
 — d. Muston v. Gladwin, 82
 — v. Needs, 1302
 — v. Nepean, 576, 1114
- Doe v. Nicholls, 980
 — v. N. Staff. R. Co., 1047
 — v. Nowell, 835, 1218, 1219
 — v. Oxenden, 1302, 1305
 — v. Oxenham, 578, 581
 — v. Page, 580
 — v. Palmer, 1284
 — v. Parkin, 1307
 — v. Parratt, 502
 — v. Passingham, 1025
 — v. Peach, 889
 — v. Pearsey, 1105
 — v. Pearson, 1240
 — v. Permewen, 1370
 — d. Winter v. Perratt, 1372
 — v. Perratt, 1372
 — v. Perryn, 1400
 — v. Phillips, 991
 — v. Poole, 565, 867
 — c. Pott, 693
 — v. Powell, 527
 — c. Pratt, 1319
 — v. Price, 240, 532
 — v. Prosser, 582
 — v. Radcliffe, 870
 — v. Redfern, 187, 190
 — c. Reid, 551
 — v. Rendle, 868, 871
 — v. Ries, 527
 — v. Roach, 1429
 — v. Roberts, 538, 1309
 — v. Rock, 530, 589
 — v. Rogers, 870
 — v. Ross, 1111
 — v. Rout, 1319
 — v. Routledge, 296
 — v. Rucastle, 219, 1393, 1397
 — v. Rusham, 297
 — v. Rutland, 872
 — v. Sandham, 872
 — v. Saunder, 1104
 — v. Scarborough, E. of, 1028
 — v. Scudamore, 1423
 — v. Shippard, 1221, 1246
 — v. Shotter, 897
 — c. Simpson, 232, 980, 981, 1390
 — v. Sloggett, 1299
 — v. Smaridge, 534
 — v. Smith, 555, 872
 — v. Spencer, 876
 — v. Spratt, 1375
 — v. Stanion, 1070, 1094, 1103
 — v. Stenlake, 1315
 — v. Stephens, 870, 871, 872
 — v. Stone, 1181
 — v. Strickland, 1284
 — v. Sturges, 1343
 — v. Summerset, 536
 — v. Taniere, 873
 — c. Taylerson, 576
 — v. Taylor, 1315, 1401
 — v. Turner, 535
 — c. Thomas, 535, 1315
 — v. Thompson, 530
 — v. Tidbury, 566

- Doe *v.* Tofield, 1320
 — *v.* Turner, 1315
 — *v.* Vardill, 202, 1388
 — *v.* Walbank, 980
 — *v.* Walker, 1287, 1318
 — *v.* Waterton, 51
 — *v.* Watts, 535, 873
 — *v.* Webb, 1411
 — *v.* Webber, 296, 1429
 — *v.* Weller, 874
 — *v.* Westlake, 1304
 — *v.* Wetton, 1397
 — *v.* Whichelo, 213
 — *v.* White, 1320, 1369, 1383
 — *v.* Wilkinson, 1221
 — *v.* Willan, 980
 — *v.* Willetts, 1321
 — *v.* Williams, 596
 — *v.* Wilson, 537, 870, 871, 872
 — *v.* Withers, 872
 — *v.* Wolley, 1112, 1114
 — *v.* Wood, 534
 — *v.* Woodbridge, 550
 — *v.* Woodroffe, 585
 — *v.* Yates, 1030, 1245
 D'Oechsner *v.* Scott, 397
 Doglioni *v.* Crispin, 282, 1258
 Doherty *v.* Allman, 1255
 Dolan *v.* Macdermot, 45
 Dollen *v.* Batt, 545
 Dollond *v.* Johnson, 38, 262
 Dolman *v.* Nokes, 1050
 Doloret *v.* Rothschild, 1119, 1126
 Dolphin *v.* Aylward, 39, 296, 297
 Dolton *v.* Hewen, 1367
 Doman's Case, 464
 Dominion of Canada Plumbago Co., *Re*, 486
 Donmirett *v.* Bedford, 1242
 Donville *v.* Baker, 1339
 — *v.* Taylor, 1323
 — *v.* Winnington, 862
 Don, *Re*, 202, 203
 — *v.* Lippman, 74
 Don's Estate, *Re*, 1368, 1388
 Donaldson *v.* Donaldson, 26, 302, 303
 Doncaster *v.* Doncaster, 244, 882
 — &c., *Soc.*, *Re*, 701
 Donce, Goods of, 1273
 Donellan *v.* Read, 77, 565
 Donisthorpe *v.* Porter, 682
 Donna Murgina, *Re*, 252
 Donne *v.* Hart, 345
 Donnell *v.* Bennett, 102
 Donovan *v.* Reedham, 1350
 Doran *v.* Wiltshire, 1163, 1254
 Dorin *v.* Dorin, 1386
 — *v.* Harvey, 1133
 Dorling *v.* Claydon, 1116
 Dorman, *Ex parte*, 826
 Dormay *v.* Borradaile, 33, 671
 Dormer *v.* Fortescue, 317
 — *v.* Thurland, 887
 Dorsett *v.* Dorsett, 1243
 Dost Aly Khan, Goods of, 1260
 Doswell *v.* Reece, 517, 519
 Douce *v.* Torrington, *Ld.*, 32, 930
 Dougan's Case, 423, 463
 Doughty *v.* Bowman, 554, 555, 556, 563
 — *v.* Bull, 111
 Douglas *v.* Andrews, 1226
 — *v.* Archbutt, 986
 — *Ld. v.* Chalmer, 1212
 — *v.* Congreve, 119, 218, 219, 221, 242, 661
 — *v.* Cooper, 887
 — *v.* Culverwell, 687, 688
 — *v.* Douglas, 1332
 — *v.* Dysart, 230
 — *v.* Russell, 715
 — *v.* Willes, 936
 Douglass *v.* N. W. R. Co., 1046, 1129
 Dove *v.* Everad, 252
 Dover *v.* Buck, 1040
 Dowell *v.* Dew, 83, 529
 Dowle *v.* Saunders, 765
 Dowley *v.* Winfield, 1114
 Dowling *v.* Belton, 682
 — *v.* Dowling, 1398
 — *v.* Hudson, 33
 — *v.* Maguire, 1038
 — *v.* Stewart, 715
 — *v.* Tyrell, 1350
 Dowling's Trusts, 1211
 Down *v.* Down, 1307
 — *v.* Worrall, 46
 Downe, *Visc.*, *v.* Morris, 187, 188, 737
 Downes *v.* Grazebrook, 756, 757
 — *v.* Jennings, 334
 — *v.* Ship, 427
 — *v.* Timperon, 885
 Downshire, *Marq. of. v.* Sandys, *Ly.*, 1253
 Dowse *v.* Percival, 255
 Dowse's Case, 464
 Dowset *v.* Sweet, 1313
 Dowsett *v.* Finch, 1311
 Dowson *v.* Bell, 371
 — *v.* Gaskoin, 1325
 — *v.* Solomon, 1095
 Dowtie's Case, 188
 Doyle *v.* Blake, 252, 991
 Drain *v.* White, 168
 Drake *v.* Drake, 1304, 1311, 1313
 — *v.* Trefusis, 982, 1045
 — *v.* Whitmore, 881, 1090
 Drakeford *v.* Drakeford, 1223, 1224, 1293
 Drant *v.* Vause, 107, 1097
 Drayson *v.* Pocock, 1138
 Drevon *v.* Drevon, 1260
 Drew *v.* Bayly, 537
 — *v.* Lockett, 774
 — *v.* Martin, 972, 973
 — *v.* Nunn, 68
 Drewe *v.* Bidgood, 935
 — *v.* Corp, 1062
 — *v.* Hansom, 1066
 Drewett *v.* Pollard, 8
 Drewry *v.* Thacker, 279
 Drinkwater *v.* Combe, 683
 — *v.* Falconer, 1332

- Drinkwater v. Ratcliffe, 510, 511
 Driver v. Frank, 1385
 Driver's Settlement, *In re*, 1012
 Droitwich, &c., Co. v. Curzon, 417
 Dronfield Silkstone Coal Co., *It*, 444, 486
 Drosier v. Brereton, 999
 Druce v. Denison, 343, 344, 375, 626
 Druitt v. Seaward, 659
 Drummond, Goods of, 1269, 1270
 — *Re*, 253
 — v. Drummond, 74
 — v. Lant, 580
 — v. Leigh, 1387
 — v. Tracy, 519, 961, 1102
 Drummond's Case, 477
 Drury v. Man, 1159
 — v. Molins, 556
 — v. Smith, 138
 Drybutter v. Bartholomew, 197, 369
 Dryden v. Frost, 749, 1153, 1173
 Drysdale v. Mace, 1076
 — v. Piggott, 14, 721
 Duane, Goods of, 1302
 Dubber v. Trollope, 200, 208, 1370
 Duberley v. Day, 345, 354
 Dublin, Corp. of, v. Judge, 583
 Duck v. Bates, 127
 Duckworth, *Re*, 483
 Duddell v. Simpson, 1062, 1083, 1084
 Dudden v. Clutton Union, 165
 Dudley v. Folliott, 1180
 Dudson's Contract, *Re*, 212
 Dufaur v. Professional Life Ass. Office,
 721, 723
 Duff v. Dalzell, 887
 — v. E. I. Co., 798
 Duffield v. Duffield, 1201, 1216, 1219
 — v. Elwes or Hicks, 137
 Duffy, *Re*, 379
 Dugdale v. Dugdale, 37
 — v. Meadows, 1148
 — v. Robertson, 147, 168
 Duggan v. Kelly, 1239
 Du Hourmelin v. Sheldon, 108
 Duke v. Andrews, 422
 — v. Barnett, 1072
 — v. Doidge, 861
 Duke's Case, 424
 Duke of Newcastle's Estates, *In re*, 945,
 948, 949, 955
 Dumas, *Ex parte*, 982
 Dumble, *Re*, Williams v. Murrell, 1359
 Dummer v. Pitcher, 181, 972, 974
 Dummer's Will, *Re*, 1045
 Dumper v. Dumper, 974
 Dumper's Case, 558
 Duncan v. Campbell, 392, 627
 — v. Duncan, 1331
 — v. Louch, 147
 — v. Topham, 421
 — v. Watts, 1341
 Duncomb v. Duncomb, 369, 370, 1425
 Duncombe v. Greenacre, 377, 378, 383
 Duncuft v. Albrecht, 1053
 Dundas, Goods of, 1268
 Dundas v. Blake, 587
 — v. Dutens, 614
 — v. Murray, 1192
 Dundee Harbour (Trustees) v. Dougall,
 574
 Dundee, Mayor of, v. Morris, 56
 Dundonald, E. of, v. Masterman, 799
 Dungannon, Ld., v. Smith, 245, 833, 840
 Dunk v. Fenner, 218, 1393
 Dunkley v. Dunkley, 383
 Dunlop, *Re*, 741
 — v. Higgins, 421, 1055
 Dunn v. Bownas, 54
 — v. Flood, 832, 1036, 1073, 1076
 — v. Green, 680
 — v. Snowden, 1227
 Dunnage v. White, 63, 969
 Dunne v. Doran, 261, 589
 — v. Dunne, 1246
 — v. English, 1039
 Duustan v. Patterson, 778
 Dunster v. Glengall, E., 524
 Duplessis v. Att.-Gen., 1265
 Durance, Goods of, 1279
 Durand's Trusts, *Re*, 725
 Durant v. Prestwood, 287
 Durlant v. Burchett, 1371
 Durell v. Pritchard, 103, 159, 161
 Durham v. Crackles, 377
 — E., v. Legard, 926, 1067, 1099
 Durham's Case, 436
 Durnford v. Lane, 632
 Durour v. Motteux, 116
 Durrant v. Friend, 1339
 — & Stoner, *Re*, 339
 Dutton, *Re*, 56
 — v. Thompson, 308
 Du Vigier v. Lee, 601
 Dwyer v. Collins, 1157
 Dyas v. Cruise, 870, 894
 Dye v. Dye, 339
 Dyer v. Dyer, 108, 969, 972, 973
 — v. Hargrave, 1065, 1081
 Dyers' Co. v. King, 161
 Dyke v. Rendall, 637, 1172
 Dykes v. Blake, 1065, 1067, 1089
 — Estates, *Re*, 894, 895
 Dyne v. Nutley, 542, 1163
 Dynevor, &c., Co., *It*, 492
 Dyose v. Dyose, 1340
 Dyot v. Morgan, 537
 Dyson v. Hornby, 1081
 — v. Morris, 759, 762
 EADS v. Williams, 1119, 1131
 Eager v. Barnes, 799
 — v. Furnivall, 338
 Eagle v. Charing Cross R. Co., 161
 — Ins. Co., 452
 Eagles v. Le Breton, 1408
 Eaglesfield v. Londonderry, M., 97
 Eales v. Cardigan, E., 18
 — v. Drake, 640, 912
 Eames v. Godwin, 506
 — v. Hacon, 282, 1258

- Eardley v. Granville, 228
 — v. Owen, 670
 Earl's Trusts, *Re*, 1099, 1286
 Earle v. Barker, 891
 — v. Bellingham, 20, 598, 1349
 — v. Hopwood, 90
 — v. Wilson, 1388
 Earle and Webster's Contract, *In re*, 957
 Earlom v. Saunders, 111
 Early v. Benbow, 1335, 1338, 1382
 — v. Middleton, 1382
 East, *Re*, 1009
 — v. Ryal, 987
 — v. Twyford, 623, 1390
 Eastbrook v. Scott, 331
 Easterby v. Sampson, 554
 East Glouc. R. Co. v. Bartholomew, 416, 426
 East Rotallack Co., *Re*, 470
 E. C. R. Co. v. Hawkes, 412
 — v. Tufnell, 1046
 E. I. Comp. v. Atkyns, 637
 — v. Paul, 605
 Easton v. Pratt, 872
 Easum v. Appleford, 908, 1352
 East & West India Dock Co. v. Hill, 569
 Eastwood v. Avison, 1400
 — v. Clarke, 1011
 — v. Kenyon, 71
 — v. Vinke, 933
 Eaton v. Barker, 625, 1205
 — v. Bennett, 674
 — v. Hewitt, 1198
 — v. Sanxter, 1161
 — v. Swansea W. Co., 153
 — v. Watts, 964
 Eaves v. Hickson, 270, 991
 Eavestaff v. Austin, 1197
 Ebbett's Case, 420
 Ebbw Vale Steel, Iron, and Coal Co., *Re*,
 417
 Ebrand v. Dancer, 973
 Eccard v. Brooke, 1317
 Eccles v. Birkett, 1192
 — v. Cheyne, 910
 Eccleshill Local Board, *In re*, 1047
 Ecclesiastical Commissioners v. Kino, 158,
 Add.
 — v. Merral, 78
 — v. N. E. R. Co., 590, 606
 — v. Rowe, 592
 Echliff v. Baldwin, 1132
 Eckersley v. Platt, 1282
 Eclipse Gold Co., *Re*, 478
 Eddel's Trusts, *Re*, 1220, 1426
 Eddels v. Johnson, 37
 Eddleston v. Collins, 230, 365, 702, 762
 Eddlestone v. Barnes, 172
 Eddowes, *Re*, 923, 1190
 — v. Eddowes, 987, 1380, 1382
 Ede v. Knowles, 292, 296, 690, 691
 Edes v. Edes, 381, 386
 Edgar v. Reynolds, 283
 Edge v. Addison, 665
 — v. Stafford, 527
 Edgell v. Day, 1123
 Edgeworth v. Edgeworth, 639, 863
 Edgington v. Fitzmaurice, 413
 Edgington's Trust, *Re*, 636
 Edie v. Babington, 847
 Edmonds, *Ex parte*, 275
 — v. Goater, 606
 — v. Peake, 271, 1088
 — v. Robinson, 805
 — v. Townsend, 382
 Edmondson's Estate, *Re*, 838, 1191
 Edmunds v. Downes, 606
 — v. Edmunds, 841
 — v. Fessey, 1387
 — v. Low, 934, 935
 — v. Porey, 772
 — v. Waugh, 602, 1303
 Edwards, *Re*, 660, 688
 — *Re*, Lon. B. & S. C. Ry. Act, *Re*,
 665
 — v. Alliston, 618, 1410
 — v. Barnes, 1318
 — v. Champion, 223, 504
 — v. Dewar, 399
 — v. Edwards, 1209, 1210, 1211
 — v. Fashion, 1051
 — v. Fidel, 969
 — v. Freeman, 284, 628
 — v. G. Junc. R. Co., 412
 — v. Hall, 54, 58, 1329
 — v. Hammond, 1205, 1216
 — v. Harben, 249, 289, 290
 — v. Harvey, 1036
 — v. Jones, 136, 302, 388, 502, 608
 — v. Lewis, 239
 — v. M'Leay, 1135
 — v. Martin, 725, 740
 — v. Martyn, 395
 — v. Meyrick, 1040
 — v. Millbank, 869
 — v. Morgan, 185
 — v. Pike, 56
 — v. Saloway, 1291
 — v. Tuck, 8, 9, 115, 116
 — v. Wardea, 608
 — v. Warwick, Ctss., 23, 110
 — v. West, 1095, 1098
 — v. Wickwar, 1074
 Edwards-Wood v. Majoribanks, 1104,
 1128
 Edwick v. Hawkes, 551
 Egbert v. Butler, 263, 1006
 Egerton v. Brownlow, E., 623, 1201, 1202
 — v. Jones, 1134
 Egg v. Devey, 1201
 Eglin v. Sanderson, 987
 Egmont, E., v. Smith, 1159
 Eilbeck v. Wood, 906
 Eisdell v. Hammersley, 854
 Eland v. Baker, 919
 — v. Eland, 276, 697, 1162
 Elborne v. Goode, 5, 1362
 Elderton, *Re*, 322
 Eley v. Positive, &c., Co., 412
 Elgar, *Re*, 1018
 Elias v. Snowdon Slate Co., 704, 1261

- Elibank *v.* Montolieu, 379
 Elkington's Case, 422
 Ellard *v.* Ld. Llandaff, 1050
 Ellecock *v.* Mapp, 187, 281
 Ellicombe *v.* Gompertz, 1300, 1401
 Elliott *v.* Dearsley, 38
 — *v.* Edwards, 1122
 — *v.* Ince, 1034, 1038
 — *v.* Smith, 1210
 Elliott, Goods of, 1263
 — *v.* Brown, 823
 — *v.* Collier, 284
 — *v.* Cordell, 355, 356, 379
 — *v.* Davenport, 1291, 1292, 1330
 — *v.* Dearsley, 1414, 1420
 — *v.* Elliott, 897, 899, 1380
 — *v.* Fisher, 106, 113
 — *v.* Ince, 696
 — *v.* Johnson, 552
 — *v.* Lambert, 324
 — *v.* N.-E. Ry. Co., 168, 170
 — *v.* Turquand, 483
 Ellis, *Ex parte*, 718
 — *Re*, 1020
 — *v.* Atkinson, 354
 — *v.* Bartrum, 1280
 — *v.* Colman, 456
 — *v.* Eden, 121, 1289, 1332
 — *v.* Houstoun, 1386
 — *v.* Lewis, 371
 — *v.* Maxwell, 5, 7
 — *v.* Nimmo, 71
 — *v.* Rogers, 1003, 1129
 — *v.* Selby, 45, 1395
 — *v.* Smith, 1273
 — *v.* Walker, 1331, 1333
 Ellis's Trust, *Re*, 398
 Ellison *v.* Airey, 1379
 — *v.* Ellison, 300, 311
 — *v.* Elwin, 350, 351
 — *v.* Thomas, 861
 — *v.* Wright, 779
 Ellston *v.* Deacon, 796
 Elms *v.* Elms, 1281
 Elmsley *v.* Young, 1404
 Else *v.* Barnard, 1057, 1091
 — *v.* Else, 1090
 Elsey *v.* Lutyens, 776
 Elton *v.* Eason, 1371
 — *v.* Elton, 509, 878, 1109, 1236
 — *v.* Sheppard, 845
 Elves *v.* Crofts, 88
 Elvy *v.* Norwood, 601, 771
 Elwell *v.* Crowther, 163
 Elwes *v.* Causton, 1334
 — *v.* Elwes, 312
 — *v.* Maw, 255
 Elwin *v.* Elwin, 1193, 1225, 1230
 — *v.* Williams, 351
 Elworthy *v.* Bird, 66
 — *v.* Wickstead, 384
 Ely, Dean of, *v.* Bliss, 573
 — *v.* Cash, 573
 Emanuel *v.* Constable, 1262, 1265
 Embrey *v.* Owen, 163
 Emery *v.* England, 861, 1384
 — *v.* Wase, 1034
 Emery's Estate, Jones *v.* Emery, 1314, 1382
 Emes *v.* Hancock, 1196
 Emley *v.* Davidson, 52
 Emma Silver Co. *v.* Grant, 413
 — *Min. Co. v.* Lewis, 411
 Emmerson *v.* Heelis, 1057
 Emmerson's Case, 442, 490
 Emmet *v.* Clarke, 1009
 — *v.* Emmet, 273, 1380
 — *v.* Tottenham, 688
 Emmett *v.* Emmet, 990
 Emmins *v.* Bradford, 658
 Emperor *v.* Rolfe, 1230, 1232
 Empress Engineering Co., *Re*, 70, 412
 Emuss *v.* Smith, 40, 107, 1097, 1290, 1361
 Engell *v.* Fitch, 1124
 England, *Re*, 654
 — *v.* Curling, 794
 — *v.* Downs, 331, 334
 — *v.* Lavers, 183, 893, 910
 — *v.* Tredegar, *Ld.*, 279
 — Ecclesiastical Commissioners for, *v.* Kino, 158
 Englefield Coll. Co., *Re*, 426, 494
 English, Goods of, 1282
 — Channel Steam Co. *v.* Rolt, 450
 — & Irish, &c., Society, 792
 Ennor *v.* Barwell, 164
 Eno *v.* Eno, 1137
 — *v.* Tatham, 1418, 1419
 Enohin *v.* Wylie, 282, 1258, 1325
 Entwistle *v.* Davis, 53
 Era Ins. Co., 457, 463
 Erlanger *v.* New Sombrero, &c., Co., 1131
 Ernest *v.* Croysdill, 588, 608, 1004, 1005
 — *v.* Nicholls, 452, 463
 — *v.* Vivian, 1186
 Errat *v.* Barlow, 1350
 Errington *v.* Chapman, 1350
 Erskine's Trusts, *Re*, 382
 Erving *v.* Peters, 265
 Esdaile *v.* Oxenham, 1159
 — *v.* Stephenson, 1066, 1081, 1101, 1129
 Esparto Trading Co., *Re*, 425, 444
 Esprey *v.* Lake, 1177
 Espin *v.* Pemberton, 725, 765, 1156
 Esron *v.* Nicholas, 1034
 Essell *v.* Hayward, 814
 Essery *v.* Cowlard, 601
 Essex *v.* Atkins, 387, 845
 — *v.* Baugh, 776
 — *v.* Clements, 1225
 — *v.* Daniell, 1170
 — *v.* Essex, 790, 791
 Estate Co., *Re*, 417
 Estwick *v.* Caillaud, 993
 Etches *v.* Etches, 1198
 Ety *v.* Bridges, 728
 European Life Assur. Soc., *Re*, 464, 471

- European Ry. Co., *Re*, 733
 — Co. v. R. Mail Co., 729
 Eustace, Goods of, 1279
 — v. Dub. Trunk Ry. Co., 426, 478
 — v. Keightley, 638
 Evans, *Ex parte*, 520, 666
 — *Re*, 278, 319
 — v. Angell, 1305
 — v. Bicknell, 331, 765, 991, 1153
 — v. Brown, 188, 267
 — v. Carrington, 392, 403, 627, 659, 676
 — v. Collins, 96
 — v. Coventry, 436, 810, 993, 1320
 — v. Crosbie, 1320
 — v. Dallow, 1281
 — v. Davis, 545, 549, 550, 1387
 — v. Edmonds, 96, 403
 — v. Elliot, 748, 754
 — v. Evans, 901, 919, 1123, 1126
 — v. Jackson, 93, 276, 881
 — v. John, 976
 — v. Jones, 211, 290, 1176, 1363
 — v. Massey, 1388
 — v. Rosser, 1233, 1234
 — v. Salt, 1373
 — v. Saunders, 883, 884
 — v. Scott, 1196
 — v. Vaughan, 1180
 — v. Walker, 16, 838
 — v. Williams, 520
 — v. Williamson, 1328
 — v. Wood, 438, 440
 — v. Wyatt, 332, 1416, 1420
 Evans' Case, 424, 476
 — Settlement, *In re*, 1045
 Eve, *Ex parte*, 424
 Evelyn v. Evelyn, 287, 615, 1417
 — v. Lewis, 753
 — v. Templar, 300
 Even's Claim, 464
 Everett v. Everett, 1290
 Evers v. Challis, 840, 1429
 Ewart v. Chubb, 406
 — v. Cochrane, 145, 146
 — v. Ewart, 660
 — v. Graham, 193
 Ewens v. Addison, 1202, 1203, 1238
 Ewer v. Corbet, 266, 275, 1161, 1342
 Ewing v. Ewing, 802
 — v. Orr-Ewing, 282, 1258
 — v. Osbaldiston, 1174
 Exeter, Bp. of, v. Ward, Ld. and Ly., 385
 Exhall Coal Mining Co., *Re*, 480
 Exmouth, Viscount, *Re*, 246
 — Docks Co., *Re*, 499
 Exton v. Scott, 1112
 Eykyn's Trusts, *In re*, 972
 Eynon, Goods of, 1274
 Eyre, *Ex parte*, 800
 — v. Burmester, 688
 — v. Green, 638
 — v. Hughes, 689
 — v. M'Dowell, 519, 690
 — v. Marsden, 7, 8, 9, 90, 116, 1226
 Eyre v. Shaftesbury, Ly., 315
 Eyre's Case, 444
 Eyston, *Ex parte* Throckmorton, *Re*, 1242
 Eyton v. Denbigh, &c., Ry. Co., 12
 FAIN v. Ayers, 1109
 Faine v. Brown, 95
 Fairbrother v. Wodehouse, 771
 Fairclough v. Marshall, 746
 Fairer v. Park, 934, 1332
 Fairley v. Tuck, 373
 Fairlie v. Boosey, 131
 Fairthorne v. Weston, 808
 Faithfull v. Ewen, 768
 Falcke v. Gray, 1126
 Falkner v. Butler, 908
 — v. Eq. Rev. Soc., 755, 1082
 — v. Grace, 1420
 — v. Som. & Dorset Ry. Co., 1047
 Family Endowment Co., *Re*, 463, 820
 Fane v. Fane, 65, 255, 1090, 1263
 Fanning, *Re*, 1001
 Farebrother v. Gibson, 1062
 — v. Simmons, 1057
 Farhall v. Farhall, 276
 Farley v. Bonham, 373
 Farmer v. Bradford, 903
 — v. Dean, 1041
 — v. Francis, 1189
 — v. Mills, 21
 — v. Smith, 739
 Farncombe's Trusts, *In re*, 859, 914, 915
 Farnham v. Farnham, 927
 Farington v. Parker, 389
 Farquhar v. Hadden, 825
 Farquharson v. Cave, 138
 — v. Floyer, 37
 Farrall v. Davenport, 1058
 Farran v. Beresford, 598
 Farrant v. Blanchford, 1007
 — v. Nichols, 1394
 Farrar v. Barraclough, 999
 — v. Ld. Winterton, 106, 1097, 1141
 Farrer v. Barker, 1232
 — v. Cambridge St. Cath. Coll., 1283
 — v. Lacey, 1088
 Farrington v. Knightly, 249, 281
 Farrow v. Rees, 1152
 Faulding's Trusts, *Re*, 1355
 Faulds v. Jackson, 1274
 Faulkner v. Bolton, 739
 — v. Daniel, 250, 598, 738
 Faversham, Ld., v. Watson, 621
 — Mayor of, v. Ryder, 54
 Fawcett v. Laurie, 467
 — v. Lowther, 741
 — v. Whitehouse, 411
 Fawcus, *Re*, Buck, *Ex parte*, 719
 Fawkes v. Gray, 1346
 Fazakerley v. Culshaw, 998
 — v. Ford, 1028
 Fear v. Castle, 336
 Fearn v. Young, 749
 Fearnside v. Flint 596

- Fearnside and Dean's Case, Dobson's Case, 422, 443
 Fearon v. Aylesford, Earl of, 402, 403
 — v. Desbrisay, 819, 862
 Featherstone's Trusts, *Re*, 1383
 Featherstonhaugh v. Fenwick, 790, 802, 818
 — v. Turner, 804, 822
 Feaubert v. Turst, 626
 Feild v. Brown, 1251
 Feilden v. Slater, 551, 555
 Feistel v. King's College, Cam., 730, 751
 Felgate, *Re*, 427
 Fell v. Biddolph, 1293
 — v. Brown, 738
 Fellowes, *Re*, 1021
 — v. Ld. Gwydyr, 1035
 Fells, *Re*, Andrew, *Ex parte*, 275
 Feltham, *Re*, 1313
 — v. Clark, 726
 — v. Feltham, 1346
 Feltham's Trusts, *Re*, 1312
 Felton's Executors' Case, 495
 Fenn v. Bittleston, 706
 — v. Death, 1376
 Fenner v. Hepburn, 528
 — v. Taylor, 381, 385
 Fenney or Collings v. Ewestace, 1315
 Fentiman v. Smith, 142
 Fenton v. Browne, 1088, 1139
 — v. Wills, 1363
 Fenwick, Goods of, 885, 1263, 1277
 — v. Clarke, 1347
 — v. East Lon. Ry. Co., 174
 — v. Greenwell, 1002
 — v. Potts, 690
 — v. Reed, 594, 687
 Feoff. Heriot's Hosp. v. Gibson, 1068
 Ferguson v. Fyffe, 74
 — v. Gibson, 33
 — v. Livingston, 600
 — v. L. & B. R. Co., 1047
 — v. Wilson, 103, 457
 Ferrao's Case, 432, 477
 Ferrars v. Cherry, 1150
 Ferrers v. Ferrers, 647
 — E. v. Staff. & Uttoxeter R. Co., 1173
 Ferrier v. Jay, 897
 Ferris v. Mullins, 691, 693
 Festing v. Allen, 1205, 1219, 1428
 — v. Taylor, 15
 Fetcher v. Montgomery, 101
 Fetherston v. Fetherston, 220, 221
 Fettipace v. Gorges, 393, 845
 Few v. Perkins, 548
 Fewings, *Ex parte*, Sneyd, *Re*, 733
 Ffooks v. S. W. Ry. Co., 443
 Field, *Re*, 1353
 — v. Brown, 108, 326
 — v. Ld. Donoughmore, 990, 994
 — v. Evans, 397
 — v. Moore, 325, 339, 632, 633
 — v. Pecket, 276, 1289, 1332, 1414
 — v. Seward, 1345
 Field v. Sowle, 395
 — v. White, 263, 611
 Fielden v. Ashworth, 1408
 Fielder v. Hanger, 283
 — v. Higginson, 1092, 1140
 Filder v. Lon. Br. & S. C. R. Co., 464
 Fillingham v. Bromley, 1245
 Finch, *Re*, 261, 391
 — v. Brown, 750
 — v. Finch, 972, 973, 1282
 — v. Gt. Western Ry. Co., 156
 — v. Hattersley, 33
 — v. Hollinsworth, 864, 1408
 — v. Lane, 1207
 — v. Pescott, 277
 — v. Shaw, 761
 — v. Squire, 52
 — v. Underwood, 553, 554
 — v. Winchelsea, *Ld.*, 667
 Finden v. Stephens, 965
 Fingal v. Blake, 1202
 Finlason v. Tatlock, 1373
 Finney, *Re*, 1353
 — v. Grice, 1327
 Finnis to Forbes, 1105
 Firman v. Pulham, 310
 Firmstone's Case, 432
 Firth v. Greenwood, 1130
 Fischer v. Popham, 1275
 Fish v. Klein, 960
 Fisher, *Ex parte*, 718
 — v. Brierley, 55, 59
 — v. Dixon, 255, 256, 704
 — v. Fisher, 36
 — v. Hepburn, 1324
 — v. Moon, 141
 — v. Taylor, 796, 798
 — v. Webster, 1396
 — v. Wigg, 506
 Fisk v. Att.-Gen., 46, 56
 Fitch v. Weber, 116
 Fitzgerald v. Chapman, 659
 — v. Field, 1232
 — v. Fitzgerald, 335, 349, 350, 354, 612, 620, 987
 Fitzgibbon v. Blake, 395
 Fitzhenry v. Bonner, 1366
 Fitzmaurice, *Re*, 602
 — v. Bayley, 92
 Fitzroy v. Howard, 1361
 — v. D. of Richmond, 859, 1293, 1378
 Fitzsimons v. Fitzsimons, 178, 181
 Fitzwilliams v. Kelly, 1334, 1417
 Flack v. Downing College, 230, 702
 — v. Longmate, 369, 745
 Flagstaff Silver Mining Co., *Re*, 469
 Flamank, *Ex parte*, 1044
 Flanagan v. Gt. W. R. Co., 457
 Flanders v. Clark, 257
 Flarty v. Odium, 729
 Fleet v. Perrins, 348, 349
 Fleetwood v. Green, 1132, 1139
 Floming v. Brooke, 1322, 1324
 — v. Buchanan, 37

- Fleming v. Burrows, 1324
 — v. Fleming, 1303
 — v. Self, 739
 Fleming's Case, 463
 Fletcher, *Ex parte*, 713, 826
 — v. Ashburner, 105, 113
 — v. Bealey, 172
 — v. Fletcher, 301, 312, 1405
 — v. G. W. R. Co., 1048
 — v. Green, 1003, 1006, 1007
 — v. Moore, 25
 — v. Smith, 169
 — v. Stevenson, 258
 Fletcher's Case, 421
 Flight v. Barton, 529, 1060, 1152
 — v. Bentley, 561, 693, 1178
 — v. Bolland, 69, 92, 1034
 — v. Booth, 1065, 1066, 1079, 1087
 — v. Thomas, 152, 153
 Flinn v. Jenkins, 1383
 Flint v. Woodin, 1059, 1083, 1120
 Fliteroff's Case, 462, 494
 Florence v. Jennings, 733
 — Land, &c., Co., *Re*, 454
 Flower v. Buller, 395
 — v. Flower, 400
 — v. Hartopp, 1075, 1091
 — and Met. B. of Works, *In re*, 984, 1161
 Floyer v. Banks, 833
 — v. Lavington, 686
 Flud v. Flud, 738
 Fludyer v. Cocker, 1081, 1117, 1118
 Flureau v. Thornhill, 1124
 Foden v. Finney, 384
 Foley v. Addenbrooke, 536
 — v. Burnell, 244, 939, 1188
 — v. Hill, 587
 — v. Parry, 964
 — v. Wontner, 47
 Foligno v. Martin, 1134
 Foljambe v. Willoughby, 654
 Folkes v. Western, 506, 646
 Follett v. Pettman, 1280
 — v. Tyrer, 338
 Folsom v. Marsh, 131
 Fontaine v. Tyler, 1331
 Footner v. Cooper, 1363
 Forbes' Case, 424, 477
 Forbes v. Adams, 354
 — v. Ball, 899, 923
 — v. Forbes, 1260
 — v. Limond, 994
 — v. Moffatt, 681, 682 i
 — v. Peacock, 849, 1162
 — v. Phipps, 351
 — v. Richardson, 20
 — v. Ross, 272
 — v. Stevens, 806
 — and Judd's Case, 477
 Ford, *Re*, 378, 383
 — v. Ager, 581, 597
 — v. Batley, 16
 — v. Chesterfield, E. of, 737
 — v. De Pontes, 906, 1278
 Ford v. Olden, 94, 757
 — v. Peering, 225, 638
 — v. Rawlins, 1217
 — v. Ruxton, 1336, 1345
 — v. Ryan, 984
 — v. Stuart, 628
 — v. Tynte, 255, 1253
 — v. White, 693, 776
 Ford and Hill, *In re*, 1142
 Ford's Estate, *Re*, 680
 Forde, *Ex parte*, 431
 Fordham v. Fordham, 215
 — v. Wallis, 269, 599, 1347, 1349
 Fordyce v. Bridges, 25, 640
 — v. Lord, 1067
 — v. Willis, 961
 Forest, *Ex parte*, 485
 Forest of Dean, &c., Co., *Re*, 495
 Forrer v. Nash, 92, 877, 1127
 Forrest v. Forrest, 973
 — v. Manchester, &c., Co., 465
 — v. Prescott, 1416
 — v. Whiteway, 1396
 Forrester v. Leigh, *Ld.*, 40, 1332
 Forsbrook v. Forsbrook, 1390, 1402
 Forshaw v. Higginson, 1011
 — v. Welsby, 305, 311
 Forsight v. Grant, 933
 Forster v. Abraham, 1009, 1014
 — v. Davies, 1012
 — v. Forster, 218
 — v. Hale, 304, 962
 — v. Hoggart, 755
 — v. Patterson, 584, 595
 — v. Rowland, 1057
 — v. Schlesinger, 1018
 — v. Thompson, 32
 Forsyth v. Bristowe, 594, 599, 603, 604, 607
 Fort v. Clarke, 1076
 Fortescue v. Barnett, 302, 723
 — v. Gregor, 640, 894
 — v. Hennah, 670
 Forth v. Chapman, 1396
 Fosbrook v. Balguy, 276
 Foss v. Foss, 639
 — v. Harbottle, 464
 Foster, *Re*, 828
 — v. Cautley, 640
 — v. Cockerell, 723, 727, 773
 — v. Cook, 40, 1288
 — v. Dawber, 82, 976
 — v. Deacon, 1096
 — v. Elsley, 965
 — v. Evans, 930
 — v. Foster, 512
 — v. Hale, 805
 — v. Handley, 34
 — v. Hayes, 1400
 — v. M'Mahon, 103
 — v. Roberts, 721
 — v. Smith, 20
 — and Lister, *Re*, 298
 Fothergill v. Fothergill, 895
 — v. Rowland, 101

- Fothergill's Case, 432, 477
 Foulston v. Furber, 1241
 Fountain, *Ex parte*, 497
 Fountaine v. Carmarthen R. Co., 453, 455
 Fourdrin v. Gowdey, 37, 934
 Fourdrinier, *Ex parte*, 479, 481, 713
 Fourth City Mut., &c., Soc. v. Williams, Marson & Cox, 779
 Fowell v. Tranter, 566
 Fowke v. Draycott, 383, 378
 Fowkes v. Pascoe, 925, 970, 971
 Fowle v. Freeman, 1055
 Fowler, *Re*, 183, 184
 — v. Cohen, 858, 916
 — v. Foster, 712
 — v. Fowler, 44, 55, 82, 639, 833, 933
 — v. Odell, 123
 — v. Wyatt, 306
 Fowler's Case, 424
 Fox, *Ex parte*, 493
 — *Re*, 1223, 1224
 — v. Buckley, 263, 1006
 — v. Chester, 194
 — v. Clifton, 794
 — v. Fox, 967, 1214
 — v. Garrett, 264, 1377
 — v. Gregg, 862
 — v. Hanbury, 813, 825
 — v. Hawks, 303
 — v. Lowndes, 52
 — v. Mackreth, 1040, 1050
 — v. Scard, 71
 Fox's Case, 431, 444, 476
 Foxlowe v. Amcoats, 1183
 Foy v. Foy, 54
 — v. Hynde, 216
 Foy's Trusts, *In re*, 997
 Fradella v. Weller, 131
 Frail v. Ellis, 1171, 1173
 Frame v. Dawson, 613, 1058
 Framlingham v. Brand, 1316
 Frampton v. Frampton, 401, 404
 — v. Stephens, 370
 France v. Clarke, 722
 — v. France, 510
 Francis v. Brooking, 383
 — v. Clemow, 1414
 — v. Francis, 986
 — v. Grover, 587
 — v. Hawkesley, 606
 — v. Hayward, 146, 542
 — v. Minton, 703
 — v. Wigzell, 395
 Franco v. Alvares, 1204
 Frank v. Frank, 637
 — v. Stovin, 1392
 Franklinski v. Ball, 748
 Franklyn v. Tuton, 100
 Franks v. Bollans, 340, 354
 — v. Brooker, 1288
 — v. Martin, 619
 — v. Price, 1198
 Fraser v. Byng, 1336
 — v. Fraser, 1215
 — v. Hill, 795
 Fraser v. Kershaw, 826
 — v. Mason, 229, 230
 — v. Murdock, 274, 1000
 — v. Thompson, 628
 — v. Wood, 1135
 Fray v. Voules, 65
 Frayne v. Taylor, 106, 1097
 Frazer v. Jones, 692, 1184
 Freake v. Cranefeldt, 605, 995
 Freakley v. Fox, 265
 Frederick v. A. G., 1115
 — v. Aynscombe, 110
 Freeland v. Pearson, 856, 857, 1092, 1100, 1102
 — v. Stansfield, 804, 810, 826
 Freeman v. Bowen, 1244
 — v. Cooke, 95, 96
 — v. Edwards, 735
 — v. Fairlie, 807
 — v. Freeman, 885, 1279
 — v. Pope, 290, 291, 292
 Freer, *Re*, 1340
 — v. Hesse, 240
 — v. Rimmer, 1070
 Freke v. Carbery, *Ld.*, 5, 1258
 Freman v. Whitbread, 26
 Fremantle v. Banks, 927
 Freme v. Brade, 721
 — v. Clement, 900, 910, 914, 1360
 — v. Wright, 1070, 1072
 Fremoult v. Dedire, 667, 668
 French v. Andrade, 830
 — v. Caddell, 1395
 — v. French, 292
 Frend v. Buckley, 1103
 — v. Dennett, 78
 Frere v. Moore, 764, 773
 Freshfield's Trust, *Re*, 723
 Freshfield v. Reed, 888
 Frewen v. Frewen, 107
 — v. Phillips, 144, 152, 153
 Friar v. Grey, 566
 Frith, *Ex parte*, 714
 — Goods of, 1274
 — v. Cameron, 998
 — v. Cartland, 982, 1004, 1005
 — v. Forbes, 694
 — and Osborne, *Re*, 876
 Frodsham v. Frodsham, 1020
 Frogley v. Phillips, 1376, 1377, 1408
 Frosel v. Welsh, 537
 Frost v. Moulton, 790, 791
 Frontleek v. Boughey, 389
 Frowd's Settlement, *In re*, 858
 Fruer v. Boquet, 281
 Fry v. Capper, 858
 — v. Fry, 272, 1035
 — v. Noble, 373
 — v. Porter, 1235
 — v. Tapson, 999
 Fryer, *Re*, 1006
 — v. Coombs, 866
 — v. Morland, 1146
 — v. Morris, 1331
 — v. Salisbury, 942

- Fryer's Settlement, *In re*, 997
 Fuller v. Bennett, 1156
 — v. Chamier, 200, 208, 218, 220, 1370
 — v. Redman, 607
 — v. Wilson, 96, 1178
 Fullerton v. Martin, 623
 Fulton v. Andrew, 1264, 1270, 1301
 Furdoonjee's Case, 475
 Furness v. Caterham R. Co., 760
 Furnival v. Crew, 555
 Fursdon v. Clogg, 583
 Fury v. Smith, 776
 Fussell v. Dowding, 659
 Fyfe v. Arbutnot, 675
 Fyfe's Case, 440
 Fyler v. Fyler, 983
 Fynn, *Re*, 321
- GABRIEL v. Blankenstein, 569
 — v. Smith, 1074, 1077
 Gadbury, *Re*, 975
 Gadd, *Re*, 651
 Gaffee, *Re*, 387, 388, 398
 Gage v. Lister, 391
 Gainsford v. Dunn, 1414
 — v. Griffith, 1166
 Gaitskell's Trust, *Re*, 1207
 Gale, *Re*, 269
 — v. Abbott, 150
 — v. Bennet, 1376
 — v. Gale, 504, 620, 656, 657, 912
 — v. Lindo, 630
 — v. Squier, 1086, 1163
 Gall v. Fenwick, 1420
 Galland v. Leonard, 1209
 Gallard v. Hawkins, 987
 Galley v. Barrington, 1315
 Galliers v. Moss, 1354
 Gallimore v. Gill, 33
 Galloway v. London, Mayor of, 460
 Gally, Goods of, 1259
 Galton v. Emuss, 93
 — v. Hancock, 39, 1416
 Gambart v. Ball, 135
 — v. Sumner, 135
 Gambod's Trusts, *Re*, 1374
 Games, *Ex parte*, 718
 Gandy v. Gandy, 403, 983
 — v. Jubber, 534
 — v. Macaulay, 992, 1008
 Gann v. Gregory, 1271
 Garbrand v. Mayot, 1378
 Garbut v. Hilton, 1236
 Garde De la v. Lempriere, 377, 384, 385
 Garden Gully, &c., Co. v. McLister, 812
 Garden v. Ingram, 1178
 Gardiner v. Fell, 183
 — v. Slater, 1235
 — v. Stevens, 1367
 Gardiner's Estate, *Re*, Garratt v. Weeks, 1380
 Gardner, *Ex parte*, 331
 — Goods of, 1282
 — v. Barker, 18
- Gardner v. Cazenove, 728
 — v. Ch. Cr. R. Co., 1047
 — v. Cowles, 782, 1021
 — v. Fooks, 92
 — v. Gardner, 387, 390, 391, 392
 — v. Hatton, 1331, 1339
 — v. Lachlan, 726
 — v. L. C. & D. R. Co., 455, 521, 722, 752, 760
 — v. Marshall, 383
 — v. M'Cutcheon, 802
 — v. Parker, 137
 — v. Sheldon, 1365
 — v. Townshend, M. of, 668
 Gardom, *Ex parte*, 798
 — v. Lee, 1083
 Garforth v. Bradley, 350, 626
 Garland, *Ex parte*, 274, 275
 — v. Beverley, 205, 1312, 1373
 Garner v. Garner, 1304
 — v. Hannyton, 991
 — v. Moore, 270
 Garnett, *In re*, Orme and Hargreave's Contract, 953
 — v. Acton, 106, 1097, 1098, 1099, 1135
 — v. Bradley, 1139
 Garrard v. Frankel, 97
 — v. Ld. Lauderdale, 993, 994
 — v. Tuck, 580, 589, 991, 1104
 Garratt v. Niblock, 1288
 Garret v. Pritty, 1235
 Garrett v. Noble, 275
 — v. Wilkinson, 973
 Garrick v. Camden, Ld., 1404
 — v. Taylor, 970, 971
 Garth v. Baldwin, 218, 242, 623
 — v. Cotton, 1248, 1250
 — v. Meyrick, 1313
 — v. Townsend, 894
 Garthshore v. Chalie, 669, 1191
 Gartness Iron Co., *Re*, 491
 Gartside v. Silkstone, &c., Co., 764
 Garvey v. Hibbert, 1313
 Garwood v. Ede, 414
 Gascoigne v. Thwing, 976
 Gaskell v. Chambers, 411
 — v. Gaskell, 508
 — v. Harman, 1193, 1228, 1229
 Gaskell's Trusts, 399
 Gaskin v. Balls, 556, 1183
 — v. Rogers, 15, 1265, 1266
 Gaston v. Frankum, 533, 1103
 Gatenby v. Morgan, 1369, 1429
 Gaters v. Madeley, 348, 351
 Gaudet Frères Steamship Co., *Re*, 472
 Gaunt v. Fynney, 161
 Gaved v. Martyn, 152
 Gavelkind, 342
 Gayer v. Wilkinson, 353
 Gayford v. Moffatt, 142, 143, 152, 153
 — v. Nicholls, 167
 Gayre v. Gayre, 1332
 Geaves v. Price, 1280
 Geddes v. Wallace, 803

- Geddis v. Proprietors of Bann Reservoir, 174
 Gedye v. D. of Montrose, 1119
 Gee v. Gurney, 919
 — v. Liddell, 262, 833, 1222
 — v. Mahood, 20
 — v. Manchester, Mayor of, 1211
 — v. Pearse, 1120, 1140
 — v. Pritchard, 130
 — v. Smart, 366
 General Cred. & Disc. Co. v. Clegg, 689, 761
 — Estates Co., *Re*, 453
 — Exch. Bank, 486
 — Finance, &c., Co. v. Liberator, &c.,
 Soc., 1181
 — Provident, &c., Co., *Re*, 450
 — Rolling, &c., Co., 470, 485
 — Share, &c., Co. v. Wetley, &c.,
 Co., 480
 — South American Co., *Re*, 451
 Genery v. Fitzgerald, 1359
 Genese, *In re*, 361, *Add.*
 Gent v. Harris, 383, 384
 — v. Harrison, 1250
 Gentry, Goods of, 1282
 George, *Re*, 652
 — v. Howard, 974
 — v. Jew, 228
 — v. Milbank, 313, 848
 Gerhard v. Bates, 96
 German Date Coffee Co., *Re*, 469
 Gerrard v. Butler, 916
 — v. Gerrard, 645
 Gervais v. Edwards, 100
 Gervis v. Gervis, 37
 Gething v. Keighley, 808
 Ghost v. Waller, 271, 982
 Giacometti v. Prodders, 380
 Gibbings v. Gibbings, 676
 Gibbins v. Eyden, 37, 338
 — v. N. E. M. Asylum, 1133
 — v. Phillips, 995
 — v. Taylor, 271
 Gibbon v. Warner, 505
 Gibbons v. Caunt, 82
 — v. Gibbons, 1383
 — v. Hills, 1329
 — v. Kibley, 381
 — v. Langdon, 1226
 — v. Snape, 233
 Gibbs v. Daniels, 1040
 — v. David, 1132
 — v. Fremont, 74
 — v. Guild, 590, 606
 — v. Harding, 401, 402
 — v. Lawrence, 1323
 — v. Merrill, 788
 — v. Rumsey, 58, 117, 969
 — and West's Case, 450, 482
 Giblett v. Hobson, 54
 Gibraltar, Bank of, 472, 495
 Gibson, *Re*, 1339
 — v. Bott, 21, 120
 — v. Clarke, 1131
 — v. Coleman, 45
 — v. D'Este, 1067
 Gibson v. D'Este, *nom.* Wilde v. Gibson,
 1065
 — v. Doey, 550
 — v. Fisher, 1408, 1409
 — v. Gibson, 371
 — v. Goldsmid, 73
 — v. Goldsmith, 1129
 — v. Holland, 1057
 — v. Ingo, 1150
 — v. Jeyes, 309, 1036, 1040
 — v. Kinven, 903
 — v. Montfort, *Ld.*, 1381
 — v. Overbury, 723
 — v. Russell, 308
 — v. Seagrim, 769
 — v. Woolard, 1090
 Gibson's Case, 458
 — Trusts, *Re*, 1293
 Giddings v. Giddings, 185, 239
 Giffard v. Williams, 512
 Gilbert v. Lewis, 390
 — v. Overton, 302, 303, 311, 313
 — v. Witty, 1411
 Gilbert's Case, 443
 Gilbertson v. Gilbertson, 1415, 1416
 — v. Richards, 832
 Gilchrist v. Cator, 383
 — v. Herbert, 612
 Giles v. Giles, 1311, 1313
 — v. Homes, 876
 — v. Melsom, 37, 1226, 1315, 1329
 — v. Warren, 1281
 Gilibrand v. Goold, 644
 Gill, Goods of, 1268
 — v. Bagshaw, 1298
 — v. Dickinson, 169
 — v. Downing, 671
 — v. Gill, 678
 — v. Newton, 756
 — v. Shelley, 1387
 Gillam v. Taylor, 43, 1408, 1409
 Gillan v. Morrison, 414
 Guillaume v. Adderley, 1329, 1333
 Gillespie v. Alexander, 992, 1337, 1347
 — and Paterson's Case, 433
 Gillet v. Wray, 1235
 Gillett v. Gane, 1311
 — v. Peppercorne, 1039
 — v. Thornton, 791
 Gilley v. Burley, 671
 Gilliat v. Gilliat, 1070, 1289, 1338
 Gillies v. Longlands, 110, 114
 Gillman v. Daunt, 1380
 Gilman's Case, 425, *Add.*
 Gimblett v. Purton, 1380
 Ginesi v. Cooper, 821
 — v. Cooper & Co., 817
 Giraud v. Hanbury, 282, 821
 Gisborne v. Gisborne, 651
 Gittings v. McDermott, 1292, 1317, 1373
 Gladding v. Yapp, 282
 Gladstone v. Gladstone, 677
 Glaholm v. Hays, 73
 Glanvill, *In re*, 399, *Add.*
 — v. Glanvill, 1190

- Glanville v. Glanville, 1313
 — v. Payne, 616
 Glass v. Richardson, 230, 844
 Gleadow v. Leatham, 15
 Gleaves v. Paine, 366, 738
 Glegg, *Ex parte*, 570
 — v. Rees, 299
 Glengall, E. of v. Thynne, Ly., 613
 Glenister v. Harding, 1115
 Glenny and Hartley, *In re*, 1010
 Glenorchy, Ld. v. Bosville, 616, 617, 623, 625
 Glog and Miller's Contract, *In re*, 1103, 1133
 Globe, New Patent Iron and Steel Co., *Re*, 469
 Glossop v. Heston, &c., Board, 174
 Gloucester, Corp. of v. Osborn, 45
 — v. Wood, 45
 Glover, *Re*, 304
 — v. Bates, 632
 — v. Chancellor, 1319
 — v. Coleman, 150
 — v. Hall, 388
 — v. Hartcup, 935
 Glubb v. Att.-Gen., 55
 Glyn, *Ex parte*, 692
 — v. Hood, 726
 Glynn v. Thorpe, 38
 Goate v. Goate, 607
 Goddard v. Snow, 334
 Godfrey v. Bryan, 377
 — v. Faulkner, 999
 — v. Godfrey, 966
 — v. Harben, 848
 — v. Tucker, 518
 — v. Turnbull, 812
 — v. Watson, 733, 749
 Godfrey's Trust, *In re*, 1019
 Godsall v. Webb, 847
 Godwin v. Culley, 606, 607
 — v. Winsmore, 369, 370
 Goilmere v. Battison, 90
 Gold Co., *Re*, 490
 — Hill Mines, *Re*, 471
 Golden v. Gillam, 294
 Goldieutt v. Townsend, 332, 614
 Goldney v. Crabb, 1138
 Goldring v. Inwood, 907
 Goldsmid v. Goldsmid, 669, 1239
 — v. Heathcote, 392
 — v. Tunbridge Wells Commis-
 sioners, 166, 170, 172
 Goldsmith v. Goldsmith, 859
 — v. Russell, 292
 Goldsworthy, *Re*, 321
 Goman v. Salisbury, 82, 1130
 Gooch v. Gooch, 1381, 1382
 — v. Lon. Banking Assoc., 485, 491
 Gooch's Case, 289, 441, 474
 Good, *Ex parte*, 831
 — v. Good, 1370
 Goodale v. Gawthorne, 110, 204
 Goodall v. Little, 130
 — v. Skerratt, 585
 Goodchap v. Roberts, 732
 Goodchild v. Dougal, 340
 Goode, *Ex parte*, 568
 — v. Burton, 1171
 — v. Harrison, 788
 — v. Job, 583, 595
 Goodenough, *Re*, 1301
 Goodfellow v. Burchett, 930
 Goodhart v. Hyett, 147
 Goodier v. Johnson, 836
 Goodlad v. Burnett, 1288, 1289, 1332
 Goodman v. Edwards, 1361
 — v. Goodman, 1226
 — v. Grierson, 687
 — v. Whitcomb, 813, 814
 Goodman's Trusts, *Re*, 1258, 1388
 Goodright v. Cator, 852
 — v. Cornish, 1424
 — v. Dunham, 1401
 — v. Hoskins, 1366
 — Doe d. v. Moses, 296, 298, 1115
 — v. Pullynn, 220
 — v. Searle, 1430
 — v. Wright, 1291
 Goodson v. Ellisson, 990
 Goodtitle v. Funucan, 867—868—870
 — v. Herring, 221
 — v. Morgan, 765
 — v. Otway, 1277
 — v. Southern, 1307, 1308
 — v. White, 1430
 Goodwin v. Fielding, 1057
 — v. Lee, 1416
 — v. Longhurst, 537
 Goodwin's Trusts, *Re*, 1388
 Goodwyn v. Goodwyn, 895
 Goodyar, *Re*, 1324
 Goold v. Teague, 107, 1354
 — v. White, 232, 1076
 Gordon, *Re*, 312
 — v. Adolphus, 1198
 — v. Bowden, 19
 — v. Duff, 1330
 — v. Ellis, 803
 — v. Gordon, 63, 591, 1305, 1388
 — v. Graham, 771
 — v. Hoffman, 1365
 — v. Howden, 795
 — v. Leri, 907
 — v. Raynes, 1192
 — v. Reay, Ld., 1269
 — v. Whieldon, 503
 Gore v. Bowser, 517, 520, 975, 1157
 Gorely, *Ex parte*, 547
 Goring v. Nash, 621, 656
 Gorley v. Gorley, 505
 Gornall, *Re*, 316
 Gorissen's Case, 422, 435, 477
 Gorst v. Lowndes, 6
 Gosbell v. Archer, 1035, 1056, 1057, 1123
 Gosden v. Dotterill, 1324, 1325, 1345
 Gosling v. Carter, 849
 — v. Townshend, 1210
 Gosman, *Re*, 283

- Goss *v.* Nugent, *Ld.*, 79, 82, 1130
 Gossett, *Re*, 895
 Gossip *v.* Wright, 688
 Gott *v.* Gandy, 549, 553
 Gottlieb *v.* Cranch, 14
 Gough *v.* Andrews, 648, 649
 — *v.* Bult, 1349
 — *v.* Davies, 190, 819
 Gould, *Ex parte*, Walker, *Re*, 559
 — *v.* Gould, 892
 — *v.* Kemp, 504
 — *v.* Lakes, 1268
 — *v.* Tancred, 750
 Goulder *v.* Canum, 389, 396
 Gourlay *v.* Somerset, *D.*, 92, 552, 824
 Gover *v.* Davis, 1323
 Gover's Case, 411, 413
 Gow *v.* Forster, 124
 Gowan *v.* Broughton, 1362
 — *v.* Gowan, 620
 Gower *v.* Eyre, 1249
 — *v.* Gower, 332, 646, 1323
 — *v.* Grosvenor, 244
 Gower's Case, 445
 Gowling *v.* Gowling, 1325
 — *v.* Thompson, 1355, 1356
 Grace, *Ex parte*, 238
 — *v.* Newman, 126, 130
 — *v.* Smith, 788, 791, 793
 Grady's Case, 436, 444
 Graftey *v.* Humpage, 663, 664
 Grafton, *D. of v. Lon. & Bir. R. Co.*, 211
 Graham *v.* Graham, 676, 749, 933
 — *Doe d. v.* Hawkins, 53
 — *v.* Hope Peake, 812
 — *v.* Jackson, 199
 — *v.* Johnson, 71
 — *v.* Keble, 252
 — *v.* Londonderry, *Ld.*, 235, 391,
 374, 375
 — *v.* Massey, 74
 — *v.* Maxwell, 279
 — *v.* McCulloch, 819
 — *v.* Musson, 1058
 — *v.* Oliver, 1128
 — *v.* Paternoster, 54
 — *v.* Peat, 535
 — *v.* Sime, 1159
 — *v.* Wickham, 670, 919
 Grand Junc. Canal Co. *v.* Shugar, 164,
 165
 Grange *v.* Tiving, 883
 — *v.* White, 514
 Granger *v.* Worms, 1065
 Grant, *Re*, 377
 — *Ex parte*, 222
 — *v.* Bridger, 1278
 — *v.* Dyer, 1316
 — *v.* Ellis, 573, 575
 — *v.* Grant, 302, 303, 391, 1303, 1304,
 1376
 — *v.* Lynam, 864, 898
 — *v.* Maddox, 81
 — *v.* Mills, 1172, 1173
 Granville *v.* Beaufort, 281
 Granville *v.* Betts, 100
 — *E. v.* McNeile, 879
 Gratrix *v.* Chambers, 1341
 Gratwick, *Re*, 898, 901, 1232
 Grave *v.* *Ld.* Salisbury, 926
 Gravely *v.* Barnard, 70
 Gravenor *v.* Watkins, 1240, 1299
 — *v.* Hallum, 44
 Graves *v.* Ashford, 135
 — *v.* Forman, 177
 — *v.* Graves, 32
 — *v.* Hicks, 11, 1417
 — *v.* Hughes, 1339
 — *v.* Weld, 256
 Gray *v.* Bond, 148
 — *v.* Dowman, 366
 — *v.* Fowler, 1084
 — *v.* Garman, 1206
 — *v.* Gray, 1091
 — *v.* Gutteridge, 1088
 — *v.* Johnston, 269
 — *v.* Mathias, 88
 — *v.* Siggers, 122
 — *v.* Warner, 1041
 Gray's Case, 434
 Grayburn *v.* Clarkson, 270
 Graydon *v.* Hicks, 1202, 1203, 1238
 Grayson *v.* Deakin, 371
 Greatred *v.* Greatred, 1292, 1316, 1418
 Greatrex *v.* Greatrex, 807
 — *v.* Hayward, 165, 166
 Great Berlin Steam Boat Co., *In re*, 961
 Gr. Brit. Mut. Ass. Soc., *Re*, 469, 499
 G. E. R. Co. *v.* Turner, 420
 Gt. Lux. R. Co. *v.* Magnay, 411
 G. N. R. Co., *In re*, and Sanderson, 1084,
 1142
 Gt. Ship Co., 480
 Gt. W. R. Co., *Re*, 470
 — *v.* Bennett, 170, 1048
 — *v.* Bir. & Oxf. R. Co., 103
 — *v.* Blake, 461
 — *v.* May, 1049
 — *v.* Smith, 559, 565
 Greaves, *Ex parte*, 665, 1005
 — *Re*, 597
 — *v.* Greenwood, 1114
 — *v.* Powell, 1413
 — *v.* Simpson, 200, 1370
 — *v.* Tofield, 14
 — *v.* Wilson, 1084, 1144
 Greaves' Settlement Trusts, *Re*, 113
 Greedy *v.* Lavender, 381
 Green, *Ex parte*, 654
 — *Re*, 260
 — *v.* Bank of England, 970
 — *v.* Barrow, 1211
 — *v.* Bartlett, 1088
 — *v.* Belcher, 645, 649
 — *v.* Besley, 787
 — *v.* Biggs, 763, 1139
 — *v.* Britten, 122, 180, 390
 — *v.* Claydon, 1104
 — *v.* Crockett, 65
 — *v.* Gascoigne, 7

- Green v. Green, 177, 178, 221, 388, 777,
 886, 1202, 1238
 — v. Harvey, 240, 1205
 — v. Humphreys, 606, 607
 — v. Ingham, 723
 — v. Jackson, 116
 — v. Low, 73
 — v. Marsden, 967
 — v. Otte, 380, 382
 — v. Pigot, 1346
 — v. Pulsford, 1137
 — v. Rutherford, 47
 — v. Saddington, 1053
 — v. Sevin, 1120
 — v. Smith, 106, 1094
 — v. Spicer, 1242
 — v. Stephens, 110
 — v. Symonds, 1324, 1339
 — v. Tribe, 1269, 1280, 1287
 — v. Waring, 810
 Green's Case, 424
 — Estate, *Re*, 1294
 — Settlement, 1114, 1227
 — Trusts, *Re*, 1208
 Greenaway v. Adams, 552
 — v. Hart, 873
 Greene v. Foster, 761
 — v. Greene, 1415
 Greenfell v. Windsor, Dean, &c., of, 730
 Greenfield v. Edwards, 1105
 Greenham v. Gibbeson, 886
 Greening v. Beckford, 727
 Greenough v. Gaskell, 1157
 — v. Littler, 762
 Greenslade v. Dare, 1112, 1153
 — v. Dower, 796
 Greenway v. Bromfield, 586, 751
 — v. Greenway, 110, 1396, 1398
 Greenwood, *Ex parte*, 471
 — *Re*, 502, 1404, 1405
 — v. Evans, 236, 237
 — v. Greenwood, 63, 1314, 1335,
 1407
 — v. Percy, 509
 — v. Roberts, 837
 — v. Rothwell, 780, 1393
 — v. Verdon, 1397
 — v. Wakeford, 1011
 Greenwood's Case, 436
 — Trusts, *Re*, 783
 Greetham v. Colton, 882, 1163
 Gregg v. Arrott, 689
 — v. Coates, 226
 Gregor v. Kemp, 670
 Gregory, *Re*, 1312
 — v. Henderson, 979
 — v. Patchett, 460
 — v. Pilkington, 733
 — v. Williams, 70, 258
 — v. Wilson, 529
 Gregson, *Re*, 1222
 Gregson's Trusts, *Re*, 1298, 1303
 Greig, *Re*, 1269, 1282
 — v. Martin, 1298
 Greisley v. Chesterfield, E., 225
- Grenfell v. Windsor, Dean, &c., of, 751
 Grell v. Levy, 75, 90
 Gresley v. Mousley, 1039, 1040, 1012
 Gretton v. Haward, 178, 183, 220
 Greville v. Browne, 1414
 — v. Greville, 1297
 — v. Tylec, 1285
 Grey v. Grey, 973
 — v. Jenkins, 882
 — v. Northumberland, D. of, 228
 — v. Pearson, 141, 1317
 — v. Stuart, 662
 Grice v. Shaw, 681
 Grier v. Grier, 618
 Griesbach v. Freemantle, 114
 Grieve v. Grieve, 1389
 Grievess v. Case, 54, 59
 — v. Rawley, 1376
 Grievson v. Kirsopp, 109, 111, 878, 923
 Griffies v. Griffies, 510
 Griffin v. Bishop's Castle R. Co., 455
 Griffith, *Re*, 28
 — v. Paget, 486, 493
 — v. Ricketts, 106, 738, 993
 Griffith's Case, 463
 Griffith-Boscawen v. Scott, 177, 886
 Griffiths v. Evan, 1403
 — v. Evans, 219, 964, 1392
 — v. Gale, 910
 — v. Griffiths, 1266, 1275
 — v. Hamilton, 281
 — v. Hatchard, 1077
 — v. Penson, 1163
 — v. Porter, 983, 992
 — v. Pruen, 1344
 — v. Jones, 1094
 — v. Robins, 309
 — v. Smith, 1346
 — v. Vere, 7
 Grigby v. Cox, 393
 Griggs v. Gibson, 178, 181, 654
 — v. Staplee, 335
 Grimmett v. Grimmett, 54
 Grimshaw's Trusts, *In re*, 1214
 Grimson v. Downing, 220
 Grimstone, *Ex parte*, 738
 Grimwood v. Cozens, 1282
 Grisewood and Smith, *Ex parte*, 426
 Grissell v. Bristowe, 440
 — v. Swinhoe, 178, 179
 Grissell's Case, 482, 483
 Groom, *Re*, 784
 — v. Booth, 1163
 Grose v. West, 1105
 Grosvenor v. Durston, 180
 — v. Lane, 346
 — v. Sherratt, 306, 308
 — Ld. v. Hampstead R. Co., 1047
 Grove, *Re*, 382, 383
 — v. Bastard, 1081, 1110
 — v. Comyn, 512
 — v. Price, 654, 989
 Groves, *Re*, 16, 17, 502
 — v. Clarke, 384
 — v. Groves, 970

- Groves *v.* Perkins, 63, 308
 — *v.* Wright, 1327, 1430
 Growes *v.* Dolphin, 1242
 Gryll's Trusts, 1406, 1407
 Guardhouse *v.* Blackburn, 1264, 1270, 1300
 Guardian, &c. Soc., *Re*, 699
 Gubbins *v.* Creed, 689
 Gude *v.* Worthington, 1297
 Gudgen *v.* Besset, 1112
 Guest *v.* Cowbridge R. Co., 520, 738, 771
 — *v.* Snythe, 1040
 — *v.* Willasey, 1269
 Guinness *v.* Ireland, Land Cor. of, 462
 Gullan, *Re*, 1281
 — *v.* Grove, 887
 Gullin *v.* Gullin, 381
 Gulliver *v.* Ashby, 833
 — *v.* Gulliver, 614
 — *v.* Vaux, 1240
 Gully *v.* Cregoe, 966
 — *v.* Davis, 1309, 1362
 — *v.* Exeter, Bp. of, 299
 Gummoe *v.* Howes, 221, 1374
 Gundry *v.* Pinniger, 659, 1404, 1405
 Gunn, Goods of, 1271
 Gunn's Case, 421
 Gunnell *v.* Whitear, 1018
 Gunter *v.* Gunter, 683
 — *v.* Halsey, 613, 1058
 Gurly *v.* Gurly, 375
 Gurnell *v.* Gardner, 694
 Gurney *v.* Goggs, 389
 — *v.* Gurney, 305, 1266
 Guthrie *v.* Walrond, 180, 1322, 1347, 1350
 Guy *v.* Pearkes, 385
 — *v.* Sharp, 1305, 1337
 Gwillim *v.* Gwillim, 1275
 — *v.* Stone, 1136
 Gwyne *v.* Heaton, 1177, 1178
 — *v.* Muddock, 1373
 Gynn *v.* Gilbard, 382

 H. *v.* W., 401, 1201
 Habergham *v.* Ridehalgh, 1355
 — *v.* Vincent, 253, 887, 1267, 1268
 Habershon's Case, 482
 Hack *v.* Lon. Prov. Build. Soc., 701
 Hackett *v.* Baiss, 160
 Haddelsey *v.* Adams, 219, 1222, 1227
 Haddon *v.* Ayers, 73
 — *v.* Fladgate, 389
 Hadley, *Re*, 1009
 — *v.* Lon. Bank of Scotland, 1094, 1132
 Hadow *v.* Hadow, 655
 Hagger *v.* Payne, 1378
 Hagshaw *v.* Yates, 770
 Haig *v.* Gray, 823
 Haigh *v.* Kaye, 971, 1026
 — *v.* North Brierly Union, 78
 Haines *v.* Burnett, 530
 — *v.* Guthrie, 1115
 Haldane *v.* Eckford, 1260

 Hale *v.* Allnutt, 995
 — *v.* Hale, 835
 — *v.* Lamb, 655
 — *v.* Oldroyd, 166
 — *v.* Saloon Omnibus Co., 290
 Hales *v.* Cox, 40, 296, 301, 313
 — *v.* Darell, 934
 Haley *v.* Bannister, 7, 1337, 1350
 — *v.* Hammersley, 704
 Halfhead *v.* Sheppard, 856, 923
 Halford *v.* Stains, 7
 Halket *v.* Merchant Traders' Assoc., 436
 Hall, *Ex parte*, 694
 — *In re*, 1018
 — Goods of, 1267, 1284
 — *v.* Barrows, 817
 — *v.* Bushill, 1141
 — *v.* Carter, 644, 648, 913
 — *v.* City, &c. Brewery Co., 553
 — *v.* Dench, 1278
 — *v.* Dewes, 850
 — *v.* Fisher, 1309, 1361
 — *v.* Hall, 311, 316, 809, 1264
 — *v.* Hallet, 270, 276, 1042
 — *v.* Hardy, 101
 — *v.* Hewer, 1384
 — *v.* Hill, 371, 934, 936, 974
 — *v.* Hugonin, 353
 — *v.* Jenkinson, 1131
 — *v.* Jones, 315
 — *v.* Kendall, 264
 — *v.* Lietch, 1364
 — *v.* Lund, 144, 145, 163
 — *v.* Macdonald, 264
 — *v.* May, 754, 1138
 — *v.* Old Tar. Lead Mining Co., 430
 — *v.* Palmer, 88, 301
 — *v.* Smith, 1154
 — *v.* Swift, 166
 — *v.* Terry, 1196
 — *v.* Turner, 280
 — *v.* Warren, 46, 1050, 1208, 1263
 — *v.* Waterhouse, 392, 393, 1263
 Hall & Co. *v.* Collyer, 550
 Hall's Case, 444
 — Estate, 374
 — Will, *Re*, 1430
 Hall-Dare *v.* Hall-Dare, 215, *Add.*
 Hall-Dare's Contract, *In re*, 941
 Hallas *v.* Robinson, 716
 Hallen *v.* Runder, 1053
 Hallett *v.* Hallett, 1006
 — to Martin, 871, 874
 Halley, The, 74
 Hallifax, *Ex parte*, 692
 — *v.* Wilson, 1230
 Halliwell *v.* Phillips, 1254
 Hallmark's Case, 424, 457
 Hallows *v.* Fernie, 428, 448
 Hallyburton, Goods of, 1263
 Halsey *v.* Grant, 1066
 — *v.* Halsey, 325
 Halton *v.* Foster, 1404
 Haly *v.* Barry, 524
 Hamer *v.* Sharp, 1035

- Hamer v. Milsley, 367
 Hamer's Devisees' Case, 31, 267
 Hames v. Hames, 1406, 1407
 Hamill v. Stokes, 803, 804
 — v. White, 676
 Hamilton v. Buckmaster, 1137, 1138, 1320
 — v. Carmichael, 1324
 — v. Chainé, 714
 — v. Dallas, 1260
 — v. Denny, 722
 — v. Hector, 402
 — v. Jackson, 370
 — v. Kirwan, 921
 — v. Mills, 350, 659, 1373
 — v. Royse, 1156
 — v. Spottiswoode, 694
 — v. West, 1392
 — D. of v. Mohun, 631
 — Ld. C., Case, 446, 449
 — Mayor of v. Hodsdon, 1318
 Hamilton's Windsor Ironworks, *Re*, 449, 454
 Hamley's Case, 424
 Hamlyn v. Betteley, 714
 Ham's Trusts, 1405
 Hammersley v. De Biel, 331, 612, 614
 Hammersmith Ry. Co. v. Brand, 174
 Hammond v. Hammond, 662
 — v. Hocking, 713
 — v. Maule, 1213
 — v. Neame, 966
 — v. Smith, 607, 933
 Hamond v. Hicks, 628
 Hamper, *Ex parte*, 791, 792
 Hampshire v. Bradley, 988
 — v. Wickens, 530
 Hampson v. Fellows, 735
 — v. Price's Patent Candle Co., 463
 Hampton v. Hodges, 746
 — v. Holman, 838, 1390, 1402
 Hanbury v. Hussey, 508
 — v. Litchfield, 1066, 1104, 1154
 — v. Spooner, 1344
 Hance v. Truwhitt, 182
 Hancock v. Att.-Gen., 738
 — v. Spittle, 1021
 Hancox v. Abbey, 1415, 1416
 Hand v. Hall, 533
 — v. North, 502
 Handley v. Farmer, 739
 — v. Stacey, 1264
 Hanley v. Pearson, 311, 312
 Hanmer v. Chance, 149, 228
 Hannaford v. Hannaford, 1411
 Hannah v. Duke, 1199
 — v. Hodgson, 904, 919, 921
 Hannam v. Sims, 1355
 Hansard v. Hardy, 739
 Hansen v. Miller, 350
 Hanslip v. Kitton, 801
 — v. Padwick, 1123, 1124, 1201, 1213, 1218
 Hanson v. Graham, 1216, 1217
 — v. Keating, 345, 378, 1129
 — v. Lake, 1141
 Harbidge v. Warwick, 150, 153
 Harbin v. Darby, 277
 Harcourt v. Seymour, 106, 113
 — v. White, 583, 605, 1042
 Hardacre v. Nash, 1320
 Hardaker v. Moorhouse, 852
 Hardcastle v. Dennison, 232
 — v. Hardcastle, 840, 1219
 Hardey v. Green, 629, 662
 Hardiman, *Re*, 510
 Harding, *Ex parte*, 745
 — v. Glover, 810
 — v. Glyn, 864, 923
 — v. Grady, 32
 — v. Harding, 1091, 1098
 — v. Nott, 1429
 — v. Pingey, 737, 739
 — v. Preece, 569
 — v. Wilson, 157
 Hardingham v. Thomas, 935
 Hardman v. Child, 1084
 — v. Johnson, 239
 Hardwick v. Hardwick, 1309
 Hardwicke, Ctss. of v. Wilmot, 661, 673
 — E. v. Douglas, 1280
 — Ld. v. Vernon, 1042
 Hardy, *Ex parte*, 107
 — *Re*, 1341
 — v. Caley, 983
 — v. Reeves, 749
 Hare v. Burgess, 234
 — v. Cartridge, 1298
 — v. Hare, 315
 — v. Horton, 704
 — v. L. & N. W. R. Co., 89
 — v. Pryce, 1327
 Hare's Case, 422, 430
 Harford's Trusts, *In re*, 1011
 Hargrave v. Hargrave, 66, 69, 1116
 Hargreaves v. Rothwell, 1156
 Harland v. Binks, 290, 994
 — v. Trigg, 1403
 Harley v. Harley, 356
 — v. Moon, 911, 1342
 Harlock v. Ashberry, 583, 596, 597
 Harman v. Gurner, 1309
 — v. Johnson, 799
 — v. Richards, 290, 298, 397
 — *Re*, &c., R. Co., 698
 Harman's Case, 464
 Harmer v. Priestley, 739
 Harmood v. Oglander, 36, 1278
 Harms v. Parsons, 87
 Harnett v. Baker, 1061, 1071
 — v. M'Dougall, 396
 — v. Yeilding, 93, 870
 Harper, *Ex parte*, 824
 — *In re*, and G. E. R. Co., 1045
 — v. Hayes, 1035
 Harpham v. Shacklock, 765
 Harpur v. Ball, 384
 Harries' Trusts, 908
 Harrington, *Re*, 190
 — v. Churchward, 792
 — v. Harrington, 246, 845

- Harrington *v.* Harte, 1404
 — *v.* Long, 89
 — *v.* Price, 703, 1179
 — *v.* Wheeler, 1130
 Harris, *Ex parte*, 568, 829
 — Goods of, 1284, 1285
 — *v.* Amery, 415, 795
 — *v.* Barnes, 1427
 — *v.* Berrall, 1281
 — *v.* Cutler, 1288
 — *v.* Davis, 1294, 11370
 — *v.* Drewe, 142
 — *v.* Farwell, 819
 — *v.* Harris, 237, 992, 1000, 1355
 — *v.* Lee, 336
 — *v.* Lloyd, 1381, 1386
 — *v.* N. Devon Ry. Co., 445
 — *v.* Pepperell, 1164, 1176
 — *v.* Poyner, 121
 — *v.* Ryding, 168
 — *v.* Watkins, 32, 36, 185
 Harris's Case, 421, 1056
 — Settled Estates, *Re*, 364, 943
 Harris Jacson, *Re*, *v.* Bounty Gov. Q. A., 52
 Harrison, *Ex parte*, 435, 440, 735
 — *Re*, 1009, 1013, 1361
 — *v.* Andrews, 350
 — *v.* Barton, 501, 504, 1051
 — *v.* Blackburn, 541
 — *v.* Cage, 646
 — *v.* Duignan, 586
 — *v.* Foreman, 1206, 1225
 — *v.* Forth, 1150
 — *v.* Good, 1168
 — *v.* Goodall, 324
 — *v.* Grimwood, 1195, 1214
 — *v.* Guest, 1177
 — *v.* Harrison, 52, 281, 371, 1250, 1405, 1407
 — *v.* Hollins, 594
 — *v.* Hyde, 1305
 — *v.* Jackson, 798, 1331, 1338
 — *v.* Mexican R. Co., 461
 — *v.* Naylor, 1213
 — *v.* Round, 1028
 — *v.* Rowley, 1344, 1345
 — *v.* Southampton, Mayor of, 50, 1239
 — *v.* Tennant, 813
 Harrison's Case, 443
 — Estate, 1368
 Harrold *v.* Harrold, 892
 — *v.* Whitaker, 746
 Harrop, *Re*, 107, 113, 189
 — *v.* Howard, 396
 — *v.* Wilson, 25, 27
 Harrop's Trusts, *In re*, 953
 Harry *v.* Davey, 1137
 Hart, *Re*, 1190
 — *v.* Alexander, 819
 — *v.* Durand, 1387
 — *v.* Frontino, &c., Co., 441
 — *v.* Hart, 98, 400, 402, 1113
 — *v.* Middlehurst, 616, 617, 628
 Hart *v.* Nash, 607
 — *v.* Prendergast, 606
 — *v.* Stephens, 348, 349
 — *v.* Swaine, 96, 1135
 — *v.* Tulk, 1305, 1316
 — *v.* Tribe, 964
 — *v.* Windsor, 553
 Hart's Case, 441
 — Trusts, *Re*, 1213, 1234
 Harter *v.* Colman, 740
 — *v.* Harter, 1300, 1302
 Hartland *v.* Murrell, 33, 696
 Hartley *v.* Allen, 26
 — *v.* Burton, 778
 — *v.* Hurl, 1360
 — *v.* Ostler, 1335
 — *v.* Smith, 317
 Hartley's Case, 432
 Hartnall, *In re*, 1020
 Harton *v.* Harton, 979
 Hartop *v.* Hoare, 247
 Hartopp *v.* Hartopp, 65, 674, 926
 Hartshorne *v.* Watson, 559
 Hartwell *v.* Hartwell, 86
 Harvey *v.* Ashley, 633
 — *v.* Aston, 1233, 1234, 1235, 1236, 1239
 — *v.* Brydges, 753
 — *v.* Cooke, 63
 — *v.* Crickett, 826
 — *v.* Grabham, 82, 1130
 — *v.* Harvey, 122, 235
 — *v.* Mun. Perm. Invest. Soc., 779
 — *v.* Stracey, 915
 — *v.* Tebbutt, 780
 — *v.* Walters, 171
 Harvey's Settled Estate, *In re*, 941
 Harward's Case, *Re*, 425
 Harwood, *In re*, 1021
 — *v.* Fisher, 352
 — *v.* Tooke, 90
 Haselfoot's Estate, *Re*, 772
 Hasket *v.* Strong, 770
 Hasleham *v.* Young, 798
 Haslewood *v.* Green, 1373
 Hasluck *v.* Pedley, 28
 Hassell *v.* Gowthwaite, 223
 Hasteed *v.* Searle, 1307
 Hastie *v.* Hastie, 387
 Hastie's Case, 475
 Hasting *v.* Orde, 657
 Hastings *v.* Astley, 686
 — Marq. *v.* Beavan, 524
 — *v.* Whitley, 87
 Hastings, *Ly.*, Case, 883
 Haswell *v.* Haswell, 854, 890
 Hatch *v.* Hatch, 305, 306, 310
 — *v.* Skelton, 682, 1417
 Hatcher *v.* Curtis, 883
 Hatfield *v.* Minet, 284
 — *v.* Pryme, 117
 Hatton, Goods of, 1273
 — *v.* Finch, 18
 — *v.* Haywood, 520, 738
 — *v.* May, 17

- Hatton v. Royle, 798
 Haughton v. Harrison, 1351, 1379, 1380
 — v. Haughton, 1239
 Hauxwell, *Ex parte*, 712
 Havelock v. Havelock, 651
 Haven, &c., Co., *Re*, 469
 Havens v. Middleton, 547, 1137
 Hawes v. Draeger, 1388
 — v. Hawes, 1333
 — v. Smith, 258
 Hawken v. Bourne, 798
 Hawker, *Ex parte*, 293, 979
 Hawkes v. Baldwin, 1203
 — v. Hubback, 398
 Hawkesworth v. Chaffey, 1055
 Hawkins, *Ex parte*, 482
 — *Re*, 55, 107
 — v. Allen, 59
 — v. Day, 261
 — v. Gardiner, 962
 — v. Gathercole, 730, 751, 1157
 — v. Hawkins, 187, 659, 1361
 — v. Holmes, 1057
 — v. Kemp, 886, 906
 — v. Luscombe, 979
 — v. Maltby, 439, 442
 — v. Parkins, 798
 — v. Perry, 780
 Hawkins' Trust, *Re*, 1344
 Hawksbee v. Hawksbee, 532, 577
 Hawksworth v. Hawksworth, 316
 Hawthorn v. Shedden, 37, 900, 901
 Hawtry v. Butlin, 715
 Hay, *Ex parte*, 830
 — v. Coventry, 1400
 — v. Palmer, 23, 653
 — v. Watkins, 918
 Hay's Case, 425
 Haycock's Policy, *Re*, 83, 1018
 Hayden, *Ex parte*, 828
 — v. Kirkpatrick, 742
 Haydon v. Rose, 1230
 — v. Williams, 606
 — v. Wood, 879
 Hayes, *Re*, 113, 181
 — v. Garvey, 935
 — v. Hayes, 838, 1330, 1338
 Hayes' Trusts, *Re*, 1222
 Hayford v. Criddle, 1062, 1064, 1155
 Haymes v. Cooper, 727
 Haynes v. Forshaw, 276, 697
 — v. Haynes, 15, 107, 1346
 — v. Mico, 933
 Hays, *Ex parte*, 654
 Hayter v. Trego, 45
 — v. Tucker, 52, 53
 Hayton, *Re*, 1398
 Haytor Granite Co., 491
 Hayward, *Re*, 1210
 — v. James, 1230
 — v. Pile, 123, 236
 Haywood v. Brunswick B. Soc., 555, 1166
 — v. Cope, 91, 1065, 1131
 — v. Silber, 552
 Hazle's Settled Estates, *In re*, 955
 Head v. Egerton, 769
 — v. Godlee, 62, 66
 — v. Godlee, Reynolds v. Godlee, 118, 623
 Head's Case; White's Case, 439
 Heald v. Hay, 729
 Heams v. Bance, 771, 772
 Heap v. Tonge, 63, 620
 Heaphy v. Hill, 102, 1130
 Heard v. Pilley, 970, 1057
 — v. Stamford, 336, 344, 349
 Hearle v. Greenbank, 338, 886
 Heartley v. Nicholson, 303
 Heasman v. Pearce, 26, 833, 1225, 1356, 1357
 Heath v. Chapman, 41
 — v. Crealock, 1181, 1184
 — v. Dendy, 1341
 — v. Fisher, 813
 — v. Lewis, 348
 — v. Percival, 819
 Heath's Settlement, 1223, 1232, 1395
 Heathcote, *Ex parte*, 690, 691
 Heathcote, Goods of, 1269
 — v. Hulme, 272
 Heathcote's Trusts, *Re*, 1209, 1211
 Heathe v. Heathe, 1378
 Heather v. O'Neill, 365
 Heatley v. Thomas, 393, 848
 Hebb, *Ex parte*, 421
 Hebbert v. Thomas, 543
 Hedges v. Blick, 16
 — v. Harpur, 16
 — v. Hedges, 136, 1417
 — v. Met. Ry. Co., 1044
 Hedley v. Bainbridge, 796
 Heffer v. Martyn, 93
 Heighington v. Grant, 277, 750, 987
 Helbert v. Banner, 492
 Helbert's Case, 473
 Hele v. Bexley, Ltd., 746
 — v. Bond, 883
 Hellawell v. Eastwood, 255
 Hellier v. Hellier, 1279
 Hellman's Will, *Re*, 1343
 Helps v. Winterbottom, 605
 Hemming v. Griffith, &c., 647
 — v. Maddick, 433
 — v. Spiers, 1116
 Hemmings v. Munkley, 1236, 1237
 Henchman v. Att.-Gen., 188
 Henderson, *Re*, 1211, 1406
 — v. Austr., &c., Co., 456
 — v. Cross, 1240
 — v. Eason, 505
 — v. Lacon, 428, 429, 453, 476
 — v. Maxwell, 127, 129
 — v. Sanderson, 437
 — v. Squire, 566
 Hendricks v. Montagu, 420
 Hennessey v. Bray, 961, 975, 1002, 1370, 1372
 Hennessey, *Ex parte*, 725
 Hennessey's Executors' Case, 434
 Henning v. Burnett, 156
 Henry v. Armstrong, 309, 311
 — v. Gt. N. R. Co., 467

- Henry v. Smith, 601
 Henshall v. Fereday, 311
 Henshaw, *Re*, 1407
 Hensler, *Re*, 1296
 Hensman v. Fryer, 37, 40, 1333, 1359
 Henstead's Case, 536
 Henty v. Wrey, 863, 921
 Henvell v. Whitaker, 33, 879
 Hephinstall v. Gott, 1351
 Hepworth v. Hepworth, 974, 975
 — v. Heslop, 275, 780
 — v. Hill, 1417
 — v. Taylor, 1317
 Herbert v. Salisbury, &c., Co., 1082
 — v. Webster, 859
 Herbert's Case, 261, 325
 — Trusts, *Re*, 1386
 Hercules Ins. Co., *Re*, 498, 722
 Hercy v. Birch, 794
 Hereford, Bp. of v. Adams, 43
 — v. Griffin, 129
 — v. Ravenhill, 111, 118
 — &c., Co., *Re*, 412, 413, 471
 Heritage v. Paine, 482
 Heritage's Case, 441, 476
 Herman v. Hodges, 690
 Hernando v. Sawtell, 902
 Herne Bay, &c., Co., *Re*, 455
 Heron v. Stokes, 907
 Herrick v. Franklin, 218, 1393
 Herries' Peerage, 195
 Herring v. Barrow, 846
 — v. Brown, 887
 — v. Clarke, 1021
 — v. Cloberry, 1156
 Hertford, Marq. of v. Lowther, *Ld.*, 1323, 1324, 1340
 Hervey v. Audland, 301
 — v. Hervey, 865, 893
 — v. M'Laughlin, 1211
 — v. Smith, 139, 142, 1151
 Hervey Bathurst v. Stanley, Craven v. Stanley, 861, 1028
 Hery v. Union Bank, 145
 Heseltine v. Heseltine, 1339
 Hesse v. Stevenson, 1152
 Hetherington v. Groome, 713
 — v. Longrigg, 1363
 — v. Oakman, 1317
 Hethrington v. Graham, 370
 Heveningham v. Heveningham, 37, 648, 741
 Hewer, *Re*, 716, 720
 Hewett v. Foster, 268
 — v. Snare, 1341, 1416
 Hewett's Case; Brett's Case, 425
 Hewison v. Negus, 298
 Hewitt, *Re*, 784
 — v. Dacre, *Ld.*, 856, 917, 918
 — v. Haye, 137
 — v. Loosemore, 765, 1155, 1156
 — v. Morris, 119
 — v. Wright, 106, 118
 Hewlins v. Shippam, 141
 Hey's Trusts, *Re*, 784
 Heygate v. Annesley, 351
 Heyhoe v. Burge, 791
 Heyman v. Dubois, 769
 Heymann v. Europ., &c., Co., 411 429
 Heysham v. Heysham, 320
 Heywood v. Heywood, 5, 657
 — v. Mallalieu, 1061
 Heyworth v. Knight, 92, 1055
 Hibbert v. Cooke, 224
 — v. Hibbert, 1408
 Hibblewhite v. M'Morine, 442
 Hichens v. Congreve, 411
 Hickley v. Hickley, 1041
 Hickling v. Boyer, 260, 1334, 1417
 Hickman v. Machin, 748
 — v. Upsall, 19, 601, 1227
 Hicks v. Ross, 16
 — v. Sallitt, 577, 588
 Hickson v. Darlow, 757
 Hiern v. Mills, 768, 1154
 Higg's Case, 463
 Higgins, *Re*, 265
 — *Re*, and Hitchman, 1050, 1063, 1140, *Add.*
 — v. Samels, 95, 96
 Higginson v. Barneby, 619
 — v. Clowes, 97, 1086, 1087
 — v. Kelley, 674
 Higham v. Rabett, 155
 Higinbotham v. Hawkins, 1252
 — v. Holme, 531, 636, 1241
 Hilbers v. Parkinson, 666
 Hiles v. Moore, 751
 Hill, *Re*, 665
 — *Ex parte*, 294
 — v. Adams, 370
 — v. Barclay, 528, 549, 552
 — v. Buckley, 1067, 1127
 — v. Chapman, 1378
 — v. Cock, 1358
 — v. Crook, 1386, 1387
 — v. Curtis, 250
 — v. East, &c., Co., 569
 — v. Edmonds, 377
 — v. Edward, 547
 — v. Gomme, 260
 — v. Hill, 316, 619, 878, 1330, 1331, 1332, 1349, 1350
 — v. Jones, 1337
 — v. Lane, 429
 — v. Pritchard, 852, 853
 — v. Rattey, 16, 17
 — v. Rowland, 558
 — v. Trenery, 671
 — v. Walker, 260, 263, 1279
 — v. Wilson, 92, 304
 Hill's Case, 476
 — v. Jones' Case, 699
 — Trusts, *Re*, 51, 1212
 Hillary, *Re*, 324, 1343
 — v. Waller, 596, 779, 1113, 1137
 Hilliard v. Fulford, 277, 1347
 Hillman, *Ex parte*, 293
 Hills v. Croll, 100
 — v. Hills, 138
 — v. Parker, 805

- Hilton v. Giraud, 52
 — v. Granville, E., 169
 — v. Hilton, 285, 1345
 — v. Woods, 90
 Hinchcliffe v. Hinchcliffe, 928, 929, 1337
 — v. Kinnoul, Ld., 142
 Hinchinbroke v. Seymour, 863, 919
 Hincley v. Simmons, 1210
 Hind v. Poole, 697, 755, 850, 1138
 — v. Selby, 121, 1231
 Hinde v. Blake, 729
 Hinder v. Streeton, 1141
 Hindle v. Taylor, 865
 Hindley v. Emery, 556
 — v. Westmeath, Ms. of, 401
 Hindmarsh, Goods of, 1235
 Hindmarsh, *Re*, 809
 — v. Southgate, 1007
 Hindostan, Bank of v. Alison, 464
 Hinds, *Ex parte*, 805
 Hindson v. Wetherill, 307
 Hinsley v. Ickeringill, 910
 Hinton, *Ex parte*, 635
 — v. Hinton, 369, 1035
 — v. Pinke, 1329
 — v. Sparkes, 72, 1088
 Hinves v. Hinves, 121
 Hipgrave v. Case, 104
 Hipkins v. Amery, 772, 1150
 Hipplesley v. Homer, 1302
 Hipwell v. Knight, 1120
 Hirst v. Tolson, 85
 Hitchcock v. Clendinen, 380
 — v. Coker, 87
 — v. Giddings, 1177
 Hitchins v. Lander, 90
 Hixon v. Oliver, 845
 Hoare, *Ex parte*, 1144
 — *Re*, 327
 — v. Hornby, 662
 — v. Met. Board of Works, 140
 — v. Oriental B. Corp., 827
 — v. Osborne, 43, 44, 46, 55, 909, 1407
 — v. Parker, 246
 Hoare's Case, 433, 452
 Hoath v. Hoath, 1213
 Hobbs v. Knight, 1267, 1281
 — v. Mid. R. Co., 1049
 Hobby v. Collins, 354
 Hobday v. Peters, 37, 671, 847, 848, 1040
 Hobson v. Bell, 1036, 1083, 1100, 1122
 — v. Blackburn, 57, 1297, 1361
 — v. Ferraby, 326, 388, 632
 — v. Middleton, 1181
 — v. Neale, 109
 — v. Sherwood, 508
 — v. Trevor, 729
 Hockham v. Pottage, 821
 Hockley v. Bantock, 691
 — v. Mawbey, 1394
 Hoddel v. Pugh, 106, 1041
 Hodder v. Ruffin, 1091
 Hodge v. Att.-Gen., 188
 — v. Foot, 1222
 Hodge's Legacy, *In re*, 1203
 Hodge's Settlement, 324
 Hodgens v. Hodgens, 325, 327, 334, 652
 Hodges v. Croydon Can. Co., 780
 — v. Grant, 502, 1333
 — v. Green, 1278
 — v. Hodges, 399
 — v. Litchfield, Ld., 1123, 1124
 — v. Peacock, 1336
 Hodgkinson v. Cooper, 1104
 — v. Crowe, 530, 531
 — v. Ennor, 163, 164
 — v. Kelly, 440
 — v. Nat. Live Stock Ins. Co., 462
 Hodgson, *Re*, 506, 795
 — v. Ball, 833
 — v. Beetive, E. of, 1029, 1359
 — v. Bibby, 1007
 — v. Clarke, 1304, 1312
 — v. Dean, 1152
 — v. Fox, 263
 — v. Halford, 1245, 1246
 — v. Hooper, 580
 — v. Hutcheson, 614
 — v. Jex, 1322, 1324
 — v. Johnson, 1053
 — v. Rawson, 1196
 — v. Williamson, 396
 Hodgkinson v. Quinn, 267, 880
 Hodle v. Healey, 595
 Hodsden v. Lloyd, 892, 1277
 Hodsdon v. Dancer, 902
 Hodson, *Re*, 1013
 — v. Ball, 1321
 — v. Tea Co., 455
 Hogarth v. Phillips, 614
 Hogben v. Neale, 1212
 Hogg v. Brooks, 566
 — v. Jones, 244, 1327
 — v. Maxwell, Maxwell v. Hogg, 130
 — v. Scott, 133
 — v. Skeen, 796
 Hoggart v. Scott, 92, 1127, 1133
 Houghton v. Houghton, 65, 306, 308, 309
 Holcombe v. Hewson, 551
 Holden, *Ex parte*, 518
 — *Re*, 112
 — *Re*, v. L. & N. W. R. Co., 1046
 — v. Ramsbottom, 1327
 — v. Webber, 1039
 Holder v. Durbin, 1014
 Holderness v. Shackels, 818
 Holdfast v. Clapham, 702
 Holdich v. Holdich, 371
 Holdsworth v. M'Crea, 135
 — v. Davenport, 52
 — v. Goose, 852, 854
 Hole v. Barlow, 173
 — v. Bradbury, 83, 128
 — v. Escott, 853
 Holford v. Hankinson, 152
 — v. Stains, 8
 — v. Wood, 1416
 Holgate v. Jennings, 121
 Holker v. Poritt, 163, 166
 Holland, *Re*, 782

- Holland v. Allsopp, 1222
 — v. Clark, 265, 598
 — v. Cole, 552
 — v. Eyre, 1055
 — v. Holland, 512, 1003
 — v. Wood, 1379
 — v. Worley, 154, 160
 Holliday v. Overton, 199, 673, 963, 1026
 Hollier v. Burne, 122
 Hollingsworth v. Grasset, 1344, 1345
 Hollinrake v. Lister, 1204
 Hollins v. Verney, 152
 Holloway v. Clarkson, 218, 846, 1344, 1406
 — v. Holloway, 1405
 — v. Radcliffe, 112, 113, 1404, 1407
 Holman v. Johnson, 86
 Holme v. Hammond, 788
 Holmes, A. D., *Re*, 728
 — v. Baddeley, 1157
 — v. Bogg, 538, 788, 1038
 — v. Coghill, 902, 922, 1286
 — v. Cradock, 1206
 — v. Custance, 1304
 — v. Goring, 142, 1240
 — v. Holmes, 927, 931
 — v. Kerrison, 605
 — v. Mackrell, 606
 — v. Meynell, 1410
 — v. Penney, 291, 299, 636, 1243
 — v. Powell, 1065, 1151, 1154
 — v. Prescott, 1201, 1216, 1218, 1220, 1423
 — v. Turner, 740, 760
 Holmesdale, Visc. v. West, 624, 643
 Holroyd v. Griffiths, 818
 — v. Marshall, 712, 715
 — v. Wyatt, 1082
 Holt v. Dewell, 726
 — v. Everall, 358
 — v. Frederick, 285
 — v. Holt, 100, 865
 — v. Jesse, 66
 — v. Sindrey, 1386
 Holtzapfell v. Baker, 546
 Holyland v. Lewin, 910
 Homan, *Ex parte*, 745
 — v. Andrews, 599
 Home Assur. Assoc., *Re*, 471
 — Investment Soc., *Re*, 486
 Home v. Pillans, 1211, 1217
 — v. Pringle, 268
 Homer v. Homer, 1308
 Homfray v. Fothergill, 822
 Hone's Trusts, *Re*, 1295
 Honey, *Ex parte*, 828
 Honeyman v. Marryatt, 1055
 Honeywood v. Foster, 233
 Honner v. Morton, 348, 351, 353
 Honor v. Honor, 617
 Honeywood v. Foster, 178, 183
 — v. Honeywood, 632, 634, 1248
 Hood v. Barrington, Ltd., 1053, 1087, 1110
 — v. Clapham, 121
- Hood v. Easton, 748, 749
 — v. Franklin, 665
 — v. Hood, 1089, 1099, 1418
 — v. Oglander, 964, 1130
 — v. Phillips, 683
 Hook v. Hook, 205
 Hoole v. Gt. W. R. Co., 464
 — v. Smith, 756
 Hooley v. Hatton, 1335, 1336
 Hooper, *Ex parte*, 613, 693, 771, 1401
 — *Re*, 278, 665
 — v. Bourne, 1048, 1049
 — v. Smart, 269
 — v. Smart, Bailey v. Piper, 1128
 — v. Smart, Piper v. Piper, Bailey v. Piper, 266
 Hopcraft v. Hickman, 1060
 Hope v. Carnegie, 960
 — v. Clifden, Ltd., 649, 1231
 — v. Hope, 75, 323, 402, 666, 677, 897, 902
 — v. International Fin. Soc., 445, 462
 — v. Liddell, 984
 Hopewell v. Ackland, 1320
 — v. Barnes, 727
 Hopkins v. Abbott, 1326
 — v. Grazebrook, 1124
 — v. Hopkins, 110, 1025, 1424, 1428, 1429
 — v. Myall, 896
 — v. Phillips, 54
 — v. Worcester, &c., Proprietors, 752
 Hopkins' Trusts, *Re*, 1224, 1326, 1395, 1398
 Hopkinson v. Burghley, Ltd., 130
 — v. Lovering, 570
 — v. Rolt, 771
 Hopper, *Re*, 1060
 — v. Conyers, 691
 Hoppers v. Conyers, 1004
 Hopton v. Dryden, 264
 Hopwood v. Ernest, 765
 — v. Hopwood, 925, 927
 Hora v. Hora, 965
 Horbury, &c., Co., *Re*, 447
 Horde v. Suffolk, E., 45
 Hore v. Becher, 354
 — v. Woulfe, 351
 Horlock v. Horlock, 397
 — v. Priestly, 764
 — v. Smith, 749, 750
 Horn v. Coleman, 502, 1405
 — v. Horn, 1162
 Hornby v. Matcham, 731
 Horncastle v. Charlesworth, 509
 Horne v. Barton, 879, 1412
 — and Hellard, *Re*, 454
 — v. Hughes, 717
 — v. Wingfield, 1121
 Horner v. Swann, 854
 — v. Wheelwright, 991
 Horner's Estate, *Re*, 1222
 Hornsby v. Lee, 353
 Horridge v. Ferguson, 1317

- Horrocks v. Rigby, 1128
 Horsenan v. Abbey, 892, 1373, 1374
 Horsepool v. Watson, 1395
 Horsey's Claim, 491
 Horsfall v. Thomas, 94
 Horsford, Goods of, 1282, 1284
 Hort's Case, Grain's Case, 464
 Horton v. Brocklehurst, 268, 989
 — v. Hall, 11
 — v. Smith, 681, 683
 Horwood v. Griffith, 1340
 Hosken v. Sincock, 780
 Hoskin v. Sincock, 739
 Hosking v. Nicholls, 272, 1330
 Hoskins v. Matthews, 1260
 Hotchkin v. Humfrey, 1232
 Hotham v. E. I. Co., 72
 — v. Sutton, 1324
 Hotham's Trusts, *Ld.*, *Re*, 226
 Hotley v. Scot, 872
 Hotten v. Arthur, 130, 132
 Houghton Estate, *In re*, 951, 953
 — c. Franklin, 21
 — v. Houghton, 1051
 — v. Koenig, 982
 — v. Lees, 90
 Houldsworth v. Evans, 430, 444, 460, 465
 Household Fire Co. v. Grant, 421, 1056
 Houston v. Hughes, 980
 Houstoun v. Houstoun, 911
 Hovenden v. Annesley, *Ld.*, 586, 606
 How v. Whitfield, 850
 Howard v. Chaffer, 1162
 — v. Collins, 1224
 — v. Conway, 1307
 — v. Digby, 639
 — c. Ducane, 878, 882, 1042
 — v. England, Bank of, 358
 — c. Harris, 686, 739
 — v. Hooker, 333
 — v. Hopkins, 616
 — v. Hopkyns, 1050
 — v. Howard, 1210
 — v. Kay, 124
 — v. Maitland, 1180
 — v. Rhodes, 1009
 — v. Robinson, 703
 — v. Shrewsbury, *E.*, 317
 — v. Woodward, 71
 Howard's Case, 422
 Howarth v. Mills, 1386
 — v. Rothwell, 19
 — v. Smith, 1110
 Howe v. Dartmouth, *Ld.*, 120, 121, 666,
 996, 1000, 1148, 1358
 — v. Hunt, 104
 — v. Smith, 1085
 Howel v. Howel, 617
 Howell v. George, 1129, 1130
 — v. Hanforth, 23
 — v. Kightley, 1091
 — v. Richards, 1166
 Howells v. Jenkins, 178
 Howes v. Herring, 1217, 1221
 Howgrave v. Cartier, 1231
- Howkin v. Jackson, 280
 Howman v. Corie, 349
 — v. Spencer, 398
 Howorth v. Dewell, 845
 Howse v. Chapman, 43, 58, 59
 Howston v. Ives, 1391
 Hoy v. Smythes, 1083, 1084
 Hoyes v. Kindersley, 391, 974
 Hubback, *Re*, 264
 Hubbard, Goods of, 1268
 — v. Alexander, 1336
 — v. Hubbard, 510
 — c. Lees, 887, 1115
 — v. Young, 121
 Hubbersty v. Manchester Ry. Co., 442
 Huber v. Steiner, 75
 Hubert v. Parsons, 1189, 1193
 — v. Treherne, 1057
 Huckvale, Goods of, 1273
 Huddleston v. Briscoe, 612, 1055
 — v. Whelpdale, 237, 238
 Hudson, *Re*, 1412
 — v. Buck, 1071
 — v. Carmichael, 366
 — v. Cook, 1098
 — v. Hudson, 257
 — v. Malcolm, 780
 — v. Temple, 1119
 Hudson's Case, 474
 Hue, *Re*, 1018
 Huffam v. Hubbard, 1231
 Hugall v. M'Lean, 553
 Hughes, *Ex parte*, 1041
 — *Re*, 727, 782
 — v. Bennett, 1166
 — v. Biddulph, 1157
 — v. Coles, 600
 — v. Cook, 739
 — v. Ellis, 1292
 — v. Empson, 270
 — v. Hosking, 1286
 — v. Howard, 703, 704
 — v. Hughes, 654, 1350, 1380
 — v. Jones, 666, 1062, 1127, 1154
 — v. Kearney, 1172
 — v. Kelley, 601
 — c. Lumley, 522
 — v. Met. Ry. Co., 549
 — v. Morris, 1059
 — v. Parker, 1061
 — v. Pritchard, 1320
 — v. Robotham, 680
 — v. Sayer, 1384
 — v. Searle, 671
 — v. Wells, 188, 392, 846, 887,
 1092
 — c. Williams, 532, 602, 748, 1315
 — v. Young, 664
 Hughes' Trusts, *Re*, 364, 665
 Hughes-Hallett v. Indian Mammoth Gold
 Mines Co., 986
 Hugo, Goods of, 1267
 Huguenin v. Baseley, 306, 307, 308, 309
 Hull v. Christian, 1345
 — &c., Co. v. Wellesley, 435

- Hull's Estate, *Re*, 1378
 Hulme v. Chitty, 403
 — v. Tenant, 393, 848
 Humberston v. Humberston, 619, 917
 Humberstone v. Stanton, 1207, 1292, 1294
 Humble v. Bowman, 856
 — v. Hunter, 1121
 — v. Shore, 1363
 Hume v. Bentley, 1071
 — v. Edwards, 1341
 — v. Pocock, 1070
 — v. Richardson, 997
 — v. Rundell, 650, 1271
 Humfrey v. Dale, 81
 — v. Humfrey, 1357
 Humphrey v. Arabin, 721
 — v. Bullen, 349
 — v. Humphrey, 389
 — v. Richards, 391
 — v. Tayleur, 916, 1293
 Humphreys v. Green, 1059
 — v. Harrison, 746, 1248
 — v. Humphreys, 1330, 1339, 1365
 Humphries, *Re*, 1387
 — v. Brogden, 166, 167, 168, 198
 — v. Cousius, 172
 Humphry v. Oliver, 921
 Hungate v. Gascoyne, 1116
 Hungerford v. Clay, 748
 — v. Earle, 297
 Hunloke v. Gell, 896
 Hunsden v. Cheyney, 333
 Hunt, *Ex parte*, 692
 — Goods of, 1273
 — v. Baker, 220
 — v. Bateman, 587
 — v. Danvers, 1180
 — v. Elmes, 765
 — v. Hort, 1303
 — v. Hunt, 402, 404, 1273
 — v. Matthews, 334
 — v. Peake, 167, 168
 — v. Wimbeldon Board, 78
 Hunt's Case, 486
 Hunter v. Atkins, 306, 309
 — v. Baxter, 261
 — v. Bullock, 44, 56
 — v. Cheshire, 1354
 — v. Daniel, 89
 — v. Gibbons, 606
 — v. Nockolds, 601, 1139
 — v. Young, 260
 — v. Walters, 767, 768, 769
 Hunter's Trusts, *Re*, 1381
 Huntley v. Griffiths, 349
 — v. Russell, 255
 Hurd v. Fletcher, 1180
 Hurdman v. N. E. R. Co, 172
 Hurry v. Hurry, 512, 1357
 — v. Morgan, 1223
 Hurst v. Beach, 137, 779, 937, 1336, 1337
 — v. Hurst, 762, 851, 1241, 1242
 Hurstone v. Ashton, 901
 Hussey v. Berkeley, 1377
 — v. Horne-Payne, 1055, 1056
 Hutcheson v. Hammond, 116, 117, 1238
 — v. Jones, 1380, 1381
 Hutchin v. Mannington, 1206, 1228, 1230
 Hutchings v. Smith, 352
 Hutchins v. Lee, 1026
 — v. Osborne, 900
 — and Romer, *Ex parte*, 126, 128, 129
 Hutchinson, *Re*, 1226
 — v. Barrow, 1290
 — v. Copestake, 158
 — and Tenant, *In re*, 967
 Hutchinson's Trusts, *Re*, 1383
 Hutley v. Hutley, 89
 Hutton v. Mansell, 1092
 — v. Rossiter, 265, 332, 1343
 — v. Scarborough, &c., Co., 463, 467
 — v. Sealy, 759
 — v. Simpson, 886, 1197
 — v. Upfill, 422
 — v. West Cork R. Co., 463
 Huxtable, *Ex parte*, *In re* Conibeer, 293
 Huxtep v. Brooman, 1320
 Hyam's Case, 434, 443
 Hyatt v. Griffiths, 567
 Hyatt's Trust, *In re*, 1020
 Hyde v. Dallaway, 594
 — v. Graham, 532
 — v. Hyde, 1264
 — v. Johnson, 594
 — v. Warden, 530, 552, 559, 1152, 1158
 Hylton v. Hylton, 306
 Hynes v. Redington, 1189
 Hynshaw v. Corporation of Morpeth, 44
 IBBETSON, *Ex parte*, 721
 — v. Beckwith, 1368
 — v. Grote, 666
 — v. Ibbetson, 244
 Ibbitson's Estate, *Re*, 111
 Ibbottson v. Elam, 23, 1327
 — v. Rhodes, 769
 Icely v. Grew, 1122
 Iggulden v. May, 234, 553
 Ilchester, Earl of, *Ex parte*, 317, 1278
 — E. v. Carnarvon, E., 1417
 Illingworth v. Cooke, 1303
 Ilott v. Genge, 1275
 Imbert, *Ex parte*, 694
 Imperial, &c., Co., 487
 Imperial Bank of China, &c. v. Hindustan, Bank of, 465
 Imperial Gas Co. v. Broadbent, 175
 — v. London Gas Co., 606
 Imperial Hydroptic Hotel Co. v. Hampson, 419, 449
 Imperial Mer. Cr. Assurance, *Re*, 492
 — v. Coleman, 411
 Inchbald v. Robinson, Same v. Barrington, 172
 Inchiquin, Ld. v. French, 1415
 Incedon v. Northcote, 375, 654
 Incorporated Soc. v. Richards, 583

Ind's Case, 436
 India, Com. Bank of, *Re*, 499
 Indian Zoedone Co., *Re*, 447, 488
 Ingham v. Bickerdike, 320
 Ingilby v. Ancotts, 202
 Ingle v. Partridge, 984, 999
 — v. Richards, 106, 265, 1010
 Ingle's Trusts, *Re*, 1311, 1333
 Inglesfield v. Coghlan, 388, 389, 1280
 Inglesant v. Inglesant, 1274
 Ingoldby v. Ingoldby, 1269
 Ingram v. Ingram, 850, 915
 — v. Morecraft, 147
 — v. Soultan, 1209
 — v. Stiff, 130—131
 Inland Revenue v. Harrison, 1149
 Inman v. Inman, 696
 — v. Wearing, 739, 759
 Innes v. Johnson, 1331, 1339
 — v. Mitchell, 17
 — v. Sayer, 895
 Inns of Court Hotel, 453
 Insole, *Re*, 380, 408
 Internat. Pulp & Paper Co., *Re*, 450, 451, 470
 Inwood v. Twyne, 114, 317
 Ion v. Ashton, 52, 1416
 Irby v. Irby, 772
 Iredell v. Iredell, 1380
 Ireland, Land, &c., Co. of v. Fermoy, Ltd., 453, 457
 Ireland v. Trembait, 381
 — v. Trembath, 1223
 Ireson v. Denn, 740
 Irnham v. Child, 83
 Irons v. Smallpiece, 70, 301
 Irvin v. Ironmonger, 22, 36, 37
 Irvine v. Sullivan, 965, 1301, 1302
 — v. Union Bank of Australia, 460
 Irving, *Re*, 694
 — v. Veitch, 607
 Irwin v. Farrer, 887
 Isaac, *Re*, 222
 — v. Defries, 43
 — v. Hughes, 854
 — v. Wall, 236, 238
 Isaacson v. Harwood, 1003
 — v. Harwood, Brook v. Harwood, 687
 — v. Webster, 1213
 Isenberg v. East India, &c., Co., 160
 Isherwood, *Ex parte*, 568
 — v. Oldknow, 869
 Isle of Wight Ferry Co., 470, 518, 519
 Ithell v. Beane, 620, 656, 895
 Ive v. King, 506, 1212, 1355
 — v. Sams, 565
 Ive's Case, 565
 Ives v. Dodgson, 1336
 Iveson v. Moore, 155
 Ivimey v. Stocker, 147, 166
 Ixy v. Gilbert, 649
 Izard, *Ex parte*, 568, 719
 Izod v. Izod, 46

J. v. S., 827

Jablochhoff Electric Light and Power Co., *Re*, 471
 Jack v. Armstrong, 776
 Jackson, *Ex parte*, 735, 827
 — *Re*, 795
 — *Re*; Featherstone's Trusts, *Re*, 1293
 — and Oakshott, *In re*, 1084
 — v. Butler, 693
 — v. Calvert, 218, 242, 1393
 — v. Cator, 557
 — v. Dover, 1232
 — v. Hamilton, 1296
 — v. Hobhouse, 396, 399
 — v. Innes, 365, 736
 — v. Jackson, 805, 919, 1054, 1060, 1192
 — v. Lever, 1096
 — v. Majoribanks, 1190
 — v. Milfield, 1019
 — v. Neal, 537
 — v. Newcastle, D. of, 159, 160
 — v. Noble, 1366, 1429
 — v. Parker, 736
 — v. Petrie, 1136
 — v. Rowe, 1186
 — v. Sedgwick, 803
 — v. Turquand, 422, 459
 — v. Welsh, 239
 — v. Whitehead, 1061
 Jackson's Will, *Re*, 664, 856
 Jacob, *Re*, 1193
 Jacobs v. Amyatt, 378
 — v. Seward, 505
 — v. Richards, 696
 Jacomb v. Harwood, 82, 256
 Jacques v. Chambers, 1297, 1333, 1334
 Jacquet v. Jacquet, 587, 588
 Jacobs v. Ryland, 1006
 Jagger v. Jagger, 6
 Jakeman's Trusts, *Re*, 214, 340, 397, 853
 James, *Ex parte*, 276, 483, 1041
 — Goods of, 1285
 — v. Catherwood, 75
 — v. Cohen, 1285
 — v. Couchman, 309
 — v. Dean, 535
 — v. Durant, 663
 — v. Eve, 449
 — v. Greaves, 307
 — v. Holmes, 307
 — v. Lichfield, 1154
 — v. May, 434, 482, 992
 — v. Rumsey, 781
 — v. Rice, 693
 — v. Richardson, 1378
 — v. Salter, 575, 600
 — v. Shrimpton, 1282
 — v. Smith, 1376
 — v. Wynford, Ltd., 1189, 1198
 Jameson v. Stein, 332, 1159
 Jaques v. Millar, 1054
 Jarman v. Vye, 1207
 Jarratt v. Aldam, 310
 Jarrold v. Houlston, 131

- Jauncey v. Knowles, 803, 814
 Jay, *Ex parte*, 531, 719
 — v. Richardson, 555, 557, 1166
 Jayne v. Hughes, 583
 Jeaffreson, *Re*, 918
 Jeaffreson's Trusts, 1374
 Jeakes v. White, 1137
 Jeans v. Cooke, 973, 975
 Jebb v. Tugwell, 122, 858
 Jee v. Audley, 832, 833, 841
 Jefferies v. Reynous, 1230
 — v. Michell, 934
 Jeffery v. De Vike, 1390
 Jeffery's Trusts, *Re*, 1342
 Jefferys v. Smith, 813
 — v. Dickson, 738, 751
 — v. Jefferys, 71, 297, 300, 313
 Jeffrey v. Ncale, 546
 — v. De Vitre, 966
 Jeffreys v. Boosey, 125
 — v. Conner, 122
 — v. Connor, 1384
 — v. Fairs, 98, 1131
 — v. Jeffreys, 1331
 — v. Marshall, 877
 Jeffrey's Trusts, *Re*, 923
 Jeffries v. Alexander, 52
 Jeffries v. Agra, &c., Bank, 803
 Jeffrys v. Boosey, 129
 — v. Machu, 240
 Jeffs v. Wood, 1345
 Jegon v. Vivian, 170, 873
 Jellicoe v. Gardiner, 1029
 Jenkin v. Row, 760
 Jenkins, *Re*, 349
 — v. Blizard, 812
 — v. Gower, 1404
 — v. Green, 530, 543
 — v. Harvey, 148
 — v. Hiles, 1132
 — v. Hughes, 658, 1390
 — v. Hutchinson, 81
 — v. Jones, 90, 755, 1180, 1339
 — v. Keymis, 297
 — v. Keymiss or Kemish, 655
 — v. Morris, 94
 — v. Quinchant, 675, 907
 Jenkinson, *Re*, 718, 1146
 — v. Harcourt, 1417
 — v. Pepys, 1087
 Jenkyn v. Vaughan, 292
 Jenkyns v. Bushby, 1157
 — v. Gaisford, 1273
 Jenner v. Finch, 1276, 1279
 — v. Jenner, 65
 — v. Morgan, 24
 — v. Morris, 225, 336, 703, 869
 — v. Turner, 1239
 Jenner's Case, 424
 Jenneys v. Andrews, 847
 Jennings v. Baddeley, 813
 — v. Broughton, 96, 102, 1136
 — v. Hammond, 415, 795
 — v. Jordan, 740
 — v. Looks, 1190
 Jennings v. Moore, 895
 — v. Rigby, 38
 — v. Ward, 689
 — Moore and Blincombe, 1181
 Jepson v. Key, 1289, 1365
 Jerdein v. Bright, 962
 Jermyn v. Preston, 107
 Jermyn v. Fellows, 860
 Jerningham v. Herbert, 1258, 1297
 Jerrard v. Saunders, 1184
 Jersey, E. v. Briton, &c., Co., 1173
 Jervis v. Berridge, 1055
 — v. Lawrence, 52
 — v. Tomkinson, 544
 — v. Wolferstan, 1347
 Jervoise v. Jervoise, 375
 — v. Northumberland, D. of, 616,
 623, 1138
 — v. Silk, 651
 Jesson v. Jesson, 928, 929
 — v. Wright, 220, 221
 Jessop v. Blake, 408, 659, 891
 — v. Watson, 116, 117, 286
 Jeston v. Key, 613, 621, 622
 Jeudwine v. Alcock, 1132
 Jevers v. Jevers, 308
 Jew v. Wood, 546
 Jewis v. Lawrence, 1344
 Jewsbury v. Mummery, 272
 Jewson v. Moulson, 377
 Jeyes v. Savage, 1232
 Job v. Banister, 549, 554
 — v. Job, 272
 Jodrell v. Jodrell, 27, 400, 639, 655
 Joel v. Mills, 33, 994, 995, 1241, 1242
 Johns v. James, 994
 Johnson, *Ex parte*, 714, 718
 — *Re*, 275
 — *Re*; Golden v. Gillam, 299
 — v. Arnold, 111, 1321
 — v. Ball, 1268
 — v. Burgess, 521
 — v. Child, 40
 — v. Crook, 1229
 — v. Fesenmeyer, 995, 1040
 — v. Gallagher, 394, 848
 — v. Goslett, 413
 — v. Helleley, 821
 — v. Holdsworth, 521
 — v. Johnson, 120, 348, 351, 384,
 677, 1331, 1342
 — v. Kennett, 1162
 — v. Kershaw, 994
 — v. Lander, 408
 — v. Legard, 621, 656
 — v. Lyford, 1270, 1282
 — v. Lyttle's Iron Agency, 466
 — v. Newton, 270
 — v. Ogilvy, 87
 — v. Roberts, 1123
 — v. Shrews. & Bir. R. Co., 93, 101
 — v. Simcock, 1316
 — v. Smart, 537, 1064
 — v. Smith, 138
 — v. Telford, 182

- Johnson and Tustin, *In re*, 1078
 — *v.* Warwick, 252
 — *v.* Webster, 681, 682
 — *v.* Wyatt, 159, 175
 Johnson's Trusts, *Re*, 241
 Johnston *v.* Renton, 441
 — *v.* Rowlands, 964
 — *v.* Sumner, 69
 — *v.* Swann, 45
 — *v.* Usborne, 81
 Johnstone *v.* Baber, 509, 892, 1090
 — *v.* Beattie, 315
 — *v.* Cox, 726
 — *v.* Hall, 549
 — *v.* Hamilton, 280, 281
 — *v.* Harrowby, *Ld.*, 1336, 1337, 1388
 — *v.* Lumb, 391
 Johnstone's Settlement, *In re*, 912
 J. S. Discount Co. *v.* Brown, 460
 Jolliffe *v.* Baker, 1175, 1176
 Jolliffe *v.* Hector, 750
 Jolly *v.* Arbuthnot, 735
 — *v.* Hancock, 1113
 — *v.* Rees, 68
 Jones, *Ex parte*, 69
 — *Goods of*, 1275
 — *Re*, 259, 780, 945, 955
 — *v.* Badley, 57
 — *v.* Barkley, 73
 — *v.* Blake, 876
 — *v.* Boulter, 298
 — *v.* Bruce, 1415
 — *v.* Caless, 1363
 — *v.* Chappell, 173, 566
 — *v.* Clifford, 97
 — *v.* Colbeck, 1405
 — *v.* Collier, 371
 — *v.* Consolidated Invest. Assurance Co., 721
 — *v.* Creswicke, 761
 — *v.* Croucher, 296
 — *v.* Curry, 898
 — *v.* Davies, 338, 365, 680
 — *v.* Edney, 551, 1063, 1087
 — *v.* Evans, 264, 1128
 — *v.* Farrell, 694
 — *v.* Flint, 153, 1052
 — *v.* Foxall, 270
 — *v.* Frewin, 1355
 — *v.* Gibbon, 775
 — *v.* Gibbons, 723, 743
 — *v.* Greatwood, 965
 — *v.* Green, 1340
 — *v.* Gregory, 1271
 — *v.* Hall, 502, 1226
 — *v.* Hancock, 1297
 — *v.* Heavens, 87
 — *v.* Higgins, 395, 1007
 — *v.* How, 670
 — *v.* Jones, 236, 237, 238, 253, 374, 1230, 1233
 — *v.* Kearney, 1181
 — *v.* Keene, 1050
 — *v.* Loughton, 617
 Jones *v.* Lewis, 272, 988
 — *v.* Littledale, 81
 — *v.* Lloyd, 181
 — *v.* Lock, 304
 — *v.* Mackilwain, 1190, 1213
 — *v.* Maggs, 7, 8
 — *v.* Martin, 670
 — *v.* Matthie, *Matthie v. Edwards*, 755
 — *v.* Mitchell, 116
 — *v.* Morgan, 219
 — *v.* Newnan, 1303
 — *v.* North, 88
 — *v.* Noy, 789, 813
 — *v.* Ogle, 28
 — *v.* Powles, 1003
 — *v.* Price, 32, 1138
 — *v.* Pugh, 1156
 — *v.* Randall, 18
 — *v.* Ricketts, 339
 — *v.* Rimmer, 1063
 — *v.* Robinson, 509, 1319
 — *v.* Roe, 1425
 — *v.* Sefton, 1324
 — *v.* Selby, 136, 138
 — *v.* Smith, 740, 741, 772, 1143, 1150, 1152, 1153
 — *v.* Southall, 902, 1291, 1338
 — *v.* Stöhwasser, 276
 — *v.* Torin, 1408
 — *v.* Tripp, 692
 — *v.* Tucker, 899
 — *v.* Verney, 871, 872
 — *v.* Waite, 401
 — *v.* Welch, 814
 — *v.* Westcomb, 1208
 — *v.* Whittaker, 297
 — *v.* Williams, 32, 43, 692, 1150, 1153
 — *v.* Winwood, 853
 — *v.* Wyse, 1242
 Jones' Will, *Re*, 664
 Jones's Case, 477
 Jongsma *v.* Jongsma, 1318, 1322
 Joze *v.* Morshead, 509
 Jopp *v.* Wood, 1193, 1195, 1206, 1260
 Jordan *v.* Adams, 220, 221
 — *v.* Fortescue, 1361
 — *v.* Holkham, 1233
 — *v.* Lowe, 1393
 — *v.* Money, 95, 332
 Jordan, Elizabeth, *Re*, 253
 Jordan's Trusts, *Re*, 1355
 Jortin *v.* S. E. R. Co., 687
 Joseph *v.* Lyons, 716
 Joseph's Will, *Re*, 1018
 Joslin *v.* Hammond, 1212
 Joy *v.* Birch, 1042
 Joyce *v.* De Moleyns, 692, 693, 767, 1184
 Joynes *v.* Statham, 487
 Joys, *Goods of*, 1279
 Jubber *v.* Jubber, 1296
 Judkin's Trusts, *Re*, 1350, 1363
 Juler *v.* Juler, 281, 1407
 Jull *v.* Jacobs, 1189, 1197, 1265, 1319
 Jumpson *v.* Pitchers, 576, 1101, 1129

- Justice *v.* Wynne, 302
 Juxon *v.* Brian, 646
- KAMPF *v.* Jones, 1429
 Kane *v.* Kane, 662
 Karet *v.* Kasher Meat Assocn., 717
 Karuth's Case, 425
 Kavanagh *v.* Morland, 1392, 1393, 1394
 Kay, *Re*, 315 316
 — *v.* Johnson, 100, 324, 456
 — *v.* Oxley, 147, 157
 Kaye, *Re*, 961
 — *v.* Laxon, 1321
 Kearns *v.* Cordwainers' Co., 164
 Kearsley *v.* Phillips, 735
 — *v.* Woodcock, 636, 1243
 Keat *v.* Allen, 631
 Keate *v.* Phillips, 767
 Keates *v.* Burton, 879
 — *v.* Lyon, 1166, 1168, 1182, 1193
 Keats *v.* Hewer, 974
 Keay *v.* Boulton, 1356, 1374
 Kebble, *Ex parte*, 1350
 Keech *v.* Hall, 746, 748, 753
 Keeling *v.* Brown, 40
 Keen *v.* Keen, 1282
 Keenan *v.* Handley, 88
 Keene *v.* Biscoe, 731
 Keene's Executors' Case, 443
 Keep, *Re*, 1222, 1223
 Keer *v.* Brown, 212
 Keightley *v.* Watson, 73
 Keigwin *v.* Keigwin, 1274
 Keir *v.* Leeman, 86
 Keith *v.* Burrows, 729
 Kekewich *v.* Manning, 302, 303
 — *v.* Marker, 1253
 Kelford *v.* Blaney, 1415
 Kelk *v.* Pearson, 159
 Kelk's Case, 445
 Kell *v.* Charmer, 1267, 1306
 — *v.* Nokes, 1121
 Kelland *v.* Fulford, 107, 1045
 Kellaway *v.* Johnson, 1001, 1007
 Kellett *v.* Kellett, 1330
 Kellock *v.* Enthoven, 437
 Kellock's Case, 484
 Kelly *v.* Byles, 130
 — *v.* Hutton, 130
 — *v.* Kelly, 863
 — *v.* Morris, 132
 — *v.* Powlet, 1327
 Kelner *v.* Baxter, 412
 Kelsey *v.* Kelsey, 10
 Kelson *v.* Kelson, 299
 Kemble *v.* Farren, 71, 72
 — *v.* Kean, 101
 Kemp *v.* Bird, 557
 — *v.* Burns, 987
 — *v.* Kelsey, 353
 — *v.* Kemp, 903
 — *v.* Sober, 549
 — *v.* Waddingham, 38
 Kemp's Settled Estates, *In re*, 953
- Kempson *v.* Ashbee, 309
 Kemptner, *Re*, 806
 Kendal *v.* Wood, 802
 Kendall *v.* Granger, 44
 — *v.* Hamilton, 823
 — *v.* Hill, 530
 — *v.* Hulls, 762
 — *v.* Kendall, 1322, 1324
 Kenebel *v.* Scrafton, 702, 780
 Kenlis, *Ld. v.* E. Bective, 1028
 Kennard *v.* Futvoye, 737
 — *v.* Kennard, 895
 Kennedy, *Ex parte*, 328
 — *v.* Daly, 1150
 — *v.* Green, 1112, 1153, 1155, 1156
 — *v.* Kennedy, 1297
 — *v.* Kingston, 857, 907
 — *v.* Panama, &c., Co., 428
 Kennell *v.* Abbott, 116, 117, 1351
 Kenny *v.* Wexham, 1096
 Kensington *v.* Dollond, 390
 — *Ex parte*, 694
 — *Ld. v.* Bouverie, 225, 740, 750
 — *Ld. v.* Mansell, 230, 231
 Kensit *v.* G. E. R. Co., 163, *Add.*
 Kent *v.* Burgess, 326
 — *v.* Freehold, &c., Co., 428, 430
 — *v.* Riley, 291
 Kent Benefit Building Soc., 453, 669
 Kentish *v.* Newman, 672
 Kenworthy *v.* Bate, 863
 — *v.* Schofield, 1087
 — *v.* Ward, 501, 502
 Keppell *v.* Bailey, 1166
 Ker *v.* Clobury, 1063
 Ker's Case, 433
 Kermode *v.* Macdonald, 1279, 1330
 Kerr *v.* Clinton, *Ly.*, 1299
 — *v.* Middlesex Hosp., 16, 17
 — *v.* Pawson, 1104
 Kerr's Policy, *Re*, 692
 — Trusts, *In re*, 916
 Kerrison *v.* Dorrien, 296
 Kerrison's Trusts, *Re*, 651
 Kerry *v.* Derrick, 1321
 Kershaw *v.* Kershaw, 1081, 1400
 — *v.* Matthews, 813
 Kershaw's Trusts, *Re*, 641
 Kettlewell *v.* Watson, 766, 773, 775, 1107,
 1155, 1174
 Kevan *v.* Crawford, 629
 Kevern *v.* Williams, 1380
 Kevill *v.* Davies, 24, 25, 26
 Key *v.* Bradshaw, 631
 — *v.* Key, 1198
 Keylway *v.* Keylway, 286
 Keynsham Co., 488
 Keyse *v.* Powell, 228, 575
 Kibble, *Ex parte*, 70
 Kidderminster, Mayor of *v.* Hardwick, 78
 Kiddill *v.* Farnell, 302
 Kidney *v.* Coussmaker, 292, 1414
 Kilford *v.* Blaney, 1415, 1416
 Killick, *Ex parte*, 388, 390
 — Goods of, 1276

- Killick, *Re*, 1274
 Killock v. Enthoven, 474
 Killock's Case, Xeres Wine Co., *Re*,
 Alliance Bank, *Ex parte*, 491
 Kilner, *Ex parte*, 718
 Kilpin v. Kilpin, 962, 974
 Kilshaw v. Jukes, 792, 793
 Kilvert's Trusts, *Re*, 1298
 Kilvington v. Gray, 119
 Kimberley v. Jennings, 94
 — v. Tew, 1206
 Kimpton, *Re*, 1273
 Kincaid's Trusts, 383, 384
 Kinch v. Ward, 218
 Kinderley v. Jervis, 267, 519
 King, *Ex parte*, 718, 828, 987
 — *Re*, 277, 1354
 — The, v. Willes, 189
 — v. Bellord, 1036
 — v. Bennett, 1385
 — v. Burchell, 1392
 — v. Chuck, 791
 — v. Cleaveland, 1407
 — v. Denison, 968
 — v. Foxwell, 1260
 — v. George, 1319, 1325
 — v. Hake, 1231
 — v. Hoare, 823
 — v. Isaacson, 1195
 — v. King, 184, 310, 348, 687, 921, 1136
 — v. Lucas, 388
 — v. Marshall, 451
 — v. Mellin, 854
 — v. Melling, 1391, 1392
 — v. Ringstead, 1366
 — v. Savery, 310
 — v. Smith, 746, 780
 — v. Voss, 337, 344
 — v. Withers, 1196
 — v. Wycombe, 1047
 King's Case, 434, 443
 — Leasehold Estates, 544
 — Mortgage, *Re*, 1353
 Kingdon v. Bridges, 972
 — v. Nottle, 555
 — v. Tagert, Badcock, *Re*, 613
 Kingsford v. Ball, 503
 Kingsley v. Young, 1104
 — *Re*, 407
 Kingsman v. Kingsman, 634
 Kingsmill v. Millard, 542, 566
 Kingston-upon-Hull, Union Bank of, *Re*,
 494
 Kinlock v. Sec. of State, India, 960
 Kinnerley v. Hossack, 830
 Kinnoul, E. v. Money, 366
 Kino v. Rudkin, 159
 Kinsman v. Barber, 808
 — v. Rouse, 584, 593, 595
 Kintrea's Case, 443
 Kirby, *Re*, 1267
 — v. Barton, 279
 — v. Potter, 1330
 Kirkcudbright, *Ld.*, v. Kirkcudbright,
 Ly., 284, 285
 W.—VOL. I.
 Kirk, *Ex parte*, Bennett, *Re*, 1326
 — v. Bell, 448
 — v. Blurton, 796
 — v. Bromley Union, 78, 1059
 — v. Clarke, 296
 — v. Eddowes, 926, 937
 — v. Kirk, 1294
 — v. Paulin, 388
 Kirkbride's Trusts, 1317
 Kirke v. Kirke, 1284
 Kirkman v. Booth, 120, 274, 277
 — v. Lewis, 56
 — v. Miles, 114
 Kirkman's Trusts, 1356
 Kirkpatrick v. Capel, 852
 — v. Kirkpatrick, 246, 1314
 Kirkstall Brewery Co., *Re*, 417
 Kirkwood v. Thompson, 755, 757, 760
 Kirwan v. Kirwan, 819
 Kirwan's Trusts, *Re*, 888, 921
 Knapp v. Knapp, 646
 — v. L. C. & D. R. Co., 1048
 — v. Noyes, 18, 1236, 1237
 — v. Williams, 52
 Knapping v. Tomlinson, 832, 833, 834,
 837, 1424
 Knatchbull v. Fernhead, 258, 259, 976, 992
 — v. Grueber, 1118, 1132
 — v. Hallett, 608
 Knatchbull's Settled Estate, *In re*, 950
 Knight v. Bowyer, 89, 600, 1140, 1155
 — v. Cameron, 1190, 1216, 1236
 — v. Davis, 1334, 1338
 — v. Duplessis, 318
 — v. Ellis, 218, 1393
 — v. Knight, 381, 377, 398, 625, 964,
 1215, 1216, 1306, 1325
 — v. Marjoribanks, 757
 — v. Pocock, 1093
 — v. Poole, 1224
 — v. Robinson, 1354
 — v. Selby, 963, 1368
 Knight's Case, 444, 445
 — Trusts, 991, 1018
 — Will, Sarah, *In re*, 987
 Knights v. Wiffen, 441
 Knollys v. Alcock, 1277
 — v. Shepherd, 1097
 Knotsford v. Gardiner, 1360
 Knott, *Ex parte*, 772, 773
 — v. Cottea, 272, 315, 317, 964
 Knowles, *Re*, 1232
 Knowles' Settled Estates, *In re*, 946, 953
 Knox v. Gye, 809, 822, 1094
 — v. Kelly, 588
 — v. Turner, 14
 — v. Wells, 18, 392
 Knye v. Moore, 88
 Koeber v. Sturges, 378, 383
 Kooystra v. Lucas, 543
 Krehl v. Burrell, 154, 160
 Kronheim v. Johnson, 304, 962
 Kusel v. Watson, 1054
 Kynaston v. E. I. Co., 1054
 Kynnaird v. Leslie, 203, 204

- LABOUCHERE *v.* Dawson, 821
 — *v.* Tupper, 274
 Lacey, *Ex parte*, 1041
 — *Re*, 635
 — *v.* Hill, 372, 373, 821, 829
 — *v.* Ingle, 773, 1173
 Lachlan *v.* Reynolds, 838, 1064, 1092,
 1816, 1359
 Lackersteen *v.* Lackersteen, 671, 674
 Lacon *v.* Allen, 692
 — *v.* Liffen, 729
 — *v.* Mertens, 702
 Lacroix, Goods of, 1259
 Ladbury, *Ex parte*, 568
 Ladyman *v.* Grave, 153
 La Ferriere *v.* Bulmer, 119
 Laing, *Ex parte*, 692
 — *v.* Reed, 699
 Lainson *v.* Lainson, 1197
 Laird *v.* Briggs, 151
 — *v.* Pin, 1122
 — *v.* Tobin, 672
 Lake *v.* Argyll, D. of, 794
 — *v.* Brutton, 688
 — *v.* Craddock, 823, 1051
 — *v.* Currie, 1289
 — *v.* Dean, 1080
 — *v.* De Lambert, 961
 — *v.* Gibson, 1051
 — *v.* Thomas, 594
 Lakin *v.* Lakin, 908
 Lamare *v.* Dixon, 1117
 Lamb *v.* Milnes, 388
 — *v.* Walker, 170
 Lamb's Trusts, *In re*, 1011
 Lambarde *v.* Older, 262
 — *v.* Peach, 1029
 Lambe *v.* Eames, 967
 Lambert *v.* Lambert, 258, 1331
 — *v.* Norris, 555
 — *v.* Overton, 136, 1308
 — *v.* Peyton, 617
 — *v.* Rogers, 1109
 Lamberth *v.* Thwaites, 857
 Lamlee *v.* Hannan, 630
 Lamphier *v.* Despard, 1323
 Lamphir *v.* Creed, 348
 Lamplugh *v.* Lamplugh, 973, 974
 Lamprell *v.* Billericay Union, 78
 Lancashire *v.* Lancashire, 625, 890, 1297,
 1833
 Lancaster *v.* Eve, 139
 — *v.* Evors, 365, 744
 — &c., R. Co. *v.* N. W. R. Co., 102
 Lance *v.* Aglionby, 1415
 — *v.* Norman, 333, 334
 Lancefield *v.* Iggulden, 37
 Land *v.* Devaynes, 1339
 — &c., Co. of Ireland, *Re*, 449, 452
 — &c., Co. *v.* Fernoy, Ld., 460
 Landell *v.* Baker, 512
 Landon, *Re*, 1009
 Landowners, West of England, &c., Co.
 v. Ashford, 450, 750
 Lane *v.* Debenham, 849, 850, 984, 1138, 1139
- Lane *v.* Dighton, 266, 668, 1004
 — *v.* Goudge, 1198, 1215, 1217
 — *v.* Green, 1313
 — *v.* Newdigate, 100
 — *v.* Page, 920, 921
 — *v.* Stanhope, 1360
 — *v.* Sterne, 810
 Lane's Case, 436
 Lanesborough, Ly. *v.* Fox, 883, 1429
 Lanfranchi *v.* Mackenzie, 158
 Lang *v.* Lang, 627, 669
 — *v.* Pugh, 1314
 Langdale, *Ex parte*, 791
 — *v.* Whitfield, 1325
 — Ly. *v.* Briggs, 1290, 1417
 Langford, Ld. *v.* Little, 884
 — *Re*, 997
 — *v.* Anger, 1353
 — *v.* Gascoyne, 268
 — *v.* Gowland, 46
 — *v.* Pitt, 1099
 — *v.* Selmes, 532, 1066
 Langham *v.* Blewett, 348
 — *v.* East Wheel, &c., Co., 430
 — *v.* Nenny, 673, 845
 — *v.* Sandford, 1304
 Langham Skating Rink Co., *Re*, 469
 Langham's Will, 52
 Langley *v.* Baldwin, 1402
 — *v.* Hammond, 146
 — *v.* Hawk, 251
 Langley Mill, &c., Co., *Re*, 470
 Langmead, *Re*, 818
 — *v.* Cockerton, 997
 Langmead's Trusts, 822
 Langridge *v.* Payne, 731
 Langslow *v.* Langslow, 179, 922, 923
 Langstaff *v.* Fenwick, 689, 948
 Langston, *Ex parte*, 690, 693
 — *v.* Ollivant, 273, 998
 Langton *v.* Horton, 715
 — *v.* Langton, 780, 1315, 1385
 — *v.* Waite, 728, 758
 Lanoy *v.* Athole, D. of, 36, 349, 644,
 1417
 Lanphier *v.* Buck, 1208, 1337, 1356
 Lansdown *v.* Elderton, 1091
 Lansdowne, Marq., *Re*, 1268
 — *v.* Lansdowne, Mss.,
 1254
 Lantsbery *v.* Collier, 882
 Lapsley *v.* Grierson, 1114
 Larchin *v.* The North Western Deposit
 Bank, 716
 Large's Case, 1241
 Larkin *v.* Marshall, 395
 Larner *v.* Larner, 1362
 Lashbrook *v.* Cock, 505
 Lassells *v.* Ld. Cornwallis, 847, 922
 Lassence *v.* Tierney, 611, 613, 614, 1330,
 1335
 Latham, Goods of, 1275
 Lauderdale Peerage, The, 1259
 Laundry *v.* Williams, 1346
 Laurie *v.* Clutton, 911

- Lavender v. Blackston, 297
 Laver v. Fielder, 612
 Lavery v. Turley, 1058
 Law v. Glenn, 751, 771
 — v. Thompson, 1193, 1239
 — v. Urlwin, 1138
 Lawdor v. Blachford, 94
 Lawes, *In re*, 927
 — v. Bennett, 107, 1098
 — v. Gibson, 1080
 — v. Lawes, 803, 807
 Lawless v. Shaw, 965
 Lawrence v. Bowle, 1006
 — v. Campbell, 993, 1157
 — v. Hogben, 754
 — v. Lawrence, 28, 371, 676
 — v. Maggs, 237
 — v. Obee, 157
 — v. Smith, 88, 130
 — v. Wallis, 906
 Lawrence's Case, Kincaird's Case, 429
 Lawrenson v. Butler, 894
 Lawrie v. Banks, 641
 — v. Lees, 538, 1074, 1134
 Lawson v. Lawson, 136, 137, 1417
 — v. Stitch, 1329
 — v. Swetenham, 644
 Lawton v. Campion, 64
 — v. Lawton, 225, 256
 Lawton's Estates, *Re*, 27
 Layard v. Maud, 767
 Layton v. Fowler, 383
 Lazarus v. Andrade, 715
 Lazonby v. Lawson, 265
 Lea v. Grundy, 392
 — v. Hinton, 14
 — v. Whitaker, 72
 Leach v. Jay, 201, 1319
 — v. Mullett, 1064
 Leacroft v. Maynard, 1338
 Leadbeater v. Cross, 1199
 Leaf v. Coles, 819
 Leak v. MacDowall, 502
 Leake v. Leake, 932
 — v. Robinson, 834, 841, 1194, 1214,
 1218, 1363
 Leake's Trusts, *Re*, 1018
 Lear v. Leggett, 1242
 Leary v. Shout, 814
 Leatham v. Amor, 715
 Leather Cloth Co. v. American Leather
 Cloth Co., 817
 — v. Lorisont, 87
 Leathes, *Ex parte*, 692
 — v. Leathes, 225
 Leathley v. French, 26
 Leavers v. Clayton, 45
 Lechmere v. Carlisle, E. of, 100, 106, 110,
 392, 393, 668, 669
 — v. Charlton, 647, 1417
 — v. Clamp, 759
 — v. Lavie, 964, 967
 — and Lloyd, *Re*, 1428
 Lee, *Ex parte*, 1091
 — v. Brown, 1343
 Lee v. Busk, 1190, 1398
 — v. D'Aranda, 669
 — v. Green, 522
 — v. Haley, 130
 — v. Heald, 646
 — v. Howlett, 727
 — v. Lee, 661, 1313, 1338, 1392, 1405
 — v. Muggeridge, 354, 847
 — v. Olding, 857
 — v. Page, 805
 — v. Pain, 937, 1293, 1306, 1337
 — v. Park, 279
 — v. Pireaux, 388
 — v. Sankey, 984
 — v. Smith, 544
 — v. Wilmot, 606
 Leech v. Leech, 644
 — v. Schweder, 161
 Leech's Claim, 484
 Leedham v. Chawner, 986
 Leeds, D. of, v. Amherst, E., 333, 1252
 — v. Corp. New Radnor, 11
 — v. Barnardiston, 325, 327
 — v. Cheetham, 546, 547, 548
 Lefee v. Saltingston, 848
 Leeke v. Bennett, 247
 Leeke's Case, 423, 425, 478
 Leeming v. Sherratt, 1217, 1222
 Lees v. Coulton; Lees v. Clutton, 513
 — v. Fisher, 763
 — v. Massey, 1405, 1407
 — v. Mosley, 1392, 1394
 — v. Nuttall, 1039
 — v. Whiteley, 1178
 Lefevre v. Freeland, 909
 Lefroy v. Walsh, 870
 Leftley v. Mills, 24
 Legard v. Hodges, 667
 Legg v. Goldwire, 616, 617
 Legge v. Asgill, 1325
 — v. Croker, 96
 — v. Legge, 224, 1249
 Leggott v. Barrett, 817, 821
 — v. Metrop. R. Co., 1095
 Le Grice v. Finch, 1331, 1333, 1338
 Lehmann v. M'Arthur, 102, 552
 Leicester Bank Co., *Ex parte*, v. De G.,
 827
 Leicester's Case, 887
 Leifchild's Case, 81, 461, 477
 Leigh v. Burnett, 238
 — v. Byron, 1387
 — v. Dickenson, 507
 — v. Jack, 575, 1105
 — v. Leigh, 1245, 1293
 — v. Lloyd, 696, 773
 — v. Mosley, 502, 1226
 — v. Norbury, 862, 1391
 Leigh's Estate, *Re*, 1045
 Leighton v. Bailie, 1362
 — v. Leighton, 925
 — v. Price, 956
 Leith v. Irvine, 689
 Lemage v. Goodman, 1279
 Lemaitre v. Davis, 167, 168

- Leman *v.* Whitley, 971
 Lemann's Trusts, *In re*, 1012
 Le Marchant *v.* Le Marchant, 967
 Le May *v.* Welch, 135
 Lemayne *v.* Stanley, 1273
 Lempière *v.* Lange, 70
 Lench *v.* Lench, 266, 668, 971, 1004
 Le Neve *v.* Le Neve, 776
 Leney *v.* Hill, 821
 Lennon *v.* Napper, 1119
 Leonard *v.* Sussex, E., 623, 624
 Leonino *v.* Leonino, 742, 1420
 Lepard *v.* Vernon, 694
 Lepine *v.* Bean, 1386
 — *v.* Ferard, 833, 1397
 Lesingham's Trusts, *Re*, 658
 Leslie *v.* Devonshire, D. of, 1297
 — *v.* French, 721
 — *v.* Thompson, 1080
 Leslie's Settlement, *In re*, 982
 Lester *v.* Garland, 635, 1204
 Lethbridge *v.* Kirkman, 1070, 1085
 — *v.* Lethbridge, 1321
 — *v.* Thurlow, 15
 Lethem *v.* Hall, 324
 Lethicullier *v.* Tracy, 1246
 Lett *v.* Randall, 16, 17, 833, 839
 Letts *v.* Hutchins, 737
 Leuty *v.* Hillas, 97, 1153, 1164, 1177
 Levasseur *v.* Scrutton, 351
 Leverson *v.* Lane, 796
 Levita's Case, 421, 424, 433
 Levy *v.* Polack, 715
 — *v.* Rutley, 126
 — *v.* Walker, 794, 817
 Lewellin *v.* Cobbold, 334
 Lewen *v.* Dodd, 505
 Lewers *v.* Shaftesbury, E., &c., 101, 103
 Lewes' Trusts, *Re*, 1227
 Lewin, *Re*, 381
 — *v.* Guest, 1089, 1101, 1140
 — *v.* Lewin, 1341
 Lewin's Trusts, *Re*, 383
 Lewis, *Re*, 320
 — Goods of, 1281, 1286
 — *v.* Allenby, 54
 — *v.* Armstrong, 795
 — *v.* Bond, 529, 1155
 — *v.* Brass, 1055
 — *v.* Bright, 795
 — *v.* Chapman, 132
 — *v.* Duncombe, 214, 602, 1034
 — *v.* Freke, 648, 649
 — *v.* Fullarton, 129
 — *v.* Hillman, 1018, 1042
 — *v.* Lane, 228, 969
 — *v.* Lewellyn, 898, 900
 — *v.* Lewis, 1274, 1418
 — *v.* Madocks, 666, 668, 670
 — *v.* Marshall, 81
 — *v.* Matthews, 390, 1345, 1353
 — *v.* Nangle, 365, 366, 737
 — *v.* Nicholson, 1087
 — *v.* Nobbs, 268
 Lewis *v.* Pennington, 1157
 — *v.* Puxley, 1390
 — *v.* Rees, 297, 313, 576, 578, 913, 978
 — *v.* S. W. R. Co., 1080
 — *v.* Thomas, 591
 — *v.* Waters, 503, 1400, 1423
 Lewis Bowles' Case, 1253
 Ley *v.* Cox, 508
 — *v.* Ley, 22, 37, 648
 — *v.* Peter, 583
 Leyland *v.* Illingworth, 1065
 Lichener, *Re*, 724
 Liddard *v.* Liddard, 618, 963, 1297
 Liddow *v.* Fleetwood, 1008
 Liddy *v.* Kennedy, 566
 Liebman *v.* Harcourt, 670
 Liefie *v.* Saltingstone, 876, 904
 Life Ass. Scotland *v.* Siddal, 992
 Liford's Case, 142
 Liggins *v.* Inge, 141
 Lightfoot *v.* Burstall, 1363
 Like *v.* Beresford, 325
 Liley *v.* Hey, 43
 Lilford, Ld. *v.* Keck, 40, 1290
 Lill *v.* Lill, 18
 Lilley *v.* Allen, 1095
 Limbard *v.* Grote, 860
 Limbrey *v.* Gurr, 59
 Limpus *v.* Arnold, 285
 Lincoln *v.* Arcedeckne, 1137
 — *v.* Newcastle, D. of, 243, 244, 622
 — *v.* Ly. *v.* Pelham, 1383, 1384
 — *v.* Windsor, 985
 — *v.* Wright, 268, 687, 688, 1057, 1058
 Lindley *v.* Lacey, 79
 Lindo *v.* Lindo, 280
 Lindow *v.* Fleetwood, 619
 Lindsay Petroleum Co. *v.* Hurd, 413
 Lindsell *v.* Bonsor, 606
 — *v.* Phillips, 596
 — *v.* Thacker, 388
 Lindsey *v.* Lynch, 92, 1058
 Lindus *v.* Melrose, 449, 456
 Line *v.* Stephenson, 553
 Ling *v.* Ling, 678
 Lingard *v.* Bromley, 1003
 Lingen *v.* Sowray, 113
 Lingwood *v.* Eade, 810
 — *v.* Gyde, 232
 Linsell *v.* Bonsor, 608
 Linton *v.* Linton, 407
 Linzer, *Re*, 397
 Lion Insurance Assoc. *v.* Tucker, 416
 Lipscomb *v.* Lipscomb, 741
 Lisburne, E. *v.* Davies, 566
 Lister *v.* Bradley, 1216, 1217
 — *v.* Hodgson, 312
 — *v.* Pickford, 588, 1309, 1321
 — *v.* Smith, 1300
 — *v.* Tidd, 727, 1409
 — *v.* Turner, 692
 Littlehampton Steam, &c. Co., 426

- Littlewood *v.* Pattison, 122
 Liverpool Borough Bank *v.* Turner, 728,
 729
 — *v.* Walker, 797
 — &c. Co. *v.* Wilson, 729
 — Corp. *v.* Wright, 86
 Livesey *v.* Harding, 728, 1411
 — *v.* Livesey, 861, 992, 1347
 Livoock, Goods of, 1284
 Llanelly R. Co. *v.* L. & N. W. R. Co.,
 81
 Llewellyn *v.* Ld. Jersey, 1164
 — *v.* Mackworth, 177
 — *v.* Rose, 58
 — *v.* Rous, 25, 26
 Lloyd *v.* Attwood, 725, 764, 770, 1008
 — *v.* Banks, 723, 724, 725
 — *v.* Branton, 1201, 1235, 1236
 — *v.* Cocker, 641
 — *v.* Collett, 1119
 — *v.* Crispe, 1104
 — *v.* David Lloyd & Co., 480
 — *v.* Griffith, 1165
 — *v.* Guibert, 74
 — *v.* Harvey, 936
 — *v.* Jackson, 1367
 — *v.* Johnes, 1093
 — *v.* Jones, 751
 — *v.* Lloyd, 213, 369, 620, 621, 622,
 915, 969, 981, 1181, 1213, 1220,
 1234, 1244, 1289
 — *v.* Mansell, 761
 — *v.* Mason, 385
 — *v.* Pughe, 391
 — *v.* Read, 970, 973
 — *v.* Roberts, 1275
 — *v.* Spillet, 1024, 1026
 — *v.* Tench, 287
 — *v.* Tomkies, 1180
 — *v.* Wait, 738
 — *v.* Williams, 384, 385, 1349
 Lloyds' Banking Co. *v.* Jones, 696, 766
 Lloyds *v.* Harper, 258
 Loader *v.* Clarke, 335
 Lobb *v.* Stanley, 1057
 Lock *v.* Bagley, 625
 — *v.* De Burgh, 25
 — *v.* Furze, 527, 543, 1180
 Locke *v.* Lamb, 1380
 — *v.* Matthews, 538, 580, 582
 Lockhart *v.* Hardy, 753, 759, 762, 1462
 Locking *v.* Parker, 588, 755, 760
 Lockwood *v.* Fenton, 655
 Loddington *v.* Kine, 1393, 1423
 Lodge *v.* Prichard, 825, 827
 Loffus *v.* Maw, 533, 1283
 Loffhouse, *Re*, 651, 653
 Loftus *v.* Swift, 226
 Logan *v.* Bell, 892, 1277
 — *v.* Birkett, 400, 401
 — *v.* Fairlee, 315
 — *v.* Wienholt, 71, 616
 Lomas *v.* Wright, 33, 301
 Lomax, *Re*, 1046
 — *v.* Holmeden, 991, 1385
 Lomax *v.* Lomax, 1350
 — *v.* Ripley, 57
 Lombe *v.* Stoughton, 5
 Londesborough, Ld. *v.* Foster, 231
 — *v.* Somerville, 1349
 London, Bp. of, *v.* Webb, 1254
 — Corp. of, *v.* Riggs, 143, 156
 — Mayor of, *v.* Pewterers' Co., 152
 — Mayor and Corp. of, *v.* Southgate
 100
 — & Birmingham R. Co. *v.* Winter,
 456
 — Bombay & Med. Bank, *Re*, 435
 — Bank of, &c., Ins. Assocn., *Re*,
 498
 — Bank of *v.* Tyrrell, 411
 — Chart. Bank of Australia, The, *v.*
 Lempriere, 846—848
 — Cotton Co., 480
 — & County Banking Co. *v.* Ratcliffe,
 771, 820
 — &c., Coal Co., *Re*, 424, 444
 — Dock Co. *v.* Sinnott, 78, 456
 — Fin. Assoc. *v.* Kelk, 461
 — Guarantee Co. *v.* Fearley, 72
 — India Rubber Co., 485, 499
 — &c., Ins. Co., *Re*, 489
 — & Life Co., *Re*, 463
 — Mar. Assur. Assoc., *Re*, 484
 — & Merc. Dis. Co., *Re*, 472, 490
 — Mon. Advance Co. *v.* Brown, 763
 — & N. W. R. Co. *v.* West, 566
 — & Paris Banking Corp., *Re*, 470
 — & Prov. Bank *v.* Boyle, 358
 — Quays, &c., Co., 490
 — &c., Soc. *v.* Brown, 762
 — & Staff. Fire Ins. Co., *Re*, 430
 — & Sub. Bank, *Re*, 434, 472
 — & Sub., &c., Co. *v.* Field, 550
 — & S. W. R. Co. *v.* Blackmore,
 1049
 — & S. W. R. Co. *v.* Flower, 553
 — & S. W. R. Co. *v.* Gomm, 832,
 1050, 1166
 — Union Bank of *v.* Ingram, 732, 763
 — Univ. of *v.* Yarrow, 54
 — & West Co. *v.* Chace, 716
 — Wharf, &c., Co., *Re*, 469, 470
 Londonderry, Ly. *v.* Wayne, 865
 Long *v.* Bowring, 71
 — *v.* Clifton, 743, 744
 — *v.* Collier, 1075, 1139, 1140
 — *v.* Kent, 1347
 — *v.* Long, 326, 654, 863, 916
 — *v.* Millar, 1056, 1057, 1058
 — *v.* Ovenden, 891, 915, 917
 — *v.* Rankin, 852
 — *v.* Short, 37, 1333
 — *v.* Watkinson, 1406
 Longbottom *v.* Berry, 704, 715
 — *v.* Pearce, 327
 Longdon *v.* Simson, 7
 Longford *v.* Eyre, 887
 Longhead *v.* Phelps, 840
 Longley *v.* Longley, 969

- Longman v. Winchester, 130
 Longmate v. Ledger, 1177
 Longmore v. Broom, 923, 966
 Longworth's Executors' Case, 427
 Lonsdale v. Berchtoldt, 1334
 — *Ld. v. Beckett*, 1009
 Loomes v. Sothard, 264
 Loosemore v. Knapp, 1417
 Lord v. Bunn, 1243
 — *v. Commissioners of Sydney*, 1105
 — *v. Lord*, 1349
 — *v. Wardle*, 255
 — *v. Wightwick*, 111
 Lorimer, *Re*, 1018
 Loring v. Thomas, 1355, 1376
 Loscombe v. Wintringham, 44
 Lovat, *Ld.*, *v. Leeds, Dss. of*, 15, 1251
 — *v. Ranelagh, Ld.*, 552
 Love v. Bell, 168, 169
 — *v. Gaze*, 281, 282
 Lovegrove, Goods of, 1267
 — *v. Cooper*, 34, 264
 Lovejoy v. Crafter, 1378
 Lovelace, *Re*, 848, 1146, 1148
 Lovell v. Knight, 902
 — *v. Lovell*, 229
 — *v. Newton*, 357
 — *v. Smith*, 155
 Loveridge v. Cooper, 723
 Lovering, *Ex parte*, 568, 719
 Lovesy v. Smith, 675
 Lovett v. Lovett, 1264
 Low v. Burron, 219
 — *v. Carter*, 972
 — *v. Holmes*, 1049
 — *v. Smith*, 1373, 1374
 — *v. Ward*, 129, 130
 Lowe v. Carpenter, 152, 154
 — *v. Davies*, 221
 — *v. Manners*, 1204, 1239
 — *v. Morgan*, 762
 — *v. Peskett*, 35
 — *v. Thomas*, 1324, 1325
 Lowe's Case, 440
 — *Settlement, Re*, 726
 Lowndes v. Bettle, 1255
 — *v. Lowndes*, 1350
 — *v. Norton*, 1250, 1278
 — *v. Stamford, E.*, 26
 Lowry's Will, *Re*, 782
 Lows v. Telford, 753
 Lowson v. Copeland, 271
 Lowther v. Bentinck, 641
 — *v. Carlton*, 1150
 — *v. Cavendish*, 1202
 — *v. Condon*, 1196
 — *v. Westmoreland, Ld.*, 618
 Loxley v. Heath, 618, 615, 616
 Luard v. Lane, 1338
 Luard's Case, 476
 Lucas, *Ex parte*, 724
 — *v. Brandreth*, 110, 111, 502, 1404
 — *v. Cooke*, 135
 — *v. Dennison*, 594, 599
 — *v. Goldsmid*, 505, 1403
 Lucas v. James, 1055, 1057
 — *v. Jones*, 51
 — *v. Williams*, 258, 274
 Lucas's Will, *Re*, 1355
 Lucena v. Lucena, 1222
 Luckcraft v. Pridham, 48, 50, 51
 Lucy's Case, 63, 64
 Luders v. Anstey, 612
 Ludlow v. Bunbury, 1240
 — *Mayor of v. Charlton*, 78, 456
 Luff v. Lord, 1041
 Lufkin v. Nunn, 537, 1151
 Lugar v. Harman, 1383
 Luke v. South Ken. Hotel Co., 760, 984
 Luker v. Dennis, 551, 1166
 Lukey v. Higgs, 1168
 Lumb v. Milnes, 390
 Lunley v. Wagner, 101, 102
 Lumpus v. Arnold, 927
 Lumsden v. Fraser, 1097
 Lumsden's Case, 69, 442
 Lund's Case, 443
 Lundy Granite Co., *Re*, 480
 Lunn v. Thornton, 715
 Lupton v. White, 1005
 Lush v. Wilkinson, 291
 Lush's Trusts, *Re*, 381
 Lushington v. Boldero, 1250, 1253, 1254
 — *Doe d. v. Llandaff, Bp. of*, 194
 — *v. Onslow*, 1269
 Luther v. Kidby, 1277
 Lutkins v. Leigh, 40
 Luttrell v. Olmius, 922
 Lutwych v. Winford, 1138
 Luxford v. Cheeke, 1198, 1422
 Luxmore v. Robson, 548
 Lycett v. Stafford, &c., R. Co., 1173
 Lyddal v. Weston, 1137
 Lyddon v. Ellison, 624, 625, 925
 — *v. Lyddon*, 650
 Lyde v. Mynn, 90
 Lygon v. Coventry, *Ld.*, 654
 Lyle v. Richards, 1164
 — *v. E. of Yarborough*, 1107
 Lynall's Trusts, *Re*, 55
 Lynch, *Ex parte*, 70
 Lyne, *Re*, 1288
 — *v. Lyne*, 1186
 Lynes' Estate, 1340
 Lyon v. Baker, 985
 — *v. Coward*, 1356
 — *v. Dillimore*, 159, 160
 — *v. Fishmongers' Co.*, 163
 — *v. Home*, 307
 — *v. Mitchell*, 1391, 1393
 — *v. Reed*, 1113
 — *v. Tweddell*, 814, 819
 Lyon's Case, 427
 Lyons v. Blenkin, 321, 323
 — *v. Tucker*, 717
 — *Mayor of v. Bengal, Adv.-Gen. of*, 46
 Lysaght v. Edwards, 1094, 1097
 Lyse v. Kingdon, 1003
 Lyster v. Holland, 1051
 Lyster's Case, 445

- Lyth v. Ault, 819
 Lyttleton v. Cross, 262
 Lytton v. G. N. R. Co., 103
 Lywood v. Warwick, 1372
- MABER v. Maher, 599, 607
 Maberley v. Robins, 1137
 Maberly v. Strode, 1317
 — v. Turton, 654
 M'Adam v. Logan, 891
 Macaree v. Tall, 1368
 Macarthur, *Ex parte*, 793
 Macaulay v. Phillips, 377, 385
 McBean v. Dean, 730
 M'Beane v. Deane, 751
 Macbryde v. Weekes, 1119, 1120
 McCabe, Goods of, 1282, 1284
 Macclesfield, E. v. Davis, 247
 M'Carogher v. Whieldon, 755, 931
 McClean v. Kennard, 823
 McCollin v. Gilpin, 450
 M'Cormick v. Garnett, 380, 1345
 — v. Grogan, 57
 M'Creight v. Foster, 1151
 M'Culloch v. Bland, 301
 — v. M'Culloch, 964
 M'Culloch v. Gregory, 1083, 1085, 1110
 Macdonald v. Bryce, 6, 7, 1127
 — v. Irvine, 121, 1330, 1332
 — v. Walker, 754, 1138
 M'Donnell v. Hesilbrige, 311, 334
 — v. M. Kinty, 575
 — v. Pope, 565
 — v. White, 589, 989
 MacDougall v. Gardiner, 447, 464, 465
 MacDougall v. Jersey Hot. Co., 462, 467
 Macdowell v. Halfpenny, 935
 McEuen v. West Lon. Wharves Co., 426
 Macey v. Shurmer, 904
 M'Fadden v. Jenkyns, 303, 304, 962
 Macfarlane v. Rolt, 1157
 M'Gachen v. Dew, 1006
 MacGregor v. MacGregor, 502, 1356, 1395
 M'Hattie, *Ex parte*, 716
 Machell v. Weeding, 1396
 M'Henry v. Davies, 394
 Macher v. Foundling Hosp., 550
 Machu, *Re*, 1241
 M'Ilwraith v. Dub. Trunk Ry. Co., 426, 478
 Macintosh v. Townsend, 50
 Macintyre v. Belcher, 824
 — v. Connell, 525
 Mack v. Peter, 130
 Mackay, *Ex parte*, 531
 — *Ex parte*, Brown, *Ex parte*, 712
 — *Re*, 810
 — v. Douglas, 291, 294
 McKay's Case, 411, 494
 Mackell v. Winter, 1412
 M'Kenna, *Ex parte*, 805
 Mackenna v. Parkes, 804
 Mackenzie v. Bradbury, 1365
 — v. Mackenzie, 218, 1337, 1406
 Mackenzie's Settlement, *Re*, 664, 665
- Mackenzie's Trusts, *In re*, 950
 Mackett v. Mackett, 967
 McKenzie v. Heskett, 1067
 McKewan v. Sanderson, 96
 McKewan's Case, 474
 Mackie v. Herbertson, 620, 621
 — v. Mackie, 119
 M'Kecknie v. Vaughan, 1313
 Mackinnon v. Sewell, 1208, 1231
 — v. Peach, 1294
 Mackintosh v. Barber, 879
 Mackley's Case, 476
 Macklin v. Richardson, 129
 Mackreth v. Marlur, 1141
 — v. Symons, 773, 1003, 1150,
 1171, 1172, 1173
 M'Lachlan v. Taitt, 1190, 1194, 1197, 1206
 MacLae v. Sutherland, 796
 MacLaren v. Stainton, 1326
 Maclean v. Dunn, 1035
 Maclean's Trusts, *Re*, 730
 M'Lean v. Longlands, 391
 Macleay, *Re*, 1240
 Macleod v. Annersley, 999
 — v. Buchanan, 728
 — v. Jones, 756
 M'Leod v. Drummond, 275, 696, 697
 MacLurcan v. Lane, 666, 667, 674
 M'Mahon v. Burchell, 1345
 M'Murdo, Goods of, 1276
 M'Murray v. Spicer, 102, 783, 1083, 1103,
 1120
 Macnab v. Whitbread, 964
 Macnamra v. Jones, 180, 986
 M'Neill v. Cahill, 776
 — v. Reed, 71
 M'Nellie v. Acton, 274
 M'Niell's Case, 431
 Maconbrey v. Jones, 861, 1384
 Macpherson v. Macpherson, 119, 268
 McQueen v. Farquhar, 863, 875, 888, 919,
 904, 1067
 M'Turk, *Ex parte*, 725
 McVicar, Goods of, 1277
 Madden v. Ikin, 1402
 Maddick v. Marks, 900
 — v. Marshall, 411
 Maddison v. Alderson, 332, 533, 1058,
 1059, 1283
 — v. Andrew, 856
 — v. Chapman, 367, 1198, 1206
 Maddock, Goods of, 1275
 Maddox, *Re*, 294
 — v. Staines, 1402
 Maddy v. Hale, 123
 Madeley v. Booth, 1062, 1101, 1104
 Maden v. Taylor, 1222
 Madgwick v. Wimble, 810, 813
 Magdalen Hosp. v. Knotts, 539, 581
 Magee v. Lavel, 72
 Magennis v. Fallon, 1064, 1096, 1132
 Maguire, *Re*, 46
 — v. Dodd, 138
 Mahon, *Ld. v. Stanhope, Ld.*, 1253
 Mainwaring v. Baxter, 216

- Mainwaring v. Beevor, 1380, 1381
 Mainwaring's Settlement, *Re*, 661
 Mair v. Glennie, 791
 — v. Himalaya Tea Co., 101
 Maitland v. Mackinnon, 542
 — v. Wilson, 1186
 Maitland's Case, 411
 Major v. Lansley, 392
 — v. Ward, 756
 Majoribanks v. Hovenden, 776
 Makin v. Watkinson, 553
 Makings v. Makings, 225
 Malcolm v. Martin, 1383
 — v. O'Callaghan, 1235, 1238, 1239
 — v. Scott, 694
 — v. Taylor, 1352, 1364, 1397, 1401, 1402
 Malden v. Fyson, 1124, 1139
 — v. Menill, 1176
 Malim v. Keighley, 903, 964
 Maling v. Hill, 1139
 Malins v. Freeman, 97, 1087
 Mallabar v. Mallabar, 116
 Mallan v. May, 87
 Mallinson v. Mallinson, 323
 Mallison v. Mallison, 317
 Mallorie's Case, 421
 Malpas v. Ackland, 1153
 Maltby v. Russell, 262
 Man v. Ricketts, 1092, 1112
 Manby v. Bewicke, 64
 Manchester, &c., Assoc., *Re*, 463
 — &c., Co. v. Carr, 546, 553
 — and Oldham Bank, *Re*, 435
 — &c., R. Co., 107
 — Union, Bank of, *Ex parte*, 724
 Mandeno v. Mandeno, 1090
 Mander v. Harris, 25, 503
 Mandeville v. Carrick, *Ld.*, 1394
 Mandeville's Case, 203
 Manfield v. Dugard, 1192
 Mangin v. Mangin, 1326
 Mangles v. Dixon, 722
 Mann v. Copland, 21, 1333, 1340
 — v. Fuller, 1337, 1338, 1365
 — v. Lang, 265
 — v. Thompson, 1379, 1382
 Mann's Case, 441
 Manners v. Furze, 751
 — *Ld.* v. Johnson, 1183
 — v. Mew, 766
 Manneville v. Manneville, 321, 324
 Manning, *Ex parte*, 1092
 — v. Andrews, 189
 — v. Chambers, 1244
 — v. Phelps, 600
 — v. Pursell, 1271, 1324, 1327
 — v. Taylor, 1369
 — v. Thesiger, 1335
 Manningford v. Toleman, 693
 Mannox v. Greener, 1321
 Mansel v. Norton, 567
 Mansell v. Mansell, 197, 1003
 — v. Price, 908
 Manser v. Back, 1087
 Manser v. Dix, 1157
 Mansergh v. Campbell, 16, 17
 Mansfield v. Ogle, 21
 Manson v. Thacker, 1175, 1176
 Mant v. Leith, 999
 Manton v. Tabois, 1327, 1331, 1339
 Maple v. Junior Army, &c., Stores, 130
 Mapleton v. Mapleton, 893
 Mapp v. Elcock, 968
 Maquire v. Armstrong, 1151
 Mara v. Manning, 393, 395
 Maraver, *Re*, 1258
 March v. Fowke, 1415
 — v. March, 317, 676
 — v. Russell, 260, 976, 1008, 1347
 Marchant v. Cragg, 503
 Margetts v. Barringer, 388
 Margitson v. Hall, 1356
 Marine Investment Co., *Re*, 493
 — &c., Co. v. Haviside, 1113
 — Mansions Co., *Re*, 453
 Marino's Case, 441
 Mark v. Smith, 869
 Mark's Trust Deed, *Re*, 703
 Markby, *Re*, 26
 Marker v. Marker, 591, 1253
 Markwell v. Markwell, 301
 Markwick v. Hardingham, 594
 Marlborough Club Co., *Re*, 477
 — *D. of*, 216
 — v. Godolphin, *E.*, 344, 839, 905, 907, 914, 923, 1291
 — v. Marjoribanks, 950
 Marler v. Tommas, 846
 Marlow v. Smith, 1137
 Marples v. Bainbridge, 1234
 — v. Hartley, 713
 Marret v. Sly, 1296
 Marriott, *Re*, 183
 — v. Abell, 1207
 — v. Anchor Co., 729, 748
 Marryat v. Marryat, 687
 Marsden v. Kent, 270
 Marsden's Trusts, *Re*, 920
 Marseilles, &c., Ry. Co., *Re*, 462, 489, 490
 Marsh v. Att.-Gen., 45, 51
 — v. Conquest, 128
 — v. Evans, 1342
 — v. E. Granville, 1101, 1116
 — v. Keating, 799
 — v. Lee, 772
 — v. Marsh, 1267, 1273, 1286
 Marshall, *Ex parte*, 475
 — v. Baker, 618, 643
 — v. Berridge, 92, 1054
 — v. Broadhurst, 85, 275
 — v. Colman, 813
 — v. Collett, 1176
 — v. Crowther, 225
 — v. Crutwell, 972
 — v. Fowler, 383
 — v. Gibbings, 377
 — v. Gingell, 879, 979
 — v. Green, 1053

- Marshall *v.* Grime, 220, 1397
 — *v.* Holloway, 6, 7, 986, 1417
 — *v.* Hopkins, 1316
 — *v.* Marshall, 403
 — *v.* Peascod, 200
 — *v.* Rutton, 68, 789
 — *v.* Shrewsbury, 739
 — *v.* Sladden, 882, 1141
 — *v.* Smith, 371
 — *v.* Ulleswater Co., 164
 Marson *v.* L. C. & D. R. Co., 1047
 Marston *v.* Gowan, 895
 — *v.* Rowe, 1277
 Martelli *v.* Holloway, 246, 1188, 1191
 Martin, *Ex parte*, 982
 — Goods of, 1267
 — *Re*, 1263
 — *v.* Bannister, 173
 — *v.* Cotter, 1066, 1154
 — *v.* Foster, 325, 326
 — *v.* Gale, 69
 — *v.* Goble, 157
 — *v.* Headon, 158, 159, 160
 — *v.* Hobson, 1326, 1327
 — *v.* Holgate, 1225, 1356
 — *v.* Lacon, 52, *Add.*
 — *v.* Laverton, 1353
 — *v.* Long, 1397
 — *v.* Martin, 654, 1228, 1229
 — *v.* Mitchell, 91, 1034, 1054
 — *v.* Pycroft, 80, 1129
 — *v.* Roe, 255
 — *v.* Trimmer, Davidson *v.* Trimmer,
 114
 — *v.* Sedgwick, 725, 727
 — *v.* Swannell, 923
 Martin's Anchor Co. *v.* Morton, 475
 Martindale *v.* Booth, 290, 706
 — *v.* Picquot, 257
 Martinez *v.* Cooper, 765
 Martins *v.* Gardiner, 1284
 Martinson *v.* Clowes, 756
 Martyn, *Re*, 783, 1011
 — *v.* Clue, 555
 — *v.* Gray, 794
 — *v.* Williams, 561, 1179
 Martyr *v.* Lawrence, 146, 542, 1163
 Mary Portington's Case, 216
 Marzials *v.* Gibbons, 126
 Maskell *v.* Farrington, 1414
 Mason, *Re*, 910, 1326
 — *v.* Barker, 1383
 — *v.* Bateson, 1298, 1303
 — *v.* Broadbent, 601
 — *v.* Clarke, 1390
 — *v.* Hill, 163
 — *v.* Mitchell, 406
 — *v.* Morgan, 348
 — *v.* Morley, 990
 — *v.* Robinson, 19
 — *v.* Shrews. & Heref. Ry. Co., 163
 Massey, *Ex parte*, 388
 — *v.* Allen, 487, 599
 — *v.* Banner, 989
 — *v.* Barton, 913
 Massey *v.* Goider, 167
 — *v.* Hudson, 1198
 — *v.* Parker, 390
 — *v.* Sladen, 735
 Massey *v.* Lloyd, 644
 — *v.* Rowen, 389, 390
 Master *v.* De Croismar, 878
 — *v.* Fuller, 394
 — *v.* Hansard, 144, 1183
 Master's Case, 443
 Masters *v.* Masters, 1269
 Mather *v.* Fraser, 256, 704, 715
 — *v.* Scott, 55
 Matheson Bros., Limited, *Re*, 499
 Mathew *v.* Brise, 319, 577
 Mathews *v.* Foulsham, 1289
 — *v.* Mathews, 933
 Mathias, Goods of, 1287
 — *v.* Mathias, 668, 1004
 Matson *v.* Dennis, 697
 — *v.* Swift, 109
 Matterson *v.* Elderfield, 755
 Matthaei *v.* Galitzin, 74
 Matthew *v.* Bowler, 1172
 — *v.* N. Assurance Co., 1018
 — *v.* Osborne, 229
 Matthewman's, Mrs., Case, 394, 476
 Matthews, *Ex parte*, 794
 — *v.* Brise, 990
 — *v.* Beaver, 289
 — *v.* Foulsham, 1332
 — *v.* Foulshaw, 1303
 — *v.* Gardner, 1370
 — *v.* Goodday, 763
 — *v.* Keble, 5, 6, 8
 — *v.* Matthews, 1310
 — *v.* Paul, 860
 — *v.* Wallwyn, 743
 — *v.* Windross, 1367
 Matthieson *v.* Harrod, 127
 Matthison *v.* Clarke, 757, 985
 Mattingley, *Re*, 901
 Mattock *v.* Kinglake, 73
 Maud *v.* Maud, 1246, 1297
 Maude, *Ex parte*, 478, 829
 Maudslay *v.* Maudslay, 677
 Maughan *v.* Mason, 117
 Maughan, *Re* Monkhouse, *Ex parte*, 569
 Maundrell *v.* Maundrell, 369, 370, 846,
 855, 866, 872, 903, 1150
 Maunsell *v.* White, 612
 Mauxwell, *Ex parte*, 718
 Maw *v.* Pearson, 983
 — *v.* Topham, 1128
 Mawhood *v.* Milbanke, 392
 Mawman *v.* Tegg, 131
 Mawson *v.* Fletcher, 1066, 1084
 Maxfield *v.* Burton, 765, 766
 Maxoudoff, *Ex parte*, 484
 Maxted *v.* Paine, 438, 440
 Maxwell *v.* Hyslop, 182, 1418
 — *v.* McClure, 1260
 — *v.* Maxwell, 33, 182
 — *v.* Port. Ten., &c., Co., 411
 — *v.* Wettenhall, 1348

- Maxwell's Case, 416
 — Trusts, *Re*, 26, 845
 May v. Bennett, 19, 20
 — v. G. W. R. Co., 1048
 — v. Hook, 503
 — v. May, 970
 — v. Roper, 354
 — v. Skey, 336
 — v. Taylor, 982
 — v. Thomson, 102, 1056
 — v. Wood, 1217
 Maybank v. Brooks, 1291
 Maybery v. Brooking, 1326
 Mayd, Goods of, 1267
 — v. Field, 394, 848, 934
 Mayer v. Murray, 750
 Mayhew v. Maxwell, 127, 129
 Mayhew's Case, 437, 443
 Mayn v. Mayn, 501
 Maynard v. Gibson, 181
 — v. Wright, 1317, 1391, 1395
 Maynard's, Sergt., Case, 1179
 Mayott v. Mayott, 1377
 Mayou, *Ex parte*, 806
 Maythorne v. Palmer, 102
 Meacher v. Young, 650
 Mead v. Ld. Orrery, 1003
 Meade-King v. Warren, 883
 Meades, *Re*, 323
 Meadows v. Parry, 1208
 — v. Tanner, 1069
 Measure v. Carleton, 1330
 — v. Gee, 220
 Mechelen v. Wallace, 1053
 Medley v. Horton, 396, 743
 — v. Medley, 407
 Medworth v. Pope, 1386
 Meeds v. Wood, 1198
 Meek v. Chamberlain, 736
 — v. Kettlewell, 303, 729
 Meggison v. Moore, 964
 Megson v. Hindle, 1386
 Meinertzen v. Walters, 927
 Meinertzen v. Davis, 960, 1009
 Melan v. Fitzjames, 74
 Melhado v. Porto, &c., Ry. Co., 412
 Melland v. Gray, 272
 Mellersh v. Keen, 811, 813, 817, 818
 Melling v. Leak, 580, 589
 Mellish v. Mellish, 320, 1390
 Mellor v. Porter, 760
 Mellor's Policy Trusts, *Re*, 358
 Meluish v. Milton, 254
 Melville v. Stringer, 713
 Mence v. Bagster, 502
 — v. Mence, 282, 1284
 Mendes v. Gendalla, 268
 — v. Mendes, 320
 Mendham v. Williams, 1230
 Meneir v. Hooper's Tel. Works, 447
 Mennard v. Welford, 1009
 Menzey v. Walker, 922
 Menzies v. Breadalbane, E. of, 171
 — v. Lightfoot, 771
 Mercer, Goods of, 1268
 Mercer v. Hall, 1238
 — v. Irving, 72
 — v. Peterson, 717
 Merceron's Trusts, 1402
 Merch. Bank. Co. of London v. Merch. J. S. Bank, 420
 Merchants, &c., Assoc., *Re*, 463
 Merc. Mut. Marine Ins. Assoc., *Re*, 475
 Meredith v. Facey, 994
 — v. Heneage, 964
 — v. Treffry, 1029
 — v. Vick, 114
 — v. Wynne, 348
 Meredith's Trusts, *Re*, 908
 Merest v. James, 680
 Merewether v. Shaw, 332
 Merlin v. Blagrave, 991
 Merrick's Trusts, 1357
 Merrill v. Morton, 1303, 1376
 Merriman v. Ward, 821
 Merritt, Goods of, 1279
 — *Re*, 906
 Merry v. Abney, 1151
 — v. Hill, 1217
 — v. Nickalls, 440
 — v. Ryves, 649, 1238
 Merryweather v. Jones, 401, 633, 676
 Mersey Docks, &c., Trustees v. Gibbs, 983
 — &c., Co. v. Naylor & Co., 483
 Mertins v. Joliffe, 1150
 Mesgrett v. Mesgrett, 1238
 Messenger v. Clarke, 391
 Messer v. Boyle, 519
 Metcalfe, *Re*, 309, 310, 1018
 — v. Hutchinson, 1414
 — v. Pulvertoft, 296
 Metham v. Devon, D. of, 1386, 1387
 Methuen and Blore's Contract, *Re*, 1320
 Methwold v. Walbank, 86
 Metrop. Assn. v. Petch, 154
 — Asy. Dis. Managers v. Hill, 174
 — Bank, The, v. Heiron, 590
 — Bank and Jones, *Re*, 488
 — Board of Works v. Lon. & N. W. Ry. Co., 174
 — Board of Works v. Metrop. Ry. Co., 145
 — Counties Soc. v. Brown, 82, 256, 704, 736
 — Dis. Ry. Co. and Cosh, *In re*, 1048
 — Ry. Co. v. Defries, 1081
 — Ry. Co. v. Woodhouse, 107
 — Ry. Wareh. Co., 468
 Mette's Estate, *Re*, 123, 953
 Metters v. Brown, 756
 Meure v. Meure, 625
 Meux v. Bell, 723, 725
 — v. Jacobs, 704
 Mews v. Carr, 1037
 — v. Mews, 389, 390
 Meyer v. Simonsen, 120
 Meyerhoff v. Froehlich, 607
 Meynell v. Massey, 645
 — v. Surtees, 82, 1056
 Meyrick v. Anderson, 249

- Meyrick v. Coutts, 892
 — v. Laws, Meyrick v. Matthias, 1028
 Miall v. Brain, 371
 Michael's Trusts, *In re*, 859
 Michell v. Bridges, 1404
 — v. Michell, 25, 644, 646, 1415
 — v. Wilton, 20
 Michell's Estate, *Re*, 52
 — Trusts, *Re*, 43, 660, 663
 Michelmores v. Mudge, 352, 353
 Micholls v. Corbett, 1083
 Micklethwait v. Micklethwait, 1027, 1253, 1254, 1374
 Middlemore v. Goodale, 555
 Middlesborough, &c., Co., *Re*, 468
 Middleton v. Cater, 50
 — v. Clitherow, 54
 — v. Dodswell, 993
 — *Ld.*, v. Eliot, 781
 — v. Greenwood, 100, 103
 — v. Losh, 8, 9
 — v. Magnay, 528, 556
 — v. Messenger, 1379
 — v. Middleton, 40, 922
 — v. Pollock, 96, 263, 294, 803
 — v. Pryor, 999
 — v. Reay, 1011
 — v. Spicer, 187
 — v. Windross, 285
 Middleton's Case, 253
 Midgley v. Coppock, 1081
 Mid. Bank Co. v. Chambers, 994
 Mid. Coy. R. Co. v. Caldecott, 1046
 Mid. R. Co., *Re*, 1322
 Mid. R. Co. v. Haunchwood & Co., 1048
 Mid. R. Co. v. Miles, 170
 Midland, &c., Co. v. Johnson, 97
 — v. Oswin, 1319
 — v. Taylor, 441
 Mignan v. Parry, 614, 616
 Migotti's Case, 476, 477
 Milbourne v. Ewart, 335
 Mildmay v. Quicke, 512
 Mildmay's Case, 81, 209, 217, 1241
 Mildred v. Austin, 738
 Miles' Claim, 797
 Miles' Will, *Re*, 999
 — v. Clark, 1212
 — v. Durnford, 697
 — v. Dyer, 1316
 — v. Harford, 1029
 — v. Harrison, 58
 — v. Jarvis, 1428
 — v. Langley, 1154
 — v. Miles, 1290, 1332
 — v. McIlwraith, 96
 — v. New Zealand, &c., Co., 771
 — v. Presland, 524
 Milford v. Milford, 343, 347, 351, 352, 353
 — v. Peile, 666
 — Docks Co., *Re*, Lister's Pet., 471
 — Haven R. Co. v. Mowatt, 1142
 Mill v. Hill, 776
 Millar v. Turner, 857
 Millard v. Bailey, 1297, 1306
 — v. Eyre, 1011
 — v. Harvey, 1058
 Miller, *Ex parte*, 491
 — v. Brown, 1286
 — v. Harris, 315
 — v. Huddleston, 20, 1342
 — v. Little, 1330
 — v. Mackay, 803
 — v. Marriott, 512
 — v. Miller, 136, 137, 809, 815
 — v. Priddon, 1009
 — v. Thurgood, 176, 178
 — v. Travers, 1301
 Miller's Case, 425, 464
 Millet v. Rouse, 325, 326
 Millett v. Davy, 748
 Millican v. Vanderplank, 1093
 Milligan v. Cooke, 1128
 Millner's Estate, *Re*, 1115
 Mills, *Ex parte*, 793
 — v. Banks, 881
 — v. Borthwick, 603
 — v. Brown, 1332
 — v. Capel, 585
 — v. Drewitt, 19, 20, 21
 — v. Farmer, 45
 — v. Fowkes, 608
 — v. Haywood, 1058, 1130
 — v. Mills, 120
 — v. Oddy, 1088
 — v. Seward, 220
 — v. Trumper, 24, 26
 Milne v. Gilbert, 1404
 Milner v. Colmer, 376
 — v. Harewood, *Ld.*, 317, 632, 633
 — v. Milner, 1211
 Milnes v. Branch, 555
 — v. Busk, 391
 — v. Gery, 1054, 1060
 Milroy v. Lord, 302, 303
 — v. Milroy, 1374
 Milsington, *Ld.* v. Mulgrave, *E.*, 235
 — v. Portmore, *E.*, 236
 Milton v. Edgeworth, 732
 Milward v. Thanet, *E.*, 1130
 Miner v. Baldwin, 19, 20
 — v. Gilmour, 162, 165
 Minet v. Leman, 1104, 1137
 — v. Morgan, 1157
 Minor, *Ex parte*, 1091, 1096
 Minors v. Battison, 878, 991, 1010, 1228
 Minshull v. Oakes, 554, 555
 Minter v. Wraith, 840
 Minton v. Kirwood, 845, 856, 1159
 Mirehouse v. Scaife, 37, 39, 40, 1333, 1414
 Mitcalfe's Case, 425
 Mitchel v. Neale, 1169
 — v. Reynolds, 87
 Mitchell v. Colls, 657
 — v. Darley Main Co., 170, 605, *Add.*
 — v. Homfray, 310
 — v. Seward, 556, 1183
 Mitchell's Case, 433
 — Claim, 606

- Mitford *v.* Mitford, 626
 — *v.* Reynolds, 44, 46, 50, 55, 628
 Moase *v.* White, 1361
 Mocatta *v.* Lindo, 1230
 — *v.* Murgatroyd, 742, 1153
 Mockett, *Re*, 278
 Moffatt *v.* Burnie, 1378
 — *v.* Farquhar, 440
 Moffett *v.* Bates, 180
 Mogg *v.* Hodges, 50
 — *v.* Mogg, 838, 1382
 Moggridge *v.* Thackwell, 45, 190, 1336
 Mohun *v.* Mohun, 1296
 Mold *v.* Wheateroft, 141, 750
 Mole *v.* Mansfield, 509
 — *v.* Smith, 65
 Mollwo & Co. *v.* Court of Wards, 788, 792
 Molony *v.* Kennedy, 391
 — *v.* Kernan, 1186
 Molton *v.* Camroux, 69, 696, 789, 1038
 — *v.* Hutchinson, 898
 Molyneux *v.* Rowe, 1280
 Monck *v.* Monck, 925, 928
 Monckton, *In re*, *v.* Gilzean, 1082, 1084
 Money *v.* Money, 326
 Money's Trusts, *Re*, 122
 Monkhouse *v.* Holme, 1197
 Monkton *v.* Att.-Gen., 1115
 Mon. Can. Co. *v.* Harford, 152
 Monro *v.* Taylor, 1075, 1096, 1120, 1140
 Monsell *v.* Armstrong, 880
 Montacute *v.* Maxwell, 613, 614
 Montagu *v.* Festing, 316
 — *v.* Nucella, 1317
 Montague *v.* Benedict, 68
 — *v.* Kater, 884
 — *v.* Montague, 640, 927
 Montefiore *v.* Behrens, 636
 — *v.* Brown, 849, 886, 1150, 1153
 — *v.* Enthoven, 1242, 1244
 — *v.* Guedalla, 927
 Montefiori *v.* Montefiori, 331
 Monteith *v.* Nicholson, 1397
 Montford *v.* Cadogan, 235, 975
 Montgomerie *v.* Bath, Marq. of, 762
 — *v.* Woodley, 1217
 Montgomery *v.* Montgomery, 221, 1392,
 1393, 1394
 Monypenny *v.* Bristow, 1099, 1286
 — *v.* Dering, 838, 839, 840, 1028
 — *v.* Monypenny, 638
 Moodie *v.* Bannister, 261, 583, 603, 606
 — *v.* Reid, 895
 Moody *v.* Steggles, 140
 — *v.* Walters, 223
 — *In re*, Yates' Contract, 1072, 1078
 Moor, *Ex parte*, 454
 — *v.* Barham, 286
 — *v.* Denn, 1367
 — *v.* Roberts, 1088
 Moore, *Ex parte*, 451, 568
 — *Re*, 278, 505
 — *v.* Barber, 1263
 — *v.* Blake, 102, 103
 — *v.* Cleghorn, 963
 Moore *v.* Crofton, 71
 — *v.* Culverhouse, 774
 — *v.* Darton, 137, 138, 303
 — *v.* Davies, 793
 — *v.* De la Torres' Case, 95, 427
 — *v.* Edwards, 1053
 — *v.* Frowd, 986, 987
 — *v.* Godfrey, 1346
 — *v.* Grey, 693
 — *v.* Hall, 158
 — *v.* Hart, 612
 — *v.* Marrable, 1130
 — *v.* Moore, 137, 138, 303, 396, 1323,
 1338, 1418, 1419
 — *v.* Morris, 398
 — *v.* Parker, 219
 — *v.* Rawson, 157
 — *v.* Shelley, 735
 — *v.* Simkin, 657
 — *v.* Webb, 152, 166
 — *v.* Webster, 338
 — *v.* Whitehouse, 1270
 — *v.* Woolsey, 721
 — Sir John, *Re*, 489
 — &c., Bank Co., *Ex parte*, 715
 Moores *v.* Choat, 693
 Moorewood *v.* Wilkes, 188
 Moorhouse *v.* Lord, 1260
 Moravian Society, *Re*, 1009
 Mordaunt *v.* Benwell, 117
 More *v.* More, 325
 More's Trusts, 1337
 Morecock *v.* Dickens, 776
 Moreton *v.* Lees, 908
 Morewood *v.* S. York R. Co. 292
 Morgan, *Re*, 239, 273, 955, 1267
 — Goods of, 1263
 — *v.* Abergavenny, 255
 — *v.* Elford, 1039
 — *v.* Griffith, 79
 — *v.* Gronow, 884, 893, 913, 914
 — *v.* Holford, 1099
 — *v.* Malleston, 302, 303
 — *v.* Middlemiss, 1365
 — *v.* Milman, 894, 1054, 1060
 — *v.* Morgan, 7, 9, 119, 214, 317
 338, 585
 — *v.* Pike, 1183
 — *v.* Rhodes, 83, 529
 — *v.* Rutson, 852
 — *v.* Surman, 904
 — *v.* Swansea, &c., Authority, 1160
 — *v.* Thomas, 1289, 1392
 Moriarty *v.* Martin, 184
 Morice *v.* Durham, Bp. of, 44
 Morison *v.* Morison, 986
 Morland *v.* Cook, 146, 1151, 1166
 — *v.* Isaac, 721
 Morley, *Ex parte*, 806
 — *Ex parte*, *re* White, 801
 — *Re*, 1353
 — *v.* Bird, 502, 697, 1292, 1330
 — *v.* Bridges, 780
 — *v.* Clavering, 1060
 — *v.* Cook, 1083, 1101

- Morley *v.* Croxon, 54
 — *v.* Morley, 683, 759
 — *v.* Rennoldson, 1233, 1234
 — *v.* Saunders, 225
 Morlock *v.* Buller, 894
 Mornington *v.* Keane, 667, 668, 1298
 Morphett *v.* Jones, 1058
 Morrall *v.* Morrall, 403
 Morrell *v.* Fisher, 1308
 — *v.* Morrell, 1301
 — *v.* Wootten, 694
 Morres *v.* Hodges, 122, 239
 Morret *v.* Paske, 743
 Morrice *v.* Bank of England Case, 262
 — *v.* Langham, 1029
 Morris' Case, 474
 — *v.* Ashbee, 132
 — *v.* Cannan, 723
 — *i.* Clarkson, 630
 — *v.* Colman, 101
 — *v.* Davies, 1388
 — *v.* Debenham, 877, 920, 1036
 — *v.* Edgington, 142, 1180
 — *v.* Glynn, 53
 — *v.* Griffiths, 111
 — *v.* Howes, 218, 892
 — *v.* Islip, 750
 — *v.* Kearsley, 1100
 — *v.* Livie, 265
 — *v.* Lloyd, 1359, 1367
 — *v.* Manesty, 524
 — *v.* Morris, 818, 890, 1254, 1255,
 1398
 — *v.* Rhydydefed Colliery Co., 869
 — *v.* Wright, 132
 Morrison *v.* Chadwick, 565
 — *v.* Hoppe, 1320
 Morrit *v.* Paske, 772
 Morritt *v.* Douglas, 1274
 Morrow *v.* Bush, 1415
 Morse *v.* Faulkner, 1181
 — *v.* Martin, 858
 — *v.* Merest, 1120
 — *v.* Royal, 591
 Morse's Settlement, *Re*, 834
 Mortimer *v.* Bell, 1069
 — *v.* Capper, 1096
 — *v.* Hartley, 1317
 — *v.* Picton, 997
 — *v.* Slater, 1405
 — *v.* Watts, 235
 — *v.* West, 1386
 Mortimore *v.* Mortimore, 1405
 Mortlock *v.* Buller, 93, 876, 882, 1036,
 1066, 1127, 1130, 1135
 Mortlock's Trusts, *Re*, 845, 856
 Morton & Hallett, *Re*, 755
 — *v.* Woods, 735
 Morton's Case, 423
 Moscrop *v.* Sandeman, 1093
 Moseley's Trusts, *Re*, 834, 835, 836
 Mosely *v.* Virgin, 100
 Moser, *Re*, 570
 Mosley *v.* Baker, 739
 — *v.* Massey, 1316
 Mosley *v.* Ward, 177, 183
 Moss *v.* Barton, 528
 — *v.* Cooper, 57
 — *v.* Dunlop, 1405
 — *v.* Gallimore, 734, 746
 — *v.* Hall, 71
 — *v.* Harter, 900
 Mostyn *v.* Lancaster, Taylor *v.* Mostyn,
 869
 — *v.* Mostyn, 1232, 1304, 1313
 Mott *v.* Buxton, 978
 — *v.* Shoolbred, 153, 154
 Mottram, *Re*, 1198
 Motz *v.* Moreau, 307
 Moule *v.* Garrett, 563
 Moullet *v.* Cole, 822
 Moulson *v.* Moulson, 929
 Mounsey *v.* Blamire, 1373, 1374
 Mountain *v.* Bennet, 1264
 Mountford *v.* Scott, 1156
 Mountstephen *v.* Brooke, 607
 Mowatt *v.* Londesborough, 413
 Mower *v.* Orr, 110
 Mowlem, *Re*, 204
 Moxey *v.* Bigwood, 97
 Moxhay *v.* Inderwick, 1168
 Moxon *v.* Payne, 63, 308
 Moyle *v.* Moyle, 270
 Moyse *v.* Gyles, 1027, 1051
 Mozley *v.* Alston, 464
 Mucklow *v.* Fuller, 975, 992
 Mudford's Claim, 477
 Mudge *v.* Adams, 406
 Muggeridge *v.* Stanton, 391
 Muggeridge's Settlement, *Re*, 278
 — Trusts, *Re*, 1244
 Muggleton *v.* Barnett, 202, 206
 Muir *v.* City of Glasgow Bank, 433
 — *v.* Jolly, 1172
 Mules *v.* Jennings, 110
 Mulkern *v.* Lord, 701
 Mullens *v.* Miller, 1059
 Mullins *v.* Hussey, 64, 1092, 1140
 — *v.* Smith, 1329, 1330, 1331, 1333,
 1340, 1341, 1342
 — *v.* Trinder, 1137
 Mumford *v.* Stohwasser, 765
 Munby *v.* Ross, 862
 Munch *v.* Cockerell, 270, 1007
 Mundel's Settlement, *Re*, 1012
 Mundy *v.* Howe, E., 650
 — *v.* Jolliffe, 1058, 1059
 — *v.* Mundy, 374
 Mun. Perm. Invest. Build. Soc. *v.* Kent,
 701
 Munns *v.* Isle of Wight R. Co., 1173
 Munro *v.* Munro, 1368
 Munroe *v.* Douglas, 1260
 Munster *v.* Cammel Co., 448
 — *v.* Cox, 797
 Murchie *v.* Black, 167
 Murgatroyd *v.* Robinson, 150, 166
 Murkin *v.* Phillipson, 1205, 1213
 Murless *v.* Franklin, 972, 974, 975
 Murphy *v.* O'Shea, 1042

- Murphy v. Sterne, 597
Murray, *Re*, 326
— v. Barlee, 394
— v. Bogue, 132, 134
— v. Bush, 443
— v. Elibank, *Ld.*, 377, 384, 385
— v. Flavell, 825
— v. Hall, 500
— v. Jones, 1208
— v. Mackenzie, 716
— v. Mann, 96
— v. Milner, 1115
— v. Pinkett, 727, 815
— v. Scott, 699
Murrell v. Goodyear, 1035, 1067, 1106, 1127
Murthwaite v. Jenkinson, 979
Murton's Trusts, *In re*, 1013
Muschamp v. Bluet, 1240
Musgrave v. Brooke, 1207, 1245
— & Hart's Case, 440, 441
Muskerry v. Chinnery, 1151
Muskett v. Eaton, 835, 1220
Mussoorie Bank v. Raynor, 967
Mutlow v. Bigg, 114
— v. Mutlow, 34
Mutual, &c. Build. Soc., *In re*, 701, *Add.*
— Life Assur. Soc. v. Langley, 727, 761
Mycock v. Beatson, 818, 1174
Myers v. Hodgson, 231
— v. Perigal, 52
— v. United Guarantee Co., 89
— v. Watson, 1068
Myerscough, *Ex parte*, 315
Myler v. Fitzpatrick, 983
- NACUPIA, &c. Co., *Re*, 471
Nairn v. Majoribanks, 224
— v. Prowse, 1172
Nandwick v. Wilkes, 617
Nanfan v. Legh, 1370
Nanney v. Williams, 297, 305, 307, 584
Nannock v. Horton, 898
Nanny v. Edwards, 761
— v. Martin, 350
Nanson v. Barnes, 201, 203
— v. Gordon, 828
Nantes v. Corrock, 393
Nant-y-glo Co. v. Grave, 494
Napier v. Napier, 898
Nash, *Re*, 783, 1011
— v. Armstrong, 1122
— v. Coates, 219, 220
— v. Eads, 757
— v. Hodgson, 608
— v. Nash, 349
— v. Palmer, 1180
— v. Worcester, &c. Commissioners, 1134
Nassau Phosphate Co., 419
Natal Invest. Co., *Re*, 453, 724
Natchbolt v. Porter, 565
Nation's Case, 440
- National, &c. Soc., *Re*, 463, 669
— Bank, *Ex parte*, 772
— &c. Bank, *Re*, 714
— Exch. Co. v. Drew, 95
— Financial Co., *Re*, 434
— Funds Assur. Co., 462, 467
— Guard. Assur. Co., *Ex parte*, 719
— Merc. Bank, *Ex parte*, 714
— Merc. Bank v. Hampson, 717
— Pr. Bank Eng. v. Games, 779
— Prov., &c. Co. v. Prud. Assur. Co., 158
— Savings Bank, 472
Native Iron Ore Co., 450, 451
Naylor v. Arnitt, 537
— v. Winch, 62, 63
Neal, *Ex parte*, 403
Neal's Trusts, *Re*, 666
Neale v. Cripps, 1255
— v. Davies, 989
— v. Day, 292
— v. Mackenzie, 529
— v. Neale, 63
Neale's S. P. Case, 639
Neate v. Marlborough, D. of, 517, 738
— v. Pickard, 1284
Neatherway v. Fry, 862
Nedby v. Nedby, 908
Needham v. Rivers Protection & Manure Co., 470
— v. Smith, 90, 669
Needham's Case, 443, 445, 473
Neesom v. Clarkson, 367
Nees v. Burrage, 276, 1122
Neighbour v. Thurlow, 1398
Neill v. Morley, 69
Nelson v. Bealby, 803
— v. Booth, 750
— v. Carter, 1331
— v. Duncombe, 69
— v. Hopkins, 1361
Nelson v. Page, 1418, 1419
— v. Stocker, 69, 332, 634, 992
— Mitchell's Case, 433
Nelthorpe v. Hill, 1347
Nelthorpe v. Holgate, 1051, 1066, 1071
Nene Valley Drainage Commissioners v. Dunkley, 1056
Nepean v. Doe, 1226
Nerot v. Burnand, 805, 812
Nesham v. Selby, 92, 1056
Nethersole v. Blind, School for the, 50
Nettleship, *Ex parte*, 693
Nettleton v. Stephenson, 6, 7
Neve v. Flood, 522
— v. Pennell, 740, 741
— v. Pennell, Hunt v. Neve, 774
Nevill v. Boddam, 1225
— v. Snelling, 689
Nevill's Case, 444, 474
Neville v. Wilkinson, 331
Nevin v. Drysdale, 926
Nevinson v. Lennard, *Ly.*, 1325
New v. Bonaker, 46
— v. Jones, 277, 985

- Newall v. Smith, 1139
 Newbegin v. Bell, 1416
 Newbery, *Re*, 316
 Newbold v. Roadknight, 1097, 1333, 1334
 Newbolt v. Pryce, 1311
 Newbould v. Smith, 595, 599
 New Brunswick Co. v. Conybeare, 458
 — &c., *Co. v. Muggeridge*,
 423, 428
 Newburgh, E. v. Newburgh, *Css.*, 1301
 Newbury's Trusts, 1351
 Newcastle, *Corp. v. Att.-Gen.*, 296
 — *D. of, Re*, 518, 519, 520
 New Clydach, &c., *Co.*, 454
 Newcomen v. Coulson, 156
 — *v. Hassard*, 392, 293
 Newell v. Radford, 81, 1053
 Newhouse v. Smith, 1416
 Newill v. Newill, 502, 966
 Newington Board v. Cottingham Board,
 174
 Newitt, *Ex parte*, 712
 Newland v. *Att.-Gen.*, 44
 — *v. Holmes*, 577
 Newlands v. Paynter, 387, 388
 New Lon., &c., Bank, v. Brocklebank,
 434, 771
 Newman, *Re*, 71, 72
 — *v. Barton*, 1347
 — *v. Hook*, 1093
 — *v. Newman*, 721, 765, 1219,
 1220, 1325
 — *v. Piercey*, 1314
 — *v. Rogers*, 1119
 — *v. Selfe*, 762
 — *v. Warner*, 1014
 Newman's Settled Estates, *In re*, 942
 Newmarch v. Storr, 1419
 Newport v. Bryan, 1003
 New Quebrada Co. v. Carr, 830
 Newry & Co. v. Edmunds, 465
 Newsom v. Pinder, 158
 New Sombrero Phosphate Co., *Re*, v. Er-
 langer, 412
 Newsome v. Flowers, 47, 989
 Newstead v. Searles, 656, 620
 Newton v. Askew, 297
 — *v. Marsden*, 1207, 1233, 1234,
 1235
 — *v. Metrop. Ry. Co.*, 253
 — *v. Newton*, 727, 767, 769, 1184
 — *v. Ricketts*, 889
 — *v. Sherry*, 260
 — *v. Taylor*, 810
 Newton's Trusts, *Re*, 354, 1373, 1374
 Nicholas v. Chamberlain, 146
 Nicholl v. Jones, 66, 181
 — *v. Nicholl*, 1427
 Nicholls v. Judson, 258, 933
 — *v. Maynard*, 732
 — *v. Osborn*, 1327, 1349
 — *v. Rosewarne*, 525
 — *v. Stretton*, 87
 Nichols v. Binns, 1263
 — *v. Hawks*, 1369
 Nichols v. Marsland, 171
 Nicholson v. Bradfield Union, 78, 456
 — *v. Drury*, 350
 — *v. Rose*, 557
 — *v. Smith*, 554
 — *v. Squire*, 325
 — *v. Tutin*, 748, 993, 994
 Nickells v. Hancock, 100
 Nickisson v. Cockill, 58, 1342
 Nicklin v. Williams, 170
 Nicol v. Nicol, 404
 Nicol's Case, 433, 458
 Nicoll v. Chambers, 1076
 — *v. Fenning*, 1168
 Nicolls v. Sheffield, 833
 Nicols v. Pitman, 131
 Nicolson v. Wordsworth, 976
 Nield v. L. & N. W. R. Co., 171
 Nightingale v. Goulbourn, 44
 — *v. Lawson*, 235, 237, 749
 Nind v. Mashall, 1166
 Nives v. Nives, 1173
 Nixon v. Albion Marine Insurance Co.,
 1086
 — *v. Brownlow*, 427
 — *v. Nixon*, 356, 1111
 — *v. Verry*, 636
 Noad v. Backhouse, 751, 993
 Noakes v. Noakes, 677
 Noble v. Brett, 266, 1347
 — *v. Edwards*, 1119
 — *v. Meymott*, 976
 — *v. Phelps*, 1263
 — *v. Ward*, 79
 Nock v. Newman, 1127
 Noel v. Bewley, 1181
 — *v. Henley, Ld.*, 641, 851
 — *v. Jevon*, 369, 981
 — *v. Robinson*, 1347
 — *v. Walsingham, Ld.*, 646
 Noell v. Wells, 253
 Nokes v. Kilmorey, *Ld.*, 1140
 Norbone's Case, 348
 Norbury v. Kitchin, 163
 — *v. Norbury*, 998
 Norcutt v. Dodd, 289
 Norfolk, *D. of v. Worthy*, 1064, 1123
 Norman, *Re*, 658
 — *v. Kynaston*, 1279
 — *v. Mitchell*, 427, 445
 — *v. Strains*, 66
 — *v. Villars*, 408
 Norris v. Chambres, 75, 189, 190, 960
 — *v. Frazer*, 57
 — *v. Harrison*, 217
 — *v. Jackson*, 100
 — *v. Le Neve*, 1155
 — *v. Norris*, 987, 1003
 — *v. Wilkinson*, 691
 — *v. Wright*, 698
 North, *Ex parte*, 712
 — *v. Martin*, 219, 221
 — *v. Purdon*, 282
 — *v. Wakefield*, 82, 831
 North B. I. Co. v. Hallett, 724

- North. Counties, &c., Co. v. Whipp, 766
 Northern v. Carnegie, 223, 968
 Northern's Estate, *Re*; Salt v. Pym, 1309
 Northey v. Burbage, 1210, 1377, 1378
 — v. Northey, 375
 Northumberland, E. of v. Egremont, E.
 of, 180, 861
 N. Staff. Steel, &c., Co. v. Ward, 414
 N. W. R. Co. v. M'Michael, 538
 North Yorks Iron Co., *Re*, 479
 Norton, *Ex parte*, 350
 — v. Bazett, 1276
 — v. Compton, 261, 263, 264, *Add.*
 — v. Cooper, 748
 — v. Ellam, 605
 — v. Florence, &c., Co., 451, 454
 — v. Frecker, 260, 270
 — v. L. & N. W. R. Co., 576
 — v. Mascall, 101
 — v. Nicholls, 135
 — v. Turvill, 336, 396
 Norway v. Rowe, 812
 Notley v. Palmer, 112
 Nott v. Riccard, 1120
 Nottage v. Jackson, 126, 135
 Nottidge v. Prince, 307
 Nottingham, &c., Tile Co. v. Butler, 1075,
 1183, *Add.*
 Nottley v. Palmer, 370
 Novello v. Sudlow, 131
 Novosielski v. Wakefield, 739
 Nowell v. Nowell, 801, 816
 — v. Roake, 898
 Noyes v. Crawley, 809
 — v. Pollock, 750
 Nugee v. Chapman, 1097, 1324
 Nugent v. Vetzera, 315
 Nuneaton Board v. Gen. Sewage Co., 174
 Nunn v. Fabian, 1059
 — v. Hancock, 1034, 1093, 1138
 — v. Wilsmore, 289
 Nunn's Trusts, *Re*, 1312
 Nuttall v. Bracewell, 163
- OAKBAND Oil Co. v. Crum, 466
 Oakden v. Pike, 1082, 1083, 1101
 Oakeley v. Pasheller, 823
 Oakes, *Ex parte*, 694
 — v. Oakes, 1338
 — v. Turquand, 93, 419, 430, 484,
 458, 476
 Oakford v. Europ., &c., Co., 819
 Oakley v. Monck, 533, 567
 — v. Wood, 1367
 Oak Pits Coll. Co., *Re*, 479
 Oaks v. Brydon, 1369
 — v. Jackson, 502
 Obee v. Bishop, 261, 589
 Obrien v. Obrien, 1253
 O'Brien v. Tyssen, 50
 O'Callaghan v. Cooper, 987, 1239
 Ocleston v. Fullalove, 1387, 1388
 Oceanic Steam Nav. Co. v. Sutherland, 276
- Ockenden v. Henley, 1085
 Oddie v. Brown, 6, 7, 1296
 — v. Woodford, 1372
 Odell, *Ex parte*, 688
 Odessa Tramway Co. v. Mendel, 422
 O'Farrell v. Stephenson, 569
 O'Ferrall, *Ex parte*, 379, 1345
 — v. O'Ferrall, 235
 Offen v. Harman, 886, 1113
 Offley v. Offley, 645
 Off. Man. Newcastle, &c., Co. v. Hymers,
 258
 Ogden v. Fossick, 101
 Ogilvie v. Currie, 429
 — v. Foljambe, 1054, 1103
 Oglander v. Baston, 350, 351
 Ogle v. Knipe, 1325
 — v. Vance, E., 79, 1122
 O'Halloran v. King, 398
 O'Herlity v. Hedges, 83, 529, 1059
 Oke v. Heath, 908, 1294
 Okeden v. Clifden, 1138
 Okill v. Whittaker, 1176
 Olathe, &c., Co., *Re*, 455
 Oldaker v. Hunt, 164
 — v. Lavender, 807
 Oldenburg, Prince, Goods of, 75
 Oldershaw v. King, 71
 Oldfield, *Re*, 319
 — v. Round, 1064, 1065
 Oldham v. Hughes, 113
 Oliviant v. Wright, 1210, 1396
 Oliver v. Oliver, 620, 1330, 1331
 — Goods of, 1274
 — v. King, 292
 Olney v. Bates, 1295
 O'Loughlin, Goods of, 1323
 O'Mahoney v. Burdett, 1209, 1211
 Omerod v. Hardman, 1129
 — v. Todmorden Co., 163
 Ommaney, *Ex parte*, 780
 — v. Butcher, 44, 281
 — v. Stilwell, 1114
 Ongley v. Chambers, 1306, 1322
 Onions v. Cohen, 530, 1135, 1136
 Onley v. Gardiner, 146, 152
 Onslow v. ———, 556
 — v. Londesborough, Ltd., 1167
 — v. Mitchell, 932
 — v. Wallis, 987
 Onslow's Trusts, *Re*, 525
 Oppenheim v. Henry, 1215, 1380
 — v. Oppenheim, 677
 Oppenheimer v. Br. & For., &c., Bank,
 491
 Opy v. Thomasius, 867
 Orange v. Martyn, 1369
 — v. Pickford, 888
 Orby v. Mohun, 870
 Ord, *Re*, 16, 1289
 — *Re*, Dickenson v. Dickinson, 1290
 — v. Johnston, 70
 — v. Noel, 93, 1036
 — v. Ord, 1268
 — v. White, 1004

- Orell *v.* Orell, 182
 Orett, *Ex parte*, 691
 Orford, E. of, *v.* Churchill, 862, 1376
 Oriental Steam Co. *v.* Briggs, 423
 — Commercial Bank *v.* Savin, 271
 — &c., Co., *Re*, Scinde R. Co. *Ex parte*, 481
 Original Hartlepool Coll. Co. *v.* Gibb, 164
 Orlebai's Settlement Trust, *Re*, 1206
 Orm *v.* Smith, 1339
 Orme, *Re*, 1189, 1193
 Ormerod's Case, 426, 478
 Ormonde *v.* Kynnersley, 1254
 Ornamental, &c., Co. *v.* Brown, 464
 O'Rorke *v.* Bolingbroke, 1033
 O'Rourke *v.* Percival, 1130
 Orpen's Case, 442
 Orr *v.* Chase, 798
 — *v.* Kaines, 1347
 — *v.* Newton, 252
 Orr-Ewing, *Re*, 74
 — *v.* Colquhoun, 164
 Orton, *Re*, 1408
 Osbaldeston *v.* Askew, 1137
 Osborn *v.* Brown, 1236
 — *v.* Marlborough, D. of, 538
 — *v.* Morgan, 377, 379, 381, 382
 — *v.* Osborn, 512
 Osborn's Mortgage Trusts, *Re*, 783
 Osborne, *Ex parte*, 739, 740
 — *v.* Leeds, D. of, 1337
 — *v.* Harvey, 1077, 1117, 1132
 — *v.* Rowlett, 755, 1139
 — *v.* Smith, 666
 Osbourn *v.* Rider, 867
 Osgood *v.* Strobe, 621, 656
 Osmond *v.* Fitzroy, 305, 308
 Oswald, Goods of, 1302
 Oswell *v.* Probert, 377
 Otley *v.* Ilkley Ry. Co., *Re*, 1289
 O'Toole *v.* Brown, 1318
 Otter *v.* Melville, 662
 — *v.* Vaux, Ld., 742, 1181
 Ottley *v.* Gilby, 989
 Otway *v.* Hudson, 232
 — Cave *v.* Otway, 683
 Ouseley *v.* Anstruther, 669, 1364
 Outram *v.* Maude, 152
 Overend & Co. *v.* Gibb, 457
 Overhill, *Re*, 1386
 Overton *v.* Banister, 992
 Ovey, *Re*, 1332
 Owen, *Re*, 222
 — *v.* Bryant, 1387
 — *v.* De Beauvoir, 573, 575, 584
 — *v.* Delamere, 275
 — *v.* Dickenson, 35, 394, 395, 848
 — *v.* Homan, 82, 394
 — *v.* Owen, 240
 — *v.* Thomas, 1056, 1086
 — *v.* Williams, 238, 239
 Owston, Goods of, 1264
 Oxenden *v.* Compton, Ld., 108
 — *v.* Falmouth, Ld., 1139
 — *v.* Oxenden, 386
 Oxford, E. of, *v.* Churchill, 1395
 — *v.* Provand, 92
 — University of, *v.* Clifton, 1392
 Oxwick *v.* Brockett, 1177
 Oxwith *v.* Plummer, 765
 PACKER *v.* Packer, 382
 — *v.* Wyndham, 343, 348
 Packham *v.* Gregory, 1194
 Paddybury *v.* Clark, 178, 181, 185
 Paddon *v.* Richardson, 271, 998
 Padget *v.* Priest, 249
 Padstow Total Loss, &c., Assoc., *Re*, 415
 Page, *Re*, Mackay, *Ex parte*, 568
 — *v.* Adams, 1083, 1084
 — *v.* Broom, 531
 — *v.* Cox, 813
 — *v.* Hayward, 1204, 1428
 — *v.* Horne, 611, 627
 — *v.* Leapingwell, 1334, 1342
 — *v.* Page, 1293
 — *v.* Soper, 846, 1406
 — *v.* Way, 636, 1243
 — *v.* Young, 1330
 Paget *v.* Anglesey, 25
 — *v.* Ede, 75
 — *v.* Foley, 600
 — *v.* Gee, 24
 — *v.* Grenfell, 14, 931
 — *v.* Huish, 21, 1329
 — *v.* Marshall, 1177
 Paget's Settled Estates, *In re*, 954
 Pagin and Gill's Case, 477
 Paglar *v.* Tongue, 1263
 Pahlen's Case, 445
 Paice *v.* Canterbury, Archbp. of, 845,
 1315, 1367
 Pain *v.* Benson, 1226
 — *v.* Coombs, 528, 529, 1058
 Paine *v.* Hutchinson, 440, 442
 — *v.* Hyde, 1204
 — *v.* Jones, 577
 — *v.* Meller, 1081, 1095
 — *v.* Ryder, 515
 — *v.* Wagner, 503
 Paine's Case, 339
 — Trusts, *In re*, 1017
 Painter *v.* Newby, 1080, 1084
 Palairot *v.* Carew, 990, 1012
 Palin *v.* Hills, 1406
 Palk *v.* Clinton, Ld., 738, 881
 — *v.* Shinner, 151
 Palmer, *Re*, 795
 — *v.* Carlisle, E. of, 762
 — *v.* Crauford, 17
 — *v.* Fletcher, 143
 — *v.* Flower, 1330, 1334
 — *v.* Garrard, 284, 286
 — *v.* Graves, 32
 — *v.* Hendrie, 748, 753, 759
 — *v.* Holford, 838
 — *v.* Johnson, 1175, 1176
 — *v.* Locke, 723, 724, 727, 920
 — *v.* Neave, 630

- Palmer v. Newell, 14, 929, 937
 — v. Simmonds, 964, 967, 1297
 — v. Temple, 1085, 1088
 — v. Trevor, 1343
 — v. Wheeler, 921
 — v. Young, 238
 Palmer's Settlement Trusts, *Re*, 1223
 Palmerston, *Ld. v. Turner*, 1082
 Palsgrave v. Atkinson, 917, 918
 Panama, &c., Co., 454
 Pannell v. Hurley, 697, 983
 — v. Mill, 543
 Papillon v. Voice, 219, 617, 623
 Paramore v. Greenslade, 1096
 Pardo v. Bingham, 35, 604
 Pares, *Re*, 215, 514
 — v. Pares, 921
 Paris Ch. Co. v. Crys. Pal. Co., 1054
 — v. Miller, 1369
 — v. Paris, 1326
 Parish v. Sleeman, 530, 546
 Park, *Ex parte*, 1280
 — *Re*, 315
 Parke, *Ex parte*, 440
 Parker, *Ex parte*, 443
 — Goods of, 1276, 1295
 — *Re*, 1377
 — v. Bloxam, 825
 — v. Brooke, 239, 387, 392, 739
 — v. Carter, 338
 — v. Clarke, 693, 743
 — v. Dee, 262
 — v. Fearnley, 33
 — v. Felgate, 1270
 — v. First Avenue Hotel Co., 160
 — v. Frith, 1119
 — v. Hodgson, 1195, 1213
 — v. Kett, 250
 — v. Lechmere, 350, 391
 — v. McKenna, 410
 — v. Marchant, 1288, 1324, 1326
 — v. Mitchell, 153
 — v. Nickson, 1279, 1280, 1364, 1373
 — v. Parker, 917
 — v. Ringham, 262
 — v. Smith, 1057, 1059
 — v. Sowerby, 371, 1217
 — v. Staniland, 1053
 — v. Taswell, 533
 — v. Turner, 680
 — v. Watkins, 749
 — v. Webb, 555
 — v. Whyte, 551, 556
 — and Parker, *Re*, Turquand, *Ex parte*, 569, 570
 Parker's Trusts, 1013
 Parkers v. Birks, 1397
 Parkes, *Ex parte*, 1171
 — v. Bott, 671
 — v. White, 392, 620, 1041
 Parkin v. Thorold, 1119, 1120
 Parkinson v. Hanbury, 749, 750
 Parkinson's Trusts, 1403
 Parnall v. Parnall, 964
 Parnell v. Hingston, 304
 Parnell v. Lyon, 1237
 Parnham's Trusts, *Re*, 1243, 1244
 Parr, *Ex parte*, 827
 — v. Eliason, 296
 — v. Lovegrove, 1073, 1086, 1100
 — v. Swindells, 1396, 1402
 Parrott v. Palmer, 228
 — v. Sweetland, 1172
 — v. Worsfold, 1331
 Parry, *Re*, 1018
 — v. Ashley, 217
 — v. Brown, 869
 — v. Daggs, *Re*, 1427
 — v. Huddleston, 265
 — v. Wright, 742
 Parson v. Peters, 1239
 Parson's Case, 441
 Parsons v. Gulliford, 1355
 — v. Hayward, 818
 — v. Parsons, 11, 654
 Part, *Ex parte*, 828
 Partington, *Re*, 1379
 Partriche v. Powlett, 504
 Partridge v. Baylis, 1230
 — v. Foster, 518
 — v. Partridge, 1331, 1332, 1338
 — v. Scott, 168
 — v. Smith, 62, 64
 Partyn v. Roberts, 617
 Paske v. Haselfoot, 911, 857
 Passingham v. Pitty, 199
 Patch v. Shore, 301, 902
 — v. Ward, 703
 — v. Wild, 751
 Patent File Co., *Re*, 450, 494
 — Steam Eng. Co., *Re*, 472
 — Ventilating Co., *Re*, 417
 Paterson, *Ex parte*, 568
 — v. Long, 29, 1061, 1086, 1152
 — v. Mills, 202
 — v. Murphy, 303
 — v. Paterson, 784
 Patience v. Main, 1260
 Patman v. Harland, 1071, 1152
 Paton v. Rogers, 1129
 — v. Sheppard, 24
 Patrick v. Milner, 1119
 Patterson, *Re*, 137
 — *Re*, Mitchell v. Smith, 136
 Patton v. Randall, 879
 Paul v. Children, 1386
 — v. Compton, 964
 — v. Hewetson, 887
 — v. Paul, 657, 677, 678
 Paull v. Simpson, 250
 Pawle's Case, 430
 Pawlett, *Ex parte*, 1000
 Pawley v. Colyer, 739
 Pawsey v. Armstrong, 787, 788
 Pawson v. Pawson, 16, 329, 626, 628
 Paxton v. Macreight, 1260
 Paylor v. Pegg, 1246
 Payn v. Hornby, 274
 Payne, *Ex parte*, 712, 718
 — *Re*, 1231, 1241

- Payne v. Collier, 674
 — v. Fern, 717
 — v. Haine, 548
 — v. Little, 266, 391, 392
 — v. Mortimer, 38, 296, 301, 628
 — v. Newton, 100
 Payne's Case, 440, 443
 Peacock, *Ex parte*, 827
 — v. Burt, 773
 — v. Eastland, 214
 — v. Monk, 639, 845
 — v. Peacock, 811
 — v. Penson, 95, 1068
 — v. Spooner, 220
 — v. Stockford, 1384
 Peacock's Trusts, *Re*, 388
 Peacocke v. Pares, 1384
 Peake v. Pennington, 878
 Pearce v. Brooks, 88
 — v. Carrington, 284, 1382
 — v. Crutchfield, 324, 325
 — v. Gardner, 890, 1035
 — v. Graham, 665, 1295
 — v. Lindsay, 811
 — v. Loman, 1190, 1213
 — v. Morris, 738
 — v. Watts, 92
 Peard v. Morton, 1210
 Pearks v. Moseley, 835, 840
 Pearman v. Pearman, 1217
 Pearmain v. Twiss, 37, 1258
 Pearn, Goods of, 1273
 Pears v. Laing, 604
 Pearsall v. Simpson, 1198
 Pearse, Goods of, 1268, 1273
 — v. Baron, 866
 — v. Pearse, 1157
 Pearson, *Ex parte*, Wilts Iron Co., *Re*, 490
 — *Re*, 663
 — v. Amicable Ass. Co., 302
 — v. Bank of England, 960
 — v. Benson, 1039, 1042
 — v. Cranswick, and Cranswick v. Pearson, 18
 — v. Dolman, 1213
 — v. Green, 989
 — v. Helliwell, 19
 — v. Knapp, 529
 — v. Lane, 106, 116
 — v. Pearson, 821, 1275, 1346, 1348, 1349
 — v. Spencer, 142, 143, 145, 146
 Pearson's Case, 426, 491, 494
 Pearsons, Goods of, 1274
 Pease v. Hewitt, 805
 — v. Jackson, 699, 767, 779
 Peat v. Chapman, 506
 — v. Powell, 1366
 Pechell v. Hilderley, 1259
 Pedder, *Re*, 106, 112, 114
 — v. Moseley, 302
 Pedders' Settlement Trusts, *Re*, 662
 Peddie v. Brown, 70
 Pedley v. Dodds, 1309
 Peek v. Gurney, 427, 429, 430
 Peek v. Matthews, 1183
 Peek's Case, 422
 — Trusts, *Re*, 1214
 Peel, Goods of, 1304
 — v. Catlow, 1395
 Peel's Case, 419
 Peele, *Ex parte*, 798
 Peers v. Ceeley, 780
 — v. Lambert, 1106
 — v. Needham, 509
 — v. Sneyd, 1092
 Pegg v. Wisden, 1134
 Pegler v. White, 92, 1075
 Pelton v. Banks, 1369
 Pelham v. Anderson, 43
 Pell v. Northampt. & Ban. R. Co., 1131
 — v. Northampton R. Co., 1173
 Pell's Case, 477
 — Trusts, 1356
 Pellatt's Case, 421, 422
 Pelley v. Bascombe, 577, 584
 Pells v. Brown, 1428
 Pelly, *Ex parte*, 426, 483, 494
 — v. Wathen, 749
 Pember v. Mathers, 563, 1168
 Pemberton v. Barnes, 511
 — v. Chapman, 251
 — v. M'Gill, 395, 398
 — v. Pemberton, 1283
 Pembroke v. Friend, 1418
 Pender v. Lushington, 440
 Pendleton v. Rooth, 595
 Penfold v. Mould, 382
 P. & O. Co. v. Shand, 75
 Penleaze, *Ex parte*, 654
 Penn v. Baltimore, 70, 75
 Penne v. Peacock, 852
 Pennel v. Reynolds, 995
 Pennell v. Deffell, 608, 820, 1005
 Penney, *Ex parte*, 438, 440
 Penniall v. Harborne, 547, 555
 Pennington v. Cardale, 559
 Pennock v. Pennock, 845, 846
 Penny v. Allen, 585, 586
 — v. Clarke, 502
 — v. Watts, 1154
 Penrhyn, *Ld.*, v. Hughes, 226
 Penrose v. Martyr, 449, 456
 Pensyflog Mining Co., *Re*, 487
 Pentlelow's Case, 421, 422
 Pentreguinea, *Re*, 77
 Penwarden v. Roberts, 716
 Pen-y-Van Colliery Co., *Re*, 490
 Peover v. Hassel, 856
 Pepper v. Dixon, 371
 Peppercorn v. Wayman, 879, 976
 Peppin v. Bickford, 1288
 Perceval v. Perceval, 1358, 1423
 Percival v. Dunn, 694
 — v. Phipps, 130
 Percy v. Percy, 19, 1299
 Perens v. Johnson, 1039
 Perfect v. Curzon, *Ld.*, 1232
 Perkes, *Ex parte*, 1039
 Perkins v. Baynton, 505

- Perkins *v.* Bradley, 189
 — *v.* Cooke, 19
 — *v.* Ede, 1106
 — *v.* Fladgate, 1296
 — *v.* Micklethwaite, 1286
 — *v.* Sewell, 211
 — *v.* Thornton, 621
 — Beach Lead Mining Co., *Re*, 481
 Perrett's Case, 422, 423
 Perrin *v.* Blake, 218
 — *v.* Lyon, 1239
 Perring *v.* Brook, 527
 — *v.* Trail, 50
 Perrott *v.* Perrott, 1251
 Perry, *Ex parte*, 691
 — *v.* Barker, 762
 — *v.* Barnett, 434, 439
 — *v.* Davis, 558
 — *v.* Holl, 1155, 1156
 — *v.* Jenkins, 253
 — *v.* Meddowcroft, 687
 — *v.* Merritt, 1240
 — *v.* Newenham, 533
 — *v.* Phelps, 262
 — *v.* Smith, 1157
 — *v.* Walker, 749
 — *v.* White, 1411
 — *v.* Whitehead, 895, 925
 — *v.* Woods, 505
 Perry-Herrick *v.* Attwood, 767
 Persse *v.* Persse, 62, 65
 Peruvian Railways, *Re*, 449
 Petchell, Goods of, 1279
 Peter *v.* Nicolls, 296
 Peterborough, Bp. of *v.* Mortlock, 1331
 Peterborough's, Ld., Case, 854
 Peters *v.* Grote, 386
 — *v.* Lewes, &c. R. Co., 878, 882, 1043, 1044
 Peterson *v.* Elwes, 1077
 — *v.* Peterson, 992, 1347, 1348
 Peto *v.* Hammond, 768, 1074, 1103
 — *v.* Peto, 64
 Petre, Ld., *Ex parte*, 652
 — *v.* Duncombe, 214
 — *v.* Espinasse, 313
 — *v.* E. C. R. Co., 412
 — *v.* Petre, 587, 588, 589, 590, 638, 1342
 Pettinger *v.* Ambler, 22, 885, 888, 902, 1278, 1279
 Pettit's Estate, *Re*, 84, 857
 Petts' Case, 287
 Petts, *Re*, 1813
 Petty *v.* Wilson, 1325, 1326
 Pettyt *v.* Janeson, 807
 Pewtner, *Re*, 1268
 Peyton *v.* Blodwell, 630
 — *v.* Bury, 1203, 1216, 1239
 — *v.* London, Mayor of, 167, 168
 Peyton's Settlement, *Re*, 999, 1036
 Pfleger, *Re*, 122
 Phayre *v.* Phayre, 1004
 Phelps, *Re*, 1269
 — *v.* Prothero, 91
 Phene *v.* Gillan, 986
 Phene's Trusts, *Re*, 506, 1227, 1379, 1383
 Phené *v.* Popplewell, 565
 Pheysey *v.* Vicary, 142, 145
 Philanthropic Soc. *v.* Kemp, 57
 Philbrick, *Re*, 906
 Philips *v.* Paget, 1343
 — *v.* Philips, 606, 679, 1292
 Phillipo *v.* Munnings, 588, 589, 976
 Philipps *v.* Smith, 224
 Phillips, *Ex parte*, Alexander, *Ex parte*, 720
 — *Re*, 108, 780
 — *v.* Atkinson, 810
 — *v.* Barlow, 1250
 — *v.* Barker, 1303
 — *v.* Beal, 261, 1320, 1430
 — *v.* Brydges, 959
 — *v.* Brydon, 845
 — *v.* Buckingham, D., 83, 1051
 — *v.* Caldcleugh, 1063, 1073, 1080, 1103
 — *v.* Chamberlaine, 16
 — *v.* Clagett, 798
 — *v.* Edwards, 877, 1058
 — *v.* Everard, 275
 — *v.* Gutteridge, 19, 20, 743
 — *v.* Homfray, 1035, 1050
 — *v.* James, 617
 — *v.* Jones, 566
 — *v.* Miller, 1154
 — *v.* Mullings, 311
 — *v.* Parry, 36
 — *v.* Phillips, 116, 233, 270, 369, 806, 823, 927, 1185, 1186, 1355
 — *v.* Sargent, 122
 — *v.* Silvester, 1095, 1132
 Phillips' Trusts, *Re*, 122
 Phillipson *v.* Gatty, 270, 999, 1001
 — *v.* Gibbon, 1151
 — *v.* Kerry, 312
 Phillpott *v.* St. George's Hosp., 55
 Philps, *Re*, 1405
 Philps' Will, 1373, 1374
 Phipps *v.* Ackers, 1205
 — *v.* Child, 73, 1071, 1129
 — *v.* Ennismore, 636, 1241
 — *v.* Hale, 1275
 — *v.* Lovegrove, Prosser *v.* Phipps, 726
 — *v.* Lovegrove, 727
 Phipson *v.* Turner, 858, 914
 Phoenix, &c., Co., 460
 — Co. (Burgess' and Stock's Case), 461
 Phosphate Sewage Co. *v.* Hartmont, 413
 Phospho-Guano Co. *v.* Guild, 74
 Photographic Artists' Association, *Re*, 472
 Picard *v.* Hine, 394
 — *v.* Mitchell, 19
 Pickard *v.* Anderson, 998
 — *v.* Marriage, 716
 — *v.* Sears, 95

- Picken *v.* Matthews, 835, 836
 Pickering, *Ex parte*, 475
 — *v.* Dowson, 1059
 — *v.* Ilfracombe, 451
 — *v.* Pickering, 121
 — *v.* Stamford, 270
 — *v.* Vowles, 235, 238
 Pickersgill *v.* Grey, 218
 — *v.* Rodger, 178, 179
 Pickett *v.* Packham, 240
 Pickstock *v.* Lyster, 290
 Pickup *v.* Atkinson, 121
 Pickwell *v.* Spencer, 1367
 Pidgely *v.* Rawling, 1248
 Pidgely *v.* Pidgely, 897
 Pierce *v.* Corp, 1057, 1087
 — *v.* Scott, 1163
 Piercy, Goods of, 1264, 1276
 — *v.* Fynney, 803
 — *v.* Young, 810
 Pierpoint *v.* Cheney, *Ld.*, 650
 Pierce *v.* Waring, 306
 Pierson *v.* Garnet, 861
 Pieschel *v.* Paris, 45
 Pigg *v.* Clarke, 1403
 Piggot *v.* Penrice, 1319
 Piggott *v.* Stratton, 95, 162, 557, 563
 Pigot *v.* Bullock, 1250
 — *v.* Cubley, 759
 — *v.* Gascoin, 250
 Pigott and G. W. Ry. Co., *Re*, 1047
 — *v.* Bagley, 813
 — *v.* Pigott, 352, 367
 — *v.* Waller, 1286
 Pike *v.* Fitzgibbon, 181, 395, 848
 — *v.* Nicholas, 131, 132
 Pilcher *v.* Randall, 1294
 — *v.* Rawlins, 765, 1184
 Pile *v.* Pile, 704
 — *v.* Salter, 1198
 Pilling *v.* Pilling, 803, 805
 Pilling's Trusts, *In re*, 1019
 Pimm *v.* Insall, 632, 1091
 Pinbury *v.* Elkin, 1199
 Pince *v.* Beattie, 986, 999
 Pinchard *v.* Fellows, 760
 Pinchin *v.* Lon. & Blackwall R. Co., 1043,
 1047
 — *v.* Simms, 934
 Pinder *v.* Pinder, 659
 Pinede's Settlement, *Re*, 909, 910
 Pinero *v.* Judson, 527
 Pinhorn *v.* Souster, 535, 736
 Pinnell *v.* Hallett, 669
 Pinney *v.* Hunt, 254
 — *v.* Marriott, 1319
 — *v.* Pinney, 1110
 Pinnington *v.* Galland, 142
 Pinnock *v.* Bailey, 727, 728
 Pinto Silver Mining Co., *Re*, 489
 Piper *v.* Piper, 1418
 Pipon *v.* Pipon, 282
 Pisani *v.* Att.-Gen. for Gibraltar, 1040
 Pitcairne *v.* Brase, 1311
 — *v.* Ogbourne, 331, 1130
 Pitt *v.* Hunt, 343
 — *v.* Jackson, 917
 — *v.* Pelham, 961
 — *v.* Pitt, 343, 367, 683, 1260
 Pitts *v.* Jones, 510
 Planet, &c., Co., *Re*, 470
 Plant *v.* James, 146
 — *v.* Taylor, 240, 1116
 Plaskynaston Tube Co., *Re*, 432
 Plasterers' Co. *v.* Parish Clerks' Co., 153,
 154
 Platt *v.* Platt, 514, 925
 — *v.* Walter, 130
 — *Ly.*, *v.* Sleep, 630
 Playfair *v.* Cooper, 600
 Playford *v.* Playford, 738
 Playters *v.* Abbott, 233, 235
 Plenty *v.* West, 1279
 Plews *v.* Baker, 810
 Plowden *v.* Hyde, 182, 699, 1099
 Plumer *v.* Marchant, 264
 Plummer *v.* Gregory, 799
 — *v.* Whiteley, 25
 Plunkett, *Re*, 1312
 — *v.* Dease, 529
 — *v.* Lewis, 935
 Plymouth, *Ly.*, *v.* Archer, 1254
 Poad *v.* Watson, 979
 Pochin *v.* Duncombe, 1105
 Pocklington *v.* Bayne, 903
 Pocock *v.* Att.-Gen. 45
 — *v.* Reddington, 987, 998
 Pocock's Estate, *Re*, 926
 — Claim, Trickett's Claim, & Carew's
 Claim, 454
 Pogson *v.* Thomas, 1319, 1320
 Poland *v.* Glyn, 995
 Polden *v.* Bastard, 146, 1308
 Pole *v.* Pole, 973
 — *v.* Ld. Somers, 937
 Pollard, *Re*, 1400
 — *v.* Clayton, 101, 1131
 — *v.* Doyle, 985
 — *v.* Greenvil, 867
 Pollexfen *v.* Moore, 106
 Pollock *v.* Croft, 1238
 — *v.* Pollock, 28
 — *v.* Rabbits, 1168
 — *v.* Stacy, 532
 — *v.* Worrall, 925
 Polyblank *v.* Hawkins, 338
 Pomfret *v.* Ricroft, 142, 147
 — *E.*, *v.* Windsor, *Ld.*, 648, 1152
 Ponsonby *v.* Ponsonby, 678
 Pontifex's Case, 435
 Ponton *v.* Dunn, 813
 Poole *v.* Adams, 1095, 1178
 — *v.* Bentley, 527
 — *v.* Bott, 1190
 — *v.* Coates, 1288
 — *v.* Hill, 1122, 1123
 — *v.* Odling, 181, 972
 — *v.* Poole, 220, 285
 — *v.* Rudd, 1088
 — *v.* Shergold, 1089, 1096, 1132

- Poole, Jackson, and White's Case, 458
 Pooley v. Driver, 788, 792
 — v. Ray, 270
 — Hall Co., *Re*, 450
 Poor v. Mial, 53, 1202
 Pope v. Biggs, 748
 — v. Curl, 130
 — v. Garland, 1067
 — v. Roots, 1096
 — v. Whitcombe, 864, 1407
 Popham v. Aylesbury, Ly., 1327
 — v. Bampffield, 621, 1216
 Popple v. Sylvester, 733
 Popplewell, *Ex parte*, 714
 — v. Hodkinson, 165, 167, 168
 Porlage v. Cole, 73
 Portal v. Lamb, *Re*, 1289
 Porter, Goods of, 1267
 — v. Baddeley, 124
 — v. Lopes, 511
 — v. Tournay, 1327, 1328
 Porter's Trusts, *Re*, 1212, 1292, 1373
 Portington's, M., Case, 1424
 Portland, D. of, v. Hill, 187, 199
 — — v. Topham, 920
 Portman v. Mill, 1067
 Post v. Marsh, 92, 94
 Postlethwaite v. Blythe, 703, 777
 — v. Mounsey, 265, 1343
 Pott v. Eyton, 792, 794
 — v. Todhunter, 299
 Potter, *Re*, 635
 — v. Duffield, 1053
 Potter's Trusts, *Re*, 1355
 Potteries, &c., Co., *Re*, 455
 Potts v. Atherton, 1206
 — v. Britton, 852
 — v. Leighton, 276
 — v. Norton, 323
 — v. Potts, 244
 — v. Smith, 145, 1341
 — v. Surr, 65, 306
 Poulett, E., v. Hood, 1165, 1326
 — v. Poulett, 654, 1195
 Poulson v. Wellington, 888
 Pounsett v. Fuller, 1124
 Pountney v. Clayton, 170
 Powdrell v. Jones, 373, 667
 Powell v. Att.-Gen., 43
 — v. Boggis, 1373
 — v. Cleaver, 323, 925
 — v. Davies, 1293
 — v. Double, 1065
 — v. Edmunds, 1087
 — v. Evans, 271
 — v. Grigby, 638
 — v. Hankey, 391
 — v. Head, 127
 — v. Hellicar, 136, 138
 — v. Howells, 1410
 — v. Martyr, 1081
 — v. Matthews, 781
 — v. Merrett, 187, 281
 — v. Morgan, 682
 — v. Oakley, 634, 635
 Powell v. Powell, 513, 667, 1282
 — v. Rawle, 1203
 — v. Robins, 33
 — v. Smith, 98
 — v. Trotter, 749
 Powell's Trusts, *Re*, 841, 1324
 Power v. Hayne, 17
 Powis v. Burdett, 1231
 Powlett, Ld. v. Herbert, 987
 Powley v. Walker, 549
 Powys v. Blagrave, 1251, 1254
 — v. Mansfield, 925, 927, 937, 973, 1286
 Poyntz v. Fortune, 529
 Pragnell v. Batten, 510
 Prance v. Sampson, 607, 809
 Pratt v. Barker, 70, 308
 — v. Bull, 518
 — v. Jenner, Jenner, *Ex parte*, 677
 — v. Matthew, 657, 658
 — v. Sladden, 280, 281
 Prebble v. Boghurst, 71, 665
 Preece v. Corrie, 532
 — v. Seale, 1234
 Prees v. Coke, 757, 761, 1177, 1178
 Prendergast v. Turton, 812
 Prescott, *Ex parte*, 827
 — v. Barker, 1361
 Press v. Parker, 1308
 Preston, *Ex parte*, 411, 429
 — v. Liverpool, &c., Railway, 412
 — v. Melville, 282
 — v. Merceau, 81
 — v. Neele, 14
 — v. Preston, 32, 33
 Prestwick v. Poley, 65
 Prestwidge v. Groombridge, 1298
 Prevost v. Clarke, 964
 Price, *Ex parte*, 691
 — *Re*, Foreman, *Ex parte*, 568
 — *Re*, Stafford v. Stafford, 364
 — v. Anderson, 1326
 — v. Assheton, 234, 529, 870
 — v. Berrington, 1177
 — v. Blakemore, 668, 1004, 1172
 — v. Carver, 760
 — v. Copner, 594
 — v. Dyer, 82, 528, 544, 566
 — v. Green, 72
 — v. Hall, 1423, 1428
 — v. Hathaway, 59
 — v. Jenkins, 299, 621, 656
 — v. Ley, 1062, 1136
 — v. Macaulay, 95, 1062, 1079, 1083
 — v. M'Bath, 780
 — v. North, 32, 1079
 — v. Page, 1302
 — v. Parker, 891
 — v. Penzance, Corp. of, 100
 — v. Powell, 1281
 — v. Price, 335
 — v. Salusbury, 1058
 — v. Strange, 1406
 — v. Worwood, 558
 Prichard v. Prichard, 1325

- Prichard v. Wilson, 756
 Priddy v. Rose, 670, 722, 1007
 Pride v. Bubb, 392, 1263
 — v. Fooks, 1376, 1401, 1402
 Prideaux v. Lonsdale, 311, 312, 335
 Pridie v. Field, 16
 Priestley v. Holgate, 1203
 Priestman v. Thomas, 1271
 Prince v. Heylin, 506
 — v. Hine, 654
 — v. Stebbing, 638
 Pringle, *Re*, 1325
 — v. Pringle, 672
 Printing, &c., Co., *Re*, 481
 — v. Sampson, 88
 Prior v. Horniblow, 598
 Pritchard v. Ames, 388
 — v. Arbouin, 54
 Pritchard's Case, 432
 Probert v. Clifford, 375
 — v. Morgan, 896
 Proby v. Landor, 906
 Proctor v. Bp. of Bath & Wells 840, 841
 — v. Hodgson, 142
 — v. Robinson, 307, 310, 401
 — v. Sargent, 87
 Proders v. Langham, 296
 Professional, &c., Soc., *Re*, 472
 Progress Assur. Co., *Re*, 480
 Prole v. Soady, 331, 351, 403
 Propert, *Re*, 784
 — v. Parker, 530
 Prosser v. Edmunds, 88
 — v. Rice, 773, 779, 1150
 Proud v. Bates, 543
 — v. Proud, 587, 598
 — v. Turner, 285
 Proudley v. Fielder, 391
 Prov. Perm. Build. Soc. v. Greenhill, 760, 779
 Prowett v. Prowett, 19
 Prowse v. Abingdon, 1190
 — v. Spurgin, 1347, 1348
 Pryce, *Re*, 718, 724
 — v. Bury, 690, 693, 703
 Pryune, *Re*, 399
 Pryor v. Hill, 378
 — v. Pryor, 860, 919, 920, 1274
 Pryse v. Cam. Ry. Co., 1131
 Puddlephatt, Goods of, 1273
 Pugh, *Ex parte*, 382
 — *Re*, 395
 — v. Heath, 597
 — v. Leeds, D. of, 867
 — and Sharnan's Case, 421
 Pulbrook v. Richmond, &c., Co., 425, 449
 Pullen v. Ready, 64
 Pullin v. Pullin, 1308
 Pulling v. L. C. & D. R. Co., 1047
 — v. Tucker, 995
 Pulsford v. Hunter, 1214, 1215
 — v. Richards, 95, 332
 Pulteney v. Darlington, Ld., 112, 113
 Pulvertoft v. Pulvertoft, 621, 622, 656
 Pumfrey, *In re*, 1004
 Punnett, *Ex parte*, 735, 816
 Purcell v. M'Namara, 591
 Purdev v. Jackson, 353
 Purefoy v. Purefoy, 993
 — v. Rogers, 1423
 Pursell v. Elder, 8
 Pusey v. Desbouvrie, 184
 — v. Pusey, 255
 Putnam v. Bates, 599
 Pybus v. Cottell, 1268
 — v. Milford, 219
 — v. Smith, 397
 Pye, *Ex parte*, 300, 925, 926
 — v. Bradbury, 1240
 — v. Danbury, 1181
 — v. Mumford, 151
 Pyer v. Carter, 145
 — in *Suffield v. Brown*, 146
 Pyke v. Northwood, 1131
 Pym v. Blackburn, 548
 — v. Bowreman, 738
 — v. Lockyer, 926, 927
 Pyncent v. Pyncent, 225
 Pyot v. Pyot, 1407
 Pyrke v. Waddingham, 1137

 QUARRELL v. Beckford, 733, 749, 751
 Queade's Trust, *Re*, 181, 364
 Queen, The v. Arnold, 406
 — v. Carnatic R. Co., 358
 — v. Nash, *Re*, Carey, 317
 Queen's Ben. B. Soc., *Ex parte*, 735
 — Coll. v. Sutton, 1331
 Queensbury Case, 863
 — D. of, v. Shebbeare, 129
 Quick v. Quick, 1270, 1282
 Quincy v. Sharpe, 606, 607
 Quinn v. Butler, 1280

 RABBETH v. Squire, 1321, 1411
 Raby v. Ridehalgh, 1001
 Race v. Ward, 139
 Rackham v. De la Mare, 1294
 — v. Siddall, 975, 980, 1002
 Radcliffe, *Re*, 262, 744
 — v. Anderson, 88
 Radford v. Radford, 1314
 — v. Willis, 1288, 1318
 Radnor, Ld. v. Shafto, 1043
 — v. Vandebendy, 370
 Raffel, *Re*, 1260
 Raffety v. King, 594, 738
 Raggett, *Re*, 741
 — v. Beatty, 1384
 Raikes v. Boulton, 37
 — v. Ward, 655
 Railway, &c., Co., *Re*, 447
 Raine, Goods of, 1267
 Rains v. Buxton, 576, 590
 Rainsford v. Freeman, 319
 Rakestraw v. Brewer, 238, 750
 Rainy v. Vernon, 1088
 Ralph v. Carrick, 1365, 1409
 Rameshur, &c., v. Koonj, &c., 162, 166
 Ramsay, *Re*, 1146

- Ramsay *v.* Blair, 543
 — *v.* Shelmerdine, 1364
 — *v.* Thorngate, 11
 Ramsay's Case, 473
 Ramsbotham *v.* Senior, 324
 Ramsbottom *v.* Gosden, 80
 — *v.* Wallis, 738
 Ramsden *v.* Dyson, 557, 566
 — *v.* Hirst, 1080, 1128
 — *v.* Hylton, 298, 648
 — *v.* Jackson, 38
 — *v.* Langley, 779
 — *v.* Smith, 660, 661, 662
 Ramsgate, &c., *Co. v.* Goldsmid; Same *v.*
 Montefiore, 420, 421
 Rance's Case, 467, 489, 495
 Rancilffe *v.* Parkyns, 1186
 Randal *v.* Payne, 1204, 1216, 1239
 — *v.* Morgan, 612
 Randall *v.* Errington, 591
 — *v.* Hall, 1068
 — *v.* Morgan, 614
 — *v.* Randall, 806
 — *v.* Russell, 239, 1430
 — *v.* Stevens, 535, 580, 582
 — *v.* Willis, 670
 Randall's Will, *Re*, 1029
 Randle *v.* Gould, 404
 Randall *v.* Doe, 1218
 Ranelagh *v.* Melton, 1042
 Ranelagh's Will, *Ld.*, 239
 Ranelagh, *Ld. v.* Hayes, 986
 Ranfield *v.* Ranfield, 230, 1212, 1266
 Rankin *v.* Huskisson, 102
 — *v.* Lay, 529
 — *v.* Weguelin, 137
 Ranking *v.* Barnes, 895, 920
 Ranking's Settlement, 502
 — Trust, 1404
 Rann *v.* Hughes, 68, 70
 Ransome *v.* Burgess, 650, 651
 Raphael *v.* Thames Val. R. Co., 100
 Rapp *v.* Latham, 799
 Rashdall *v.* Ford, 453, 456, 459
 Ratcliffe *v.* Barnard, 765
 Ratcliff's Case, 286
 Rathbone, *In re*, 1012
 Raven & White, 1350
 Ravenhill *v.* Dansey, 650, 654
 Ravenscroft *v.* Frisby, 598
 — *v.* Jones, 926
 Ravenshaw *v.* Hollier, 667
 Rawbone, *Re*, 724
 Rawe *v.* Chichester, 238
 Rawlins *v.* Briggs, 547
 — *v.* Burgis, 1099
 — *v.* Jennings, 1323
 — *v.* Powel, 934
 — *v.* Rawlins, 1349
 — *v.* Wickham, 95, 96, 814
 Rawlinson *v.* Miller, 1114, 1116
 — *v.* Montague, Dss., 222
 — *v.* Rawlinson, 1327
 — *v.* Wass, 1375
 Raworth *v.* Parker, 994
 Rawson, *Ex parte*, 829
 — *v.* Eicke, 527
 Rawstron *v.* Taylor, 165
 Ray, *Ex parte*, 388, 390
 — *v.* Pung, 369, 908
 — *v.* Ray, 273
 Ray's Settled Estates, *In re*, 954
 Raymond's, *Ld.*, Case, 325
 Rayne *v.* Baker, 1150, 1173
 Rayner *v.* Kochler, 250, 261
 — *v.* Preston, 1095, 1178
 Read, *Ex parte*, 440
 — *v.* Backhouse, 1280
 — *v.* Bailey, 829
 — *v.* Shaw, 999
 — *v.* Snell, 375, 623
 — *v.* Stedman, 281
 Reade *v.* Bentley, 129, 791
 — *v.* Conquest, 125, 132
 — *v.* Lacy, 132
 — *v.* Litchfield, 648
 — *v.* Reade, 911
 Reay *v.* Rawlinson, 1369, 1403
 Reddel *v.* Dobree, 138
 Redding, *Re*, 1273
 — *v.* Wilkes, 613, 1058
 Rede *v.* Oakes, 877, 920, 1036, 1135
 Redfern *v.* Bryning, 1314
 Redgrave *v.* Hurd, 96, 1059
 Redington *v.* Redington, 71, 217, 973
 Redman *v.* Redman, 630
 Redmayne *v.* Forster, 763
 Reech *v.* Kennegal, 258
 Reed *v.* Braithwaite, 1317
 — *v.* Devaynes, 1344
 — *v.* Don Pedro, &c., *Co.*, 1133
 — *v.* Harvey, 568
 Rees *v.* George, 285
 — *v.* Keith, 349, 352
 — *v.* Met. B. Works, 778
 — *v.* Rees, 1268
 Reese River Co. *v.* Atwell, 290, 292
 — *v.* Smith, 95, 476
 Reeve *v.* Hicks, 365
 — *v.* Long, 642
 — *v.* Reeve, 644
 — *v.* Whitmore, *Ex parte*, 712, 716
 Reeve's Case, 444
 Reeves *v.* Baker, 964, 1360
 — *v.* Barlow, 712
 — *v.* Reeves, 656
 Reeves' Trusts, *Re*, 1344, 1363
 Reffell *v.* Reffell, 1301
 Regden *v.* Vallier, 506
 Regent, &c., Stores, *Re*, 480
 Reg. Can. Co. *v.* Ware, 107, 1081, 1096
 Regent's Can. Iron Co., *Re*, 453
 Reg. *v.* Aire & Cal. Nav. Co., 170
 — *v.* Clarke, 315
 — *v.* D'Oyly, 447
 — *v.* Ellis, 1144
 — *v.* Howes, 322
 — *v.* Met. Bd. of Works, 165
 — *v.* Metrop. R. Co., 1048
 — *v.* Treasury, Lords of the, 26

Reg. v. Wellesley, 231
 — v. Westbrook, 196
 — v. Wilson, 230, 844
 Rehden v. Wesley, 271, 990, 1001, 1003, 1006
 Reid v. Hoare, 862
 — v. Kenrick, 661
 — v. Reid, 364, 856, 916, 917, 919, 1197,
 Add.
 — v. Shergold, 847, 894, 905
 Reid's Case, 441
 Reidpath's Case, 421
 Reilley v. Reilley, 260
 Reith v. Seymour, 846
 Remnant v. Hood, 863, 1192, 1194, 1196
 Ren v. Bulkeley, 852
 Renals v. Cowlishaw, 1183
 Rendlesham, *Ld. v. Meux*, 1138
 — v. Woodford, 182
 Rennell v. Lincoln, *Bp. of*, 194
 Rennie v. Morris, 440
 Renshaw v. Bean, 158
 Renvoize v. Cooper, 1354
 Reresby v. Newland, 644, 884
 Retallick v. Hawkes, 1123
 Reuss v. Picksley, 1054
 — Princess v. Bos, 419, 469
 Revel v. Watkinson, 225, 226
 Rew v. Lane, 757
 — v. Pettet, 607
 Rex v. Bridger, 189
 — v. Hatfield, 1105
 — v. Lamb, 1144
 — v. Mead, 404
 — v. Newman, 44
 — v. Pagham Commissioners, 171
 — v. Pease, 174
 — v. Rigge, 1159
 — v. Russell, 164
 Reynard v. Arnold, 1096
 Reynell v. Lewis, 410
 — v. Reynell, 219, 978
 — v. Sprye, 86, 89, 95
 Reynish v. Martin, 1189, 1190, 1235, 1238
 Reynolds, *Ex parte*, 691, 1039, 1041
 — Goods of, 1287
 — *Re*, 112, 1046
 — v. Arnold, 547
 — v. Blake, 1092
 — v. Bowley, 826
 — v. Pitt, 547
 — v. Wright, 222, 223, 341, 359
 Rhoades, *Re*, 1364
 Rhodes v. Bate, 308, 310
 — v. Buckland, 738, 756
 — v. Ibbetson, 1073
 — v. Muswell Hill Co., 1245
 — v. Rhodes, 1197
 — v. Smethurst, 605
 — v. Whitehead, 1428
 Rhys v. Dare Valley R. Co., 1047, 1081
 Rica Gold Washing Co., *Re*, 472
 Rice v. Gordon, 269, 276, 697
 — v. Rice, 764, 768, 773, 1173
 Rich v. Cockell, 184, 391, 393
 — v. Whitfield, 110, 111

Richards, *Re*, 1348, 1350
 — & Co., *Re*, 481
 — v. Barton, 1124, 1169
 — v. Bergavenny, *Lr.*, 1370
 — v. Davies, 808, 1393
 — v. Delbridge, 303
 — v. Fly, 152
 — v. Harper, 167
 — v. James, 713
 — v. Jenkins, 145
 — v. Revitt, 1166
 — v. Richards, 110, 140, 155, 204,
 335, 346, 682, 1114
 — v. Rose, 168
 — v. Swansca, &c., Co., 1047
 Richardson, *Re*, 754
 — v. Chaser, 1123
 — v. Evans, 551
 — v. Gilbert, 129
 — v. Greese, 933, 934
 — v. Harrison, 907, 979, 980,
 1394, *Add.*
 — v. Horton, 266
 — v. Langridge, 534
 — v. Merrifield, 326
 — v. Power, 1190, 1191
 — v. Richardson, 302, 303, 505
 — v. Smallwood, 292
 — v. Smith, 1060
 — v. Watson, 1306
 — v. Young, 594, 595
 Richmond, *Re*, 427
 — v. White, 264
 Rickard, *Re*, 44
 — v. Barrett, 40
 Rickards v. Gledstones, 725
 Rickett v. Guillemard, 1226
 Rickett's Trusts, 889
 Ricketts v. Bell, 93
 — v. Carpenter, 1314
 — v. Lewis, 697
 — v. Turquand, 1305
 Rickitt, *Re*, 1313
 Rickman v. Johns, 12
 — v. Morgan, 931, 932
 Riddell v. Errington, 943
 — v. Riddell, 1179
 Rider v. Kidder, 289, 970, 972
 — v. Wager, 1339, 1345
 — v. Wood, 205
 Ridge's Trusts, *Re*, 1412
 Ridges v. Morrison, 1336
 Ridgway v. Sneyd, 1131, 1177
 — v. Wharton, 92, 1055, 1056, 1057
 — v. Woodhouse, 1202
 Ridler v. Ridler, 291
 Ridley v. Ridley, 77, 90
 Ridout v. Lewis, 639
 — v. Pain, 1299
 — v. Plymouth, *Ld.*, 374, 375
 Rigby, *Ex parte*, 256, 982
 — v. Bennett, 144, 168
 — v. Macnamara, 1091
 Rigden v. Vallier, 980, 1025, 1051
 Right v. Beard, 534

- Right *v.* Bucknell, 1181
 — *v.* Compton, 1315
 — *d.* Jeffreys *v.* Bucknell, 765
 — *v.* Price, 1275
 — *v.* Smith, 979
 Righton *v.* Righton, 107
 Rigley's Trusts, *Re*, 55
 Riley *v.* Garnett, 835, 1219
 Rimington *v.* Cannon, 575, 585, 1393, 1429
 — *v.* Hartley, 514
 Ringrose *v.* Bramham, 1379
 Ripley, Goods of, 1282
 — *v.* Waterworth, 118, 806
 Rippen *v.* Priest, 1354
 Rippon *v.* Dowding, 339, 886
 — *v.* Norton, 686
 Rishton *v.* Cobb, 385, 1234, 1313
 — *v.* Whatmore, 1054, 1087
 Ritchie *v.* Broadbent, 353
 — *v.* Couper, 1039
 — *v.* Smith, 86
 River Steamer Co., *Re*, 607
 Rivers, E. *v.* Derby, E., 1191
 Rivett-Carnac's Will, Sir J., *In re*, 956
 Rivington's Case, 464
 Roach *v.* Garvan, 320
 — *v.* Hammond, 1407
 — *v.* Trood, 916, 919
 — *v.* Wadham, 908, 1182
 Roadley *v.* Dixon, 371
 Roberdeau *v.* Rous, 969
 Roberts, *Re*, 836, 1245, 1362
 — *Re*, Tarleton *v.* Bruton, 1294
 — *v.* Barry, 1119
 — *v.* Brett, 72
 — *v.* Cooke, 1352
 — *v.* Croft, 692, 765
 — *v.* Crowe, 474
 — *v.* Dixall, 863
 — *v.* Dixwell, 198, 219, 338, 617
 — *v.* Eberhardt, 809
 — *v.* Edwards, 1326, 1374
 — *v.* Gordon, 114
 — *v.* Haines, 167
 — *v.* Kuffin, 1323
 — *v.* Massey, 1088
 — *v.* Phillips, 1275
 — *v.* Pocock, 1333
 — *v.* Roberts, 630, 715, 1267
 — *v.* Rowlands, 1123
 — *v.* Smith, 371
 — *v.* Walker, 37, 189, 1359, 1420
 — *v.* Watkins, 395
 — *v.* Wyatt, 1102
 Roberts' Case, 422
 Robertson *v.* Armstrong, 983, 984
 — *v.* Broadbent, 1332
 — *v.* Fraser, 506
 — *v.* Jackson, 80
 — *v.* Lockie, 813, 814
 — *v.* Norris, 337, 755, 756
 — *v.* Powell, 1279, 1280, 1299
 — *v.* Quiddington, 817
 — *v.* Skelton, 1096
 — *v.* Smith, 1267
 Robins *v.* Evans, 1062, 1079
 Robinson, *Re*, 1267
 — Goods of, 1267
 — *v.* Addison, 1331
 — *v.* Anderson, 801, 802
 — *v.* Ashton, 801
 — *v.* Briggs, 882, 919
 — *v.* Chartered Bank of India, 438, 440
 — *v.* Dickenson, 611, 627
 — *v.* Fitzherbert, 218
 — *v.* Geldard, 58
 — *v.* Hardcastle, 917
 — *v.* Harman, 1124
 — *v.* Hicks or Robinson, 1390
 — *v.* Hunt, 1402
 — *v.* Killey, 654
 — *v.* Litton, 746, 1250
 — *v.* Lon. Hosp. Gov., 50, 58, 116
 — *v.* Lowater, 880, 1162
 — *v.* M'Donnell, 292
 — *v.* Musgrove, 1065, 1075, 1080
 — *v.* Ommaney, 853
 — *v.* Page, 80, 1130
 — *v.* Pett, 277
 — *v.* Pickering, 395
 — *v.* Preston, 1051
 — *v.* Robinson, 113, 119, 219, 272, 273, 1001
 — *v.* Shepherd, 1408, 1409
 — *v.* Tickell, 1343
 — *v.* Tonge, 262
 — *v.* Trevor, 779
 — *v.* Waddelow, 1403
 — *v.* Webb, 1332
 — *v.* Wheelwright, 399, 1202, 1203, 1297
 — *v.* Whitley, 927, 937
 — *v.* Wilkinson, 819
 — *v.* Wood, 916, 1242, 1430
 Robinson's Case, 421
 — Estate, *Re*, 379
 — Executors, *Re*, 436
 Robley *v.* Brooke, 802
 Robson *v.* Flight, 868, 873
 — *v.* Whittingham, 159, 161
 Roch *v.* Callen, 600, 1336
 Roche *v.* Roche, 862
 Rochford *v.* Hackman, 321, 324, 1206, 1207, 1242
 Rochfort *v.* Fitzmaurice, 211, 617
 Roddam *v.* Morley, 598, 604
 Roddy *v.* Fitzgerald, 141, 221, 1393, 1394
 Roden *v.* Smith, 1346
 Rodgers *v.* Marshall, 894
 Rodick *v.* Gandell, 694
 Rodwell *v.* Phillips, 1052
 Roe *v.* Blackett, 1369
 — *v.* Grew, 1392
 — *v.* Harrison, 552, 558
 — *v.* Jeffery, 1397
 — *v.* Nevill, 1299
 — *v.* Pattison, 1368
 — *v.* Prideaux, 867, 868, 869
 — *v.* Quarterlev, 203, 1368

- Roe *v.* York, Archbp. of, 565
 Roebuck *v.* Chadebet, 512
 Roffey *v.* Bent, 1242
 — *v.* Shallcross, 1106
 Rogers, *Ex parte*, 225, 991, 1398
 — *v.* Acaster, 353, 354
 — *v.* Challis, 689
 — *v.* Danvers, 262
 — *v.* Frank, 252
 — *v.* Goodenough, 1286
 — *v.* Humphreys, 753, 871
 — *v.* Ingham, 64
 — *v.* James, 252
 — *v.* Jones, 176, 178, 185
 — *v.* Maule, 187
 — *v.* Mutch, 1379, 1380, 1382
 — *v.* Mutton, 737
 — *v.* Ox. Wor. & Wol. R. Co., 464
 — *v.* Rogers, 968
 — *v.* Skillicorne, 1162
 — *v.* Soutten, 925
 — *v.* Thomas, 1362
 — *v.* Waterhouse, 1138
 Rogers' Case; Harrison's Case, 422
 — Trusts, *Re*, 23
 Rolfe *v.* Chester, 772
 — *v.* Flower, 797
 — *v.* Gregory, 588, 590, 1005
 — *v.* Perry, 1418
 — *v.* Peterson, 71
 Rolland *v.* Hart, 590, 725, 776, 1155, 1156
 Rolls *v.* Miller, 550
 — *v.* Pearce, 137
 Rolt *v.* Rolt, 646
 — *v.* Somerville, Ltd., 1254
 — *v.* White, 1004
 Rolph, *Ex parte*, 714
 Ronalds *v.* Feltham, 32
 Roney's Case, 424
 Rook *v.* Warth, 217
 Rooke *v.* Kensington, Ltd., 703
 — *v.* Rooke, 647, 897, 918
 Roome *v.* Roome, 927, 928
 Rooper *v.* Harrison, 193, 727, 764, 772
 Rootes, *Re*, 1373
 Roper *v.* Hallifax, 852
 — *v.* Roper, 1341, 1389
 Roper's Trusts, *Re*, 320, 651
 Roper-Curzon *v.* Roper-Curzon, 641
 Roscommon *v.* Fowke, 888, 903
 Rose *v.* Bartlett, 1360
 — *v.* Calland, 1140
 — *v.* Cunynghame, 1057, 1099, 1268
 — *v.* Groves, 164
 — *v.* Hill, 1368
 — *v.* Rolls, 382
 — *v.* Rose, 1352
 — *v.* Watson, 768, 1094
 Roseberry *v.* Taylor, 649
 Rosenberg *v.* Cook, 1049, 1063, 1083
 Rosewell *v.* Bennet, 937
 Roshier *v.* Roshier, 1241
 — *v.* Williams, 296, 299
 Ross *v.* Borer, 16, 17
 — *v.* Estates, &c. Co., 428
 Ross *v.* Parkyns, 792
 — *v.* Ross, 1210, 1409
 Ross's Trust, *Re*, 286, 397
 Rossiter, *Re*, 1419
 — *v.* Miller, 1053, 1055, 1088
 Rosslyn's Trustees, *Re*, 5
 Rotherham, &c. Co., *Re*, 412
 — *v.* Rotherham, 37
 Rothschild *v.* Currie, 74
 Rothwell *v.* Rothwell, 620
 Round *v.* Bell, 601
 Roundel *v.* Currer, 1202
 Roundell *v.* Breary, 667
 Rous *v.* Jackson, 841
 Rouse *v.* Jones, 279
 Rousillon *v.* Rousillon, 75, 87
 Routh *v.* Webster, 794
 Routledge *v.* Dorril, 838, 859, 887, 895,
 914, 915, 917, 1424
 — *v.* Grant, 1055
 — *v.* Low, 126, 129
 Rowbotham *v.* Dunnett, 57
 — *v.* Wilson, 142, 169, 193
 Rowden *v.* Malster, 232
 Rowe *v.* Gray, 511
 — *v.* Rowe, 122, 391, 934, 935
 — *v.* Wood, 748, 807
 Rowland *v.* Cuthbertson, 371, 372
 — *v.* Gorsuch, 1408
 — *v.* Morgan, 244
 — *v.* Tawney, 834
 — *v.* Witherden, 982
 Rowlands *v.* Evans, 813, 1042
 Rowlatt *v.* Easton, 1310
 Rowley, *Re*, 780
 — *v.* Adams, 783, 806, 1021, 1081
 — *v.* Rowley, 312, 403, 919, 921
 — *v.* Unwin, 391
 Roworth *v.* Wilkes, 131
 Rowse *v.* Stanning, 1319
 Roy. Brit. Bank *v.* Turquand, 452, 460
 — Hotel Co., &c., 494
 Royds *v.* Royds, 987
 Royle *v.* Wynne, 1121
 Royou *v.* Paul, 1130
 Ruck *v.* Barwise, 502
 Ruddock *v.* Marsh, 68
 Rudge *v.* Bowman, 490
 — *v.* Winnall, 325
 Ruding's Settlement, *Re*, 902
 Rudow *v.* Gt. Brit. Life Soc., 479, 499
 Rudyerd *v.* Nerne, 349
 Ruffin, *Ex parte*, 806
 Ruffles *v.* Alston, 404
 Rule *v.* Jewell, 812
 Rummens *v.* Hare, 83, 301
 — *v.* Robins, 92
 Rundell *v.* Murray, 132
 Ruscombe *v.* Hare, 365
 Rush *v.* Higgs, 279
 Rushbrook *v.* Lawrence, 737, 757
 Rushworth's Case, 750
 Russel *v.* Buchanan, 1190
 — *v.* Russel, 690
 — *v.* Smithies, 749

- Russel's Case, 251
 Russell, *Ex parte*, 294, 1020
 — *Re*, 1290
 — *v.* Austwick, 803
 — *v.* Clowes, 187, 281
 — *v.* E. Ang. R. Co., 753
 — *v.* Harford, 142, 1086
 — *v.* Jackson, 57, 964
 — *v.* Kellett, 43, 46
 — *v.* Nicholls, 323
 — *v.* Plaice, 275, 696, 1138
 — *v.* Russell, 812
 — *v.* St. Aubyn, 929
 — *v.* Wakefield Comp., 465
 — *v.* Watts, 143, 144, *Add*
 Russell's Policy Trusts, *Re*, 724
 Russell Road Purchase Monies, 765
 Rutherford's Case, 433
 Rutland *v.* Rutland, 284
 — *v.* Wythe, 871
 Rutley *v.* Gill, 1092
 Rutter *v.* Maclean, 182
 Ryall *v.* Hannam, 1312
 — *v.* Rowles, 745
 — *v.* Ryall, 266
 Ryan *v.* Cowley, 1395
 — *v.* Daniel, 90
 Rycroft *v.* Christy, 303, 389
 Ryder, H. D., *Re*, 231
 — *v.* Wombwell, 69
 Rye's Settlement, 839
 Ryland *v.* Smith, 350
 Rylands *v.* Fletcher, 171, 553
 Ryves *v.* Ryves, 36, 502
- ST. ALBAN'S, Bp. of, *v.* Battersby, 550
 — D. of, *v.* Beauchlerk, 1336
 St. Aubyn *v.* Humphreys, 666
 — *v.* Smart, 799
 — *v.* St. Aubyn, 26
 St. Barbe, *Ex parte*, 829
 St. George *v.* Wake, 334
 St. Germans, E. *v.* Crys. Pal. R. Co., 1173
 St. Helen's Smelting Co. *v.* Tipping, 172
 St. John, Ld. *v.* Boughton, 588, 599
 St. Katharine, Hosp. of, *Ex parte*, 1046
 St. Leonard's, 202
 — (Shoreditch) *v.* Hughes,
 1083
 St. Mary's, Wigton, Vicar of, *Ex parte*, 997
 St. Paul, Sir H. *v.* Birmingham R. Co.,
 1089
 — *v.* Dudley and Ward, 684
 St. Paul's, Precentor of, *Ex parte*, 1046
 St. Thomas' Dock Co., *Re*, 470
 St. Thomas' Hospital *v.* Ch. Cr. R. Co., 1047
 Saberton *v.* Skeels, 1406
 Sabin *v.* Heape, 1162
 Sablonière Hotel Co., 488
 Sacheverell *v.* Froggatt, 545
 Sackville *v.* Smyth, 1419
 Saddington *v.* Kinsman, 353
 Sadler, *Ex parte*, 569
 — *v.* Lee, 789, 799
 — *v.* Pratt, 918
- Sadler *v.* Rickards, 15
 Saffrey, *Ex parte*, 294, 717
 — *v.* Elgood, 254
 Saffron Walden, &c., Soc. *v.* Rayner, 724
 725
 Sahlgreen and Carrall's Case, 421
 Sainsbury *v.* Matthews, 1053
 Salaman *v.* Glover, 79
 Sale *v.* Lambert, 1053
 Salisbury *v.* Hatcher, 1035, 1127
 — *v.* Hird, 537
 — *v.* Lambs, 1230
 — *v.* Petty, 1211
 — *v.* Salisbury, 669
 — Marq. *v.* Gladstone, 228
 — — *v.* G. N. R. Co., 1047
 Salkeld *v.* Johnston, 1106
 Salles *v.* Savignnon, 325, 326
 Salmons *v.* Cutts, 1039
 — *v.* Gibbs, 860, 920
 Saloway *v.* Strawbridge, 754, 1138
 Salt *v.* Chattaway, 37, 116
 Salter *v.* Metrop. Dis. R. Co., 1047
 Saltmarsh *v.* Barrett, 281, 991
 Saltoun, Ld. *v.* Adv.-Gen., 1146
 Salusbury *v.* Denton, 46, 864, 922
 Salvin *v.* North Branceth Coal Co., 172
 — *v.* Weston, 19, 20, 371
 Salwey *v.* Salwey, 348, 626, 989
 Sampson, *Re*, and Wall, 326, 620, 634, 635
 — *v.* Easterby, 555
 — *v.* Hoddinott, 162, 165
 — *v.* Pattison, 760
 — *v.* Sampson, 1309
 Samuda *v.* Lawford, 103
 Samuel *v.* Jones, 729
 — *v.* Samuel, 1243, 1244
 — *v.* Ward, 936
 Sandeman *v.* Mackenzie, 862
 Sander's Case, 438
 Sanders *v.* Ashford, 1293, 1294
 — *v.* Davis, 715
 — *v.* Homer, 1020
 — *v.* Kiddell, 16
 — *v.* Page, 343
 — *v.* Rodway, 404
 — *v.* Sanders, 583, 595
 Sanders' Trusts, *Re*, 1206, 1225, 1317,
 1318, 1401, 1402
 Sanderson *v.* Bayley, 1377
 — *v.* Berwick-on-Tweed, Mayor,
 &c., of, 553
 — *v.* Dobson, 1318
 — *v.* Mackenzie, 1384
 — *v.* Walker, 988, 1040, 1042
 Sandford *v.* Morrice, 1029
 Sandwell, *Re*, Zerfass, *Ex parte*, 569
 Sandwich, E. of *v.* G. N. Ry. Co., 163
 Sandon *v.* Hooper, 748
 Sands to Thompson, 580, 587, 779
 Saner *v.* Bilton, 546
 Sanford *v.* Raikes, 1305
 Sanger *v.* Sanger, 358, 399
 Sangster *v.* Cochrane, 779
 Sankey, Brook, &c., Co., *Re*, 451

- Sankey & Co. v. Marsh, 483
 Sansom v. Rhodes, 1122
 Sarazin v. Hamel, 135
 Sarel, *Re*, 396, 397
 Sargent, *Ex parte*, 434
 Saumarez v. Saumarez, 1320, 1358
 Saunder v. Owen, 906
 — v. Vautier, 1193
 Saunders, *Re*, 1276
 — v. Cramer, 612
 — v. Dehew, 296, 1184
 — v. Merryweather, 746
 — v. Milsome, 687, 690
 — v. Musgrave, 534
 — v. Richardson, 1385
 — v. Smith, 130, 132
 — v. Vautier, 1215
 — v. Watson, 189, 290
 Savage v. Blythe, 252
 — v. Lane, 265
 — v. Robertson, 1387
 — v. Tyers, 1367
 — Goods of, 1269
 Savery v. Dyer, 16
 — v. King, 688
 Savile v. Blacket, 1333
 — v. Kinnaird, 1053
 Savill v. Savill, 177, 633
 Saville v. Blacket, 854
 — v. Saville, 931, 932
 Savini v. Lonsada, 315
 Saward v. M'Donnell, 897
 Sawyer v. Birchmore, 1157
 — v. Goodwin, 799
 — v. Sawyer, 1007
 Saxon Life, &c., Co., *Re*, 486
 Saxton v. Saxton, 1290
 Say v. Creed, 1404
 Sayer v. Bradly, 1372, 1404
 Sayer's Trusts, *Re*, 834
 Sayers v. Collyer, 94, 99, 550, 1183
 Sayre v. Hughes, 972, 973
 Scales v. Baker, 390, 392, 1004
 — v. Maude, 304
 Scarborough v. Bowman, 330
 — E. of, v. Saville, 833
 Scarf v. Jardine, 820
 Scarisbrick v. Eccleston, 1029
 — v. Skelmersdale, 6
 Scarlett v. Abinger, *Ld.*, 1246
 Scarpellini v. Atcheson, 348
 Scarsdale, *Ld.* v. Curzon, 244
 Scawin v. Scawin, 974
 Schenk v. Agnew, 1210
 Schibsby v. Westenholz, 75
 Schneider v. Norris, 1057
 Schofield v. Heap, 926
 Scholefield v. Lockwood, 366
 — v. Redfern, 26, 119
 Scholes v. Hargreaves, 543
 Scholey v. Venezuela Ry. Co., 430
 Scholfield v. Spooner, 661
 Schroder v. Schroder, 176, 182
 Scoones v. Morrell, 1140
 Scorell v. Boxall, 1052
 Scotland, Life Association of, v. Siddal, 209, 378, 591, 1007
 Scotney v. Lomer, 976, 1003, 1005, 1213, 1243, *Add.*
 Scott v. Avery, 810, 1060
 — v. Beecher, 1417
 — v. Colburn, 453
 — v. Cumberland, 1363
 — v. Dunbar, 1151
 — v. Ebury, *Ld.*, 410, 412
 — v. Fawcett, 509
 — v. Great Clifton School Board, 78
 — v. Hanson, 1064
 — v. Harwood, 1378
 — v. Hastings, *Ld.*, 524
 — v. Jackson, 1077
 — v. Jones, 995
 — v. Josselyn, 846
 — v. Key, 964, 966
 — v. Langstaffe, 1051
 — v. Miller, 795
 — v. Milne, 807
 — v. Nixon, 573
 — v. Pape, 143, 144, *Add.*
 — v. Parker, 73
 — v. Porcher, 694
 — v. Rayment, 794
 — v. Salmond, 21
 — v. Scott, 94, 299, 331, 333, 1390
 — v. Spashett, 383
 — v. Stanford, 131
 — v. Steward, 619
 — v. Tyler, 275, 1234, 1235, 1236, 1239
 Scottish N. E. R. Co. v. Stewart, 100
 — Petroleum Co., *Re*, 429, 431
 Scotto v. Heritage, 1136
 Scriven v. Sandom, 900
 Scroope v. Scroope, 973
 Scrope v. Offley, 308
 Scrutton v. Pattillo, 349, 350
 Scudamore v. Scudamore, 110
 Sculthorpe v. Burgess, 971, 1025
 — v. Tipper, 960, 989
 Scurfield v. Howes, 1226
 Seagram, *Re*, 1275
 — v. Knight, 598, 605, 1249, 1252
 Seagrave v. Seagrave, 392, 403, 620, 638
 Seal v. Claridge, 716
 Seale v. Barter, 1389
 — v. Seale, 1297
 Seaman v. Vawdrey, 1064, 1128
 — v. Wood, 834
 Sear v. House Prop. & Invest. Soc., 552
 Searby v. Tottenham R. Co., 576
 Searle v. Law, 301
 Scaton v. Benedict, 68
 — v. Mapp, 1061, 1069, 1070, 1119
 — v. Twyford, 732
 Seccombe v. Edwards, 1206, 1317
 Seddon v. Bolton, Bank of, 151
 Seed v. Bradford, 935
 Seeley v. Jago, 113
 Seers v. Hind, 552
 Sefton, E. v. Hopwood, 1263
 Selby v. Alston, 197, 679

- Selby *v.* Bowie, 269, 270
 — *v.* Nettlefold, 154
 — *v.* Pomfret, 740
 — *v.* Selby, 39, 40, 1057
 — *v.* Whittaker, 1190
 Sellick *v.* Trevor, 1072, 1073, 1122
 Sells *v.* Sells, 80, 82
 Selsey, *Ld. v.* Lake, *Ld.*, 1313
 Semble, 559
 Semphill *v.* Bayly, 1235
 Simple *v.* Pink, 71
 Senhouse *v.* Christian, 155
 Senior *v.* Pawson, 160
 Sercombe *v.* Saunders, 306
 Sergeant, Mertens *v.* Walley, *Re*, 658
 Sergisen *v.* Sealy, 217, 895
 Serle *v.* St. Eloy, 1416
 Seton *v.* Slade, 686, 1054, 1119
 Settled Estates Act, *Re*, 1091
 Severs *v.* Severs, 265
 Sewell *v.* Crewe-Read, 55
 — *v.* Denny, 7, 8
 — *v.* King, 302
 Sewell's Case, 421, 461
 Seymour *v.* Lucas, 1244
 — *v.* Vernon, 216, 217, 1201
 Seys *v.* Price, 349
 Shackleford's Case, 422
 Shackleford, &c., *Co. v.* Owen, 417
 Shackleton *v.* Sutcliffe, 1064, 1065, 1138
 Shadbolt *v.* Thornton, 51
 — *v.* Vanderplank, 9, 33
 Shadforth *v.* Temple, 1098
 Shadwell *v.* Shadwell, 612
 Shaftesbury, *E. v.* Marlborough, *D.*, 235, 236, 237
 Shafto *v.* Adams, 311
 Shafto's Trusts, *In re*, 1016
 Shaftsbury *v.* Shaftsbury, 1338, 1339
 Shakel *v.* Rozier, 86
 Shakels *v.* Richardson, 32, 35
 Shales *v.* Shales, 974
 Shallcross *v.* Finden, 32
 — *v.* Oldham, 803
 — *v.* Wright, 270
 Shanley *v.* Baker, 1352
 — *v.* Harvey, 137
 Shannon *v.* Bradstreet, 870, 872, 873, 894
 Shardlow *v.* Cotterell, 1054
 Sharlon *v.* Mildon, 250
 Sharman, Goods of, 1266
 Sharp *v.* Adcock, 1138
 — *v.* De St. Sauveur, 113
 — *v.* Leach, 309, 310
 — *v.* Lush, 277
 — *v.* Milligan, 530
 — *v.* St. Sauveur, 109
 — *v.* Sharp, 1369
 Sharpe *v.* Foy, 632, 725, 1156
 — *v.* San Paulo Ry. Co., 983
 Sharples *v.* Adams, 765
 Sharr *v.* Pilck, 243
 Sharshaw *v.* Gibbs, 226, 1251
 Shattock *v.* Shattock, 37, 394, 848
 Shaw, *Ex parte*, 432, 435, 1353
 — *Re*, 514
 — *v.* Benson, 415
 — *v.* Borrer, 31, 32, 992
 — *v.* Bunny, 757
 — *v.* Cunliffe, 1350
 — *v.* Ford, 1240
 — *v.* Foster, 1094
 — *v.* Gould, 408, 1388
 — *v.* Jeffery, 687
 — *v.* Johnson, 240, 601, 602
 — *v.* Jones-Ford, 1292
 — *v.* Kay, 529, 544
 — *v.* Neale, 518, 693
 — *v.* Port Phillip, &c., *Co.*, 441
 — *v.* Rhodes, 6
 — *v.* Simmons, 415
 — *v.* Thackray, 94
 — *v.* Weigh, 1368
 Shaw's Settled Estates, *Re*, 942
 — Trusts, *Re*, 537
 Sheard *v.* Venables, 1062
 Shearman *v.* Br. Mut. Life Comp., 671
 — *v.* McGregor, 671
 Shee *v.* French, 34
 Sheehy *v.* *Ld.* Muskerri, 866, 869
 Sheerness Well Co. *v.* Polson, 1074
 Sheffield *v.* *Ld.* Orrery, 1198
 — *v.* Von Donop, 884
 — Gas, &c., *Co. v.* Harrison, 423, 704
 Sheil, *Ex parte*, 793
 Shelburne, *E. v.* Biddulph, 213
 Sheldon *v.* Cox, 776, 1155
 — *v.* Sheldon, 1268
 Shelford *v.* Acland, 898, 901
 Shellard, *Ex parte* Adams, *Re*, 694
 Shelley *v.* Bryer, 1376
 — *v.* Shelley, 244
 — *v.* Westbrook, 321
 Shelley's Case, 200, 208, 217, 617, 623, 981
 Shelmardine *v.* Harrap, 781
 Sheldermine, *Re*, 1013
 Shepard *v.* Elliot, 750
 — *v.* Jones, 748, 749
 Shephard *v.* Beetham, 52
 — *v.* Walker, 102, 1058
 Shepherd *v.* Allen, 814
 — *v.* Churchill, 1021
 — *v.* Gillespie, 438
 — *v.* Ingram, 1379, 1381
 — *v.* Keatley, 1071, 1073
 — *v.* Moulds, 273, 1001
 — *v.* Nottidge, 281, 1407
 — *v.* Shorthose, 1110
 — *v.* Titley, 770, 771
 Shepherd's Case, 440
 Shepherdson *v.* Dale, 506, 1356
 Sheppard, *Ex parte*, 828
 — *Re*, 1012, 1021
 — *v.* Duke, 598
 — *v.* Gibbons, 505
 — *v.* Kent, 35
 — *v.* Lessingham, 1314

- Sheppard *v.* Oxenford, 808, 809, 810
 — *v.* Sheppard, 20
 — *v.* Wilson, 26, 644
 Sheppard's Trusts, *Re*, 1208
 Sherer *v.* Bishop, 1314, 1382
 Sheriff *v.* Axe, 277
 — *v.* Coates, 131
 Shermau *v.* Collins, 1196
 Sherrard *v.* Sherrard, 23
 Sherratt *v.* Bentley, 673, 1299
 — *v.* Mountford, 1303, 1376
 Sherrington *v.* Yates, 351
 Sherry *v.* Oke, 1123
 Sherwin *v.* Shakspear, 1081, 1082, 1100
 Shewell *v.* Dwaris, 389, 390, 1202
 Shewell's Case, 478
 Shewen *v.* Vanderhorst, 261
 Shiers *v.* Ashworth, 1293
 Shilleto *v.* Collett, 381
 Shillito *v.* Hobson, 693
 Shiltz, *Re*, 1242
 Ship *v.* Crosskill, 429
 Shipbrook, *Ld.*, *v.* Hinchinbrook, *Ld.*, 268, 325
 Shiphard *v.* Lutwidge, 35
 Shipman's Case, 440
 Shipperdson *v.* Tower, 110, 886
 Shipway *v.* Ball, 382
 Shireff *v.* Hastings, 38
 Shirley *v.* Martin, 631
 — *v.* Stratton, 96, 1060, 1065
 Shirreff *v.* Wilks, 797
 Shirt *v.* Westby, 1341
 Shirton *v.* Richardson, 505
 Shish *v.* Foster, 1129
 Shore *v.* Collett, 1109
 — *v.* Shore, 225
 — *v.* Wilson, 1306
 Shotts Iron Co. *v.* Inglis, 173
 Shovelton *v.* Shovelton, 966
 Shrapnell *v.* Blake, 737
 Shrewsbury *v.* Hornbury, 42
 — Peerage, 1110
 — Cts. of, *v.* Shrewsbury, *E. of*, 645, 683
 — *E.*, *v.* Hope Scott, 922
 — *E.*, *v.* N. Staff. Ry. Co., 411, 412
 — *E.*, *v.* Scott, 1200, 1202
 — &c., Co. *v.* L. & N. W. Ry. Co., 94
 Shrimpton *v.* Shrimpton, 1213
 Shropshire, &c., Co. *v.* The Queen, 764
 Shudal *v.* Jekyll, 925, 937
 Shurmur *v.* Sedgwick, Crossfield *c.* Shurmur, 298
 Shute *v.* Shute, 370
 Shuttleworth *v.* Greaves, 350, 1293, 1330, 1378
 — *v.* Howarth, 1362
 — *v.* Lowther, 780
 Sibbald *v.* Lowrie, 1117
 Sibeth, *Ex parte*, 387
 Sibley *v.* Cook, 1292
 — *v.* Higgs, 713
 Sibley *v.* Perry, 15, 862, 1330, 1391
 Sibley's Trusts, *Re*, 1355
 Sibthorp, Goods of, 1263
 Sichel *v.* Mosenthal, 794
 Sichel's Case, 435, 482
 Siddall, *Re*, 415
 Siddons *v.* Short, Harley & Co., 143
 Sidebotham *v.* Barrington, 1129, 1140
 — *v.* Watson, 1331, 1338
 Sidgreaves *v.* Brewer, 965, 1266, 1325
 Sidmouth *v.* Sidmouth, 974
 Sidney *c.* Shelley, 1197
 — *v.* Sidney, 620, 638, 1330
 — *v.* Wilmer, 205
 Sidney *v.* Ranger, 1040
 Siggers *v.* Evans, 993, 994
 Sikes *v.* Wild, 1124
 Silberschildt *v.* Schiott, 744, 1353
 Silcox *v.* Bell, 1377
 Silk *v.* Prime, 35
 Silkstone, &c., Co., *Re*, 480, 488
 Sillick *v.* Booth, 1190, 1226
 Sillitoe, *Ex parte*, 828, 829
 Silver *v.* Udall, 512
 — Valley Mines, *Re*, 469
 Silvester *v.* Jarman, 1354
 — *v.* Wilson, 978
 Simeon *v.* Simeon, 886, 889
 Simm *v.* Ang. Am. Tel. Co., &c., 411
 Simmins *v.* Shirley, 746
 Simmonds *v.* Cock, 1216
 — *v.* Palles, 994
 — *v.* Swaine, 810
 Simmons *v.* Edwards, 388
 — *v.* Guttridge, 265
 — *v.* Heseltine, 1123, 1137
 — *v.* Leonard, 807
 — *v.* Pitt, 7
 — *v.* Simmons, 388
 Simon *v.* Barber, 45, 1298
 Simons *v.* Horwood, 624
 — *v.* M'Adam, 1136
 Simper *v.* Foley, 147, 152, 153
 Simpson, *Re*, 806
 — *v.* Ashworth, 111, 1370
 — *v.* Bathurst, 852, 987
 — *v.* Chapman, 818, 825
 — *v.* Clayton, 562
 — *v.* Dendy, 1105
 — *v.* Denny, 515
 — *v.* Frew, 861
 — *v.* Gutteridge, 256
 — *v.* Howden, *Ld.*, 412
 — *v.* Lester, 121
 — *v.* Morley, 519
 — *v.* Paul, 893
 — *v.* Terry, 1134
 — *v.* Vickers, 1204
 — *v.* West. Pal. Hotel Co., 461
 Simpson's Case, 422
 — Settlement, *Re*, 893
 Sims *v.* Brutton, 799
 Simson *v.* Jones, 633, 634
 Simson's Trusts, *Re*, 1000
 Sinclair *v.* Jackson, 601

- Sing v. Leslie, 682, 855, 903
 Singleton v. Gilbert, 1378
 — v. Tomlinson, 109, 117, 1139, 1268
 Sinnett v. Herbert, 55, 56
 Sish v. Hopkins, 740, 770
 Sisson v. Giles, 113
 Sitwell v. Bernard, 119, 1193
 Skarf v. Soulby, 291
 Skeats v. Skeats, 973
 Skeggs, *Re*, 107, 112
 Skelton v. Cole, 1053
 Skett v. Whitmore, 304
 Skey v. Barnes, 1205, 1192, 1412
 Skidmore v. Bradford, 71, 973
 Skinner v. M'Douall, 1053
 — v. Sweet, 265
 Skinner's Trusts, *Re*, 1335
 Skirring v. Williams, 121, 122
 Skitter, *Re*, 782
 Skottowe v. Williams, 310
 — v. Young, 1388
 Skrymsher v. Northcote, 1352, 1363
 Skull v. Glenister, 142, 145, 542
 Slade v. Fooks, 1377
 — v. Rigg, 762
 Sladen v. Sladen, 205, 1373
 Slaney v. Slaney, 1211
 — v. Wade, 1115
 — v. Watney, 1344
 Slark v. Dakyns, 858, 914
 Slater, *Ex parte*, 809
 — v. Dangerfield, 211, 1391, 1393
 Slater's Case, 443
 — Trusts, *Re*, 731
 Slator v. Brady, 537
 Slatter v. Noton, 1288
 — v. Slatter, 404
 Sleech v. Thorington, 385, 1342, 1349
 Sleight v. Lawson, 1006
 Slingsby v. Grainger, 1307, 1325, 1326
 Slipper v. Stidstone, 830
 — v. Tottenham, &c., Ry. Co., 29, 553
 Sloane v. Cadogan, 302
 Slocombe v. Glubb, 334, 634
 Sloper, *Re*, 108
 — v. Oliver, 263, 265
 Sluysken v. Hunter, 312
 Sly v. Blake, 598
 — v. Sly, 1270
 Small v. Currie, 1153
 — v. Wing, 1193
 Smallcombe v. Evans, 444
 Smalley v. Hardinge, 569, 570
 Smallman v. Goodlen, 1330
 Smart, *Ex parte*, 726
 — *Re*, 205
 — v. Clark, 1212
 — v. Harding, 1052
 — v. Morton, 168
 — v. Sandars, 1112
 — v. West Ham Union, 78, 456
 Smedley v. Varley, 276
 Smee v. Smee, 1264
 Smethurst v. Hastings, 999
 — v. Tomlin, 251
 Smith, *Ex parte*, 481, 693, 694, 813, 829
 — Goods of, 1267, 1323
 — *Re*, 757, 1337
 — v. Adams, 373
 — v. Adkins, 888
 — v. Anderson, 415, 1345
 — v. Armstrong, 1091
 — v. Ashton, 894
 — v. Aykwell, 631
 — v. Baker, 734, 1181
 — v. Barneby, 1406
 — v. Bate, 320
 — v. Blakey, 599
 — v. Bolden, 987
 — v. Bruning, 631
 — v. Butcher, 1374
 — v. Camelford, Lord, 856
 — v. Campbell, 1408
 — v. Capron, 877, 1118, 1104
 — v. Chadwick, 95, 96, 428, 429
 — v. Charles, 1386
 — v. Cheese, 716
 — v. Cherrill, 656
 — v. Chichester, 750
 — v. Clarke, 1069
 — v. Claxton, 117
 — v. Clay, 587
 — v. Compton, 1166
 — v. Conder, 285
 — v. Cooke, 225
 — v. Cowdery, 1237
 — v. Crabtree, 1315
 — v. Day, 543
 — v. Doolan, 672
 — v. Evans, 644, 646, 768, 1171, 1173
 — v. Everett, 256, 817
 — v. Fitzgerald, 1329, 1333, 1365
 — v. Fletcher, 171
 — v. Frederick, 683
 — v. Garland, 296
 — v. Green, 738
 — v. Guyon, 1162
 — v. Harrison, 1136
 — v. Henley, 1113
 — v. Hibbard, 1171
 — v. Hill, 601
 — v. Houlton, 854
 — v. Hull Glass Co., 457
 — v. Hurst, 519, 751
 — v. Iliffe, 311, 312, 675
 — v. Jackson, 1131
 — v. Jeffries, 81
 — v. Jeyes, 803, 813
 — v. Johnson, 129
 — v. Kay, 95, 309
 — v. King, 673
 — v. Land, &c., Corp., 1066
 — v. Lidiard, 1303, 1376
 — v. Lloyd, 575, 576
 — v. Lomas, 7
 — v. Lucas, 181, 504
 — v. Lyne, 311, 312

- Smith *v.* Manchester, Duke of, 458
 — *v.* Matthews, 378, 962
 — *v.* Morgan, 38
 — *v.* Mules, 805, 812
 — *v.* Neale, 77
 — *v.* Olding, 761
 — *v.* Oliver, 54
 — *v.* Osborne, 1223
 — *v.* Owen, 161
 — *v.* Palmer, 1407
 — *v.* Parkes, 803
 — *v.* Peat, 548
 — *v.* Pepper, 1354
 — *v.* Peters, 1054
 — *v.* Pilkington, 739
 — *v.* Pincombe, 63
 — *v.* Reese River Co., 429, 430
 — *v.* Ridgway, 1309
 — *v.* Robinson, 1071, 1074
 — *v.* Smith, 138, 154, 160, 200, 258,
 260, 268, 283, 285, 369, 383,
 398, 725, 805, 833, 835, 934,
 961, 976, 1019, 1048, 1275,
 1345
 — *v.* Spencer, 374, 1198, 1211
 — *v.* Surman, 1052, 1053
 — *v.* Tebbitt, 1116, 1264
 — *v.* Thackerah, 167
 — *v.* Thorne, 606
 — *v.* Timms, 995
 — *v.* Tracey, 286
 — *v.* Warde, 974
 — *v.* Watson, 1057
 — *v.* Watts, 1066
 — *v.* Webster, 1055
 — *v.* Weguelin, 75
 — *v.* Wheeler, 850
 — *v.* White, 88, 564
 — *v.* Widlake, 533
 — *v.* Wilson, 80
 Smith's Case, 451, 740
 — — and Gledstane's Case, 483
 — Estate, *Re*, 1353
 — Trusts, *Re*, 1208, 1294, 1355, 1357
 Smith Fleming & Co.'s Case, 479
 Smither *v.* Willcock, 1206
 Smithwick *v.* Smithwick, 111, 354
 Smyth, *Ex parte*, 23, 24, 827
 — *v.* Nangle, 234
 — *v.* North, 569
 Smythe *v.* Symthe, 1253, 1319
 Sneed *v.* Sneed, 894, 895
 Sneesby *v.* Thorne, 92, 93, 1130, 1161
 Sneezum, *Re*, 84, 85
 Snell *v.* Finch, 746
 Snell's Case, 444
 Snelling *v.* Pulling, 1139
 — *v.* Thomas, 80
 Snelson *v.* Corbet, 374, 375, 1327
 Sneyd *v.* Sneyd, 369
 Snow *v.* Booth, 600, 601
 — *v.* Milford, 814
 — *v.* Poulden, 1190, 1219
 — *v.* Teed, 864
 — *v.* Whitehead, 174
 Snowball, *Ex parte*, 830
 Soady *v.* Turnbull, 268
 Soames *v.* Edge, 100
 — *v.* Martin, 18
 — *v.* Robinson, 32, 35
 Soar *v.* Foster, 970, 972
 Société Générale de Paris *v.* Dreyfus, 74
 — *v.* Tramways Union,
 433, 723
 Sockett *v.* Wray, 847
 Solicitors', &c., *Soc. v.* Lamb, 721
 Solley *v.* Wood, 235, 236
 Sollory *v.* Leaver, 10
 Solly *v.* Forbes, 809
 Solomon, *Ex parte*, 827
 — *v.* Solomon, 1418
 — *v.* Vintners' Co., 167, 168
 Soltan *v.* De Held, 174
 Somersett *v.* Cox, 725, 726, 730
 — &c., *Co. v.* Harcourt, 141
 Somerville *v.* Mackay, 803
 Soudes' Will, *Ld.*, *Re*, 916
 Sonley *v.* Clock Makers' Co., 1265
 Sopwith *v.* Maughan, 185, 371
 Soresby *v.* Hollins, 54
 Sorsbie *v.* Park, 73
 Sotheran *v.* Dening, 1279
 Sotilichos *v.* Kemp, 81
 Soule *v.* Gerrard or Sowell *v.* Garret,
 1316
 Souter *v.* Drake, 1071, 1103
 South, *Ex parte*, 694
 — *v.* Bloxam, 769, 772
 — *v.* Williams, 1330
 South of Ireland Colliery Co. *v.* Waddle,
 78, 456
 South Kensington Co-operative Stores, *Re*,
 29, 480
 South Wales Atlantic Steamship Co., *Re*,
 415, 788
 S. Wales R. Co. *v.* Redmond, 461
 S. W. R. *v.* Wythes, 100
 Southall *v.* Br. Mut., &c., *Soc.*, 493, 494
 Southampton, *Ld. v.* Hertford, Marq., 4, 6
 Southby *v.* Hutt, 1072, 1082, 1100, 1109
 Southcomb *v.* Exeter, Bp. of, 102, 1089,
 1119
 Southcot *v.* Watson, 1324
 Southern *v.* Harriman, 92
 — *v.* Wollaston, 839
 Southey *v.* Sherwood, 130
 — *v.* Somerville, *Ld.*, 246, 1280
 Southouse *v.* Bate, 845, 846
 Southwold Railway, *In re*, 997
 Sowarsby *v.* Lacey, 1162
 Sowden *v.* Sowden, 668
 Sowerby *v.* Gutteridge, 301
 Sowerby's Trusts, *Re*, 1292
 Spackman *v.* Evans, 444
 — *v.* Holbrook, 277
 — *v.* Miller, 745
 — *v.* Timbrell, 31, 266, 267, 1347
 Spalding *v.* Spalding, 1314
 — *v.* Thompson, 772
 Spargo's Case, 432, 477

- Sparkes *v.* Cator, 929
 Sparling *v.* Parker, 118
 Sparrow *v.* Farmer, 739
 — *v.* Josselyn, 1333
 — *v.* Paris, 71
 — *v.* Shaw, 1395
 Speake *v.* Speake, 616, 638
 Spedding *v.* Nevell, 1035, 1124
 Speer's Trusts, *In re*, 1045
 Speight, *Re*, 271
 — *v.* Gaunt, 271, 990, *Add.*
 Spence, *Re*, 321
 — *v.* Spence, 219, 879, 979
 Spencer *v.* Boyes, 1181
 — *v.* Clarke, 721, 766
 — *v.* Duckworth, 1229
 — *v.* Lon. & Bir. R. Co., 174
 — *v.* Pearson, 770, 772
 — *v.* Slater, 290, 291
 — *v.* Spencer, 861, 1339, 1384
 — *v.* Topham, 1040
 — *v.* Ward, 1313
 — *v.* Wilson, 117, 1214
 Spencer's Case, 463, 554, 555, 561, 1166
 Spenley's Estate, 760
 Spering *v.* Spering, 404
 Sperling, Goods of, 1274
 — *v.* Rochfort, 382, 910
 Spicer *v.* Spicer, 380, 614
 Spickernell *v.* Hotham, 608, 666
 Spiers *v.* Brown, 132
 Spiller *v.* Madge, 1293
 — *v.* Paris Skating Rink Co., 412
 Spink *v.* Lewis, 1405
 Spinks *v.* Robins, 927
 Spirett *v.* Willows, 291, 382, 384, 390
 Spode *v.* Smith, 257
 Spong *v.* Spong, 1414
 Spooner *v.* Sandilands, 1112
 Spooner's Trusts, 908
 Sporre *v.* Barnaby, 991
 Spraae *v.* Stone, 1277
 Spradbery's Mortgage, *Re*, 744
 Sprague, *Ex parte*, 829
 Spread *v.* Morgan, 178, 184, 185
 Sprigge *v.* Sprigge, 1282
 Spring *v.* Biles, 1262
 — *v.* Pride, 397, 662, 1041
 Springett *v.* Dashwood, 987, 988
 — *v.* Jenings, 57, 1360
 Sproule *v.* Prior, 40
 Spurrell *v.* Spurrell, 1225, 1379
 Spurrier *v.* Hancock, 1097
 Spurway *v.* Glyn, 1348
 Spyer *v.* Hyatt, 374
 Spyre *v.* Porter, 89
 Squire *v.* Compton, 226
 Squires *v.* Ashford, 378, 383
 — *v.* Campbell, 162
 Stables, *Re*, 696, 1163
 Stace & Worth's Case, 432, 463
 Stacey *v.* Elph, 252, 975, 976
 Stackhouse *v.* Barnston, 605
 — *v.* Ly. Jersey, 692, 693, 767,
 1184
 Stackpole *v.* Beaumont, 1235, 1237
 Stackpoole *v.* Howell, 1344
 — *v.* Stackpoole, 621, 656, 917,
 1028
 Stafford, E. of, *v.* Buckley, 11
 — *v.* Wentworth, Lady, 24
 Stafford, Marquis, *v.* Coyney, 155
 Staff. Can. Co. *v.* Birm. Can. Co., 166
 Stahlschmidt *v.* Lett, 260, 263
 Staigt *v.* Burn, 157, 158, 159
 Staines *v.* Morris, 563, 1139, 1159
 Stains *v.* Blake, 732
 Stainton *v.* Carron Co., 63, 808
 Stammers *v.* Elliott, 263, 265, 1345
 — *v.* Halliley, 1342
 Stamp *v.* Cooke, 1408
 Stamper *v.* Pickering, 22
 Standard *v.* Lee, 127
 Standen *v.* Bullock, 297
 — *v.* Christmas, 562
 — *v.* Standen, 1311
 Standering *v.* Hall, 181
 Standing *v.* Bowring, 970, *Add.*
 Standley, *Re*, 1388
 — *v.* Hemmington, 1122
 Stanes *v.* Parker, 986
 Stanfield *v.* Hallam, 365
 — *v.* Hobson, 595
 — *v.* Stanfield, 1295
 Stanford *v.* Roberts, 225, 991
 Stanhope, *Re*, 1391
 — *v.* Mannors, 732
 — *v.* Stanhope, 224
 Stanhope's Case, 444, 1063
 — Trusts, *Re*, 1293
 Staniforth *v.* Fox, 527
 — *v.* Staniforth, 650
 Staniland *v.* Staniland, 966
 — *v.* Willott, 136
 Stanley, *Ex parte*, 451
 — *v.* Bernes, 1258
 — *v.* Chester, &c. R. Co., 412
 — *v.* Coulthurst, 624, 1247
 — *v.* Dowdeswell, 1056
 — *v.* Grundy, 761
 — *v.* Jackson, 624
 — *v.* Jones, 88
 — *v.* Robinson, 93
 — *v.* Stanley, 286, 395, 1029, 1301,
 1305
 — *v.* White, 542
 Stannard *v.* Forbes, 1165
 — *v.* Ullithorne, 1165
 Stansfeld *v.* Cubitt, 718
 Stansfield *v.* Habersham, 1424
 — *v.* Hobson, 583
 Stanton *v.* Hall, 356, 379, 388
 — *v.* Tattersall, 1064
 Stapilton *v.* Stapilton, 62, 209
 Staplehill *v.* Bully, 656
 Stapleton *v.* Cheales, 1216, 1217
 — *v.* Stapleton, 304
 Starkey *v.* Starkey, 617
 Stavers *v.* Barnard, 1376
 Stead *v.* Cragh, 344

- Stead *v.* Hardaker, 36
 — *v.* Mellor, 964
 — *v.* Newdigate, 106, 112
 — *v.* Platt, 339, 1213, 1219
 — *v.* Salt, 798
 Stead's Mortgaged Estates, *Re*, 602
 Steam Stoker Co., *Re*, 466
 Stedham-Dyke, Goods of, 1287
 Steed *v.* Calley, 385
 — *v.* Preece, 107
 Steedman *v.* Poole, 388, 396, 1155
 Steele—May—Wilson, Goods of, 1286
 Steele *v.* N. Met. R. Co., 102
 — *v.* Mid. R. Co., 1047
 — *v.* Mitchell, 1151
 — *v.* Waller, 300, 1129
 Steer *v.* Crowley, 1083, 1100, 1119, 1123
 Stein *v.* Ritherdon, 1319, 1320, 1324
 Steinmetz *v.* Halthin, 385
 Stelfox *v.* Sugden, 20
 Stent *v.* Bailis, 1095
 — *v.* Robinson, 1350
 Stephens, *Ex parte*, 570
 — *v.* Bridges, 680
 — *v.* De Medina, 1122
 — *v.* Gadsden, 916
 — *v.* Hotham, 275
 — *v.* James, 320, 324
 — *v.* Olive, 291, 401
 — *v.* Powys, 1307
 — *v.* Reynolds, 796
 — *v.* Stephens, 176, 178, 179, 1201,
 1358, 1427
 — *v.* Taprell, 1281
 — *v.* Venables, 265, 725, 1007
 Stephenson, *Ex parte*, 666
 — *v.* Dowson, 1329, 1331
 Stepney *v.* Biddulph, 1096
 Sterndale *v.* Hankinson, 597
 Sterne, *Ex parte*, 223
 — *v.* Beck, 731
 Stuart *v.* Gladstone, 812, 817
 Stevens *v.* Austen, 1036, 1137, 1838
 — *v.* Bagwell, 88
 — *v.* Benning, 83, 128
 — *v.* Guppy, 1110, 1117
 — *v.* Hale, 1365
 — *v.* Mid Hants R. Co., Lon. Fin.
 Ass. *v.* Stevens, 742
 — *v.* Pyle, 1385
 — *v.* Van Voorst, 665
 Stevens' Will, *Re*, 1353
 Stevenson *v.* Abingdon, 1377
 — *v.* Liverpool, Mayor of, 218, 978
 — *v.* Masson, 926
 Stewart *v.* Blakeway, 391, 806
 Stewart, *Ex parte*, 691, 725
 — Goods of, 1268
 — *Re*, 107, 112, 249
 — *v.* Alliston, 1062, 1118
 — *v.* Austin, 429
 — *v.* Eddowes, Hudson *v.* Stewart,
 79
 — *v.* Forbes, 802
 — *v.* Gibson, 795
 Stewart *v.* Jones, 1294
 — *v.* Stewart, 66, 925, 927, 928
 Stewart's Case, 427, 430, 444
 Stickney *v.* Sewell, 273, 698, 999
 Stiffe *v.* Everitt, 356, 379
 Stikeman *v.* Dawson, 789
 Stileman *v.* Ashdown, 322, 973
 Stiles *v.* Cowper, 873
 Still *v.* Hoste, 1313
 Stillman *v.* Weedon, 902
 Stilwell *v.* Wilkins, 1177
 Stirling-Maxwell *v.* Cartwright, 280
 Stock *v.* M'Avoy, 974
 — *v.* Vining, 676
 Stockdale *v.* Nicholson, 1406
 — *v.* Onwhyn, 88, 130
 Stocken *v.* Dawson, 277
 — *v.* Dean, 1043
 — *v.* Stocken, 650, 933
 Stocken's Case, 445
 Stocker *v.* Brocklebank, 101, 792
 — *v.* Harbin, 37
 — *v.* Wedderburn, 93, 100, 794
 Stockil *v.* Punshon, 1269
 Stockley *v.* Stockley, 63
 Stockport Waterw. Co. *v.* Potter, 163, 166,
 170
 Stocks *v.* Barre, 1325
 — *v.* Dodsley, 1406
 Stockton Iron Co., *Re*, 438, 735
 Stockwell *v.* Ritherdon, 1281
 Stoddart *v.* Nelson, 1377
 Stokes *v.* Check, 17
 — *v.* City Off. Co., 159, 161
 — *v.* Heron, 16, 17
 — *v.* Holden, 189
 — *v.* Moore, 1057
 — *v.* Salomons, 1320
 Stoke's Trusts, *Re*, 1011
 Stokoe *v.* Cowan, 289, 290
 — *v.* Robson, 781
 — *v.* Singers, 157
 Stolworthy *v.* Stolworthy, 904
 Stone, *Ex parte*, 828
 — *v.* Att.-Gen., 45, 1324
 — *v.* City & County Bank, 476
 — *v.* Godfrey, 63, 333
 — *v.* Greening, 1361
 — *v.* Parker, 33, 1321, 1418
 — *v.* Stone, 603, 974
 — *v.* Theed, 236, 237
 Stonehewer *v.* Thompson, 738
 Stones *v.* Heurtly, 505, 506
 — *v.* Rowton, 1010
 Stonor *v.* Curwen, 624
 Stonor's Trusts, *Re*, 364
 Stooke *v.* Stooke, 1325
 Stopford *v.* Canterbury, Ltd., 654
 Storer *v.* G. W. R. Co., 100
 — *v.* Prestage, 21
 Storke *v.* Storke, 316
 Storrs *v.* Benbow, 837, 841, 1382
 Storry *v.* Walsh, 267
 Story *v.* Gape, 975
 — *v.* Johnson, 537

- Story *v.* Windsor, Ld., 1186
 Stott *v.* Milne, 987
 Stoughton *v.* Leigh, 369
 Stourton *v.* Stourton, 316
 Stowell *v.* Robinson, 1122
 Stracey, *Re*, 1267
 Strachan *v.* Thomas, 600
 — *v.* Graham, 135
 Strang, *Ex parte*, 483
 Strange *v.* Fooks, 1007
 — Ld. *v.* Smith, 1238
 Stranks *v.* St. John, 527
 Stranton, &c., Co., 440
 Stratford *v.* Bosworth, 612
 — *v.* Twynam, 1042
 Strathmore *v.* Bowes, 334, 634
 Straton *v.* Rastall, 1160
 Stratton *v.* Best, 179, 501, 506
 — *v.* Hale, 635
 — *v.* Pettit, 533
 Stray *v.* Russell, 438
 Streaker, Goods of, 1284
 Streatfield *v.* Streatfield, 616, 617
 Street *v.* Rigby, 101, 810
 Strelley *v.* Pearson, 531
 Stretch *v.* Watkins, 1215
 Stretton *v.* Ashmall, 999, 1000
 Strevens *v.* Bayley, 1289
 Strickland *v.* Aldridge, 1301
 — *v.* Strickland, 40
 — *v.* Symons, 275
 — *v.* Turner, 1177
 Stringer, *Ex parte*, 438
 — *v.* Gardiner, 1312, 1376
 — *v.* Harper, 1416
 Stringer's Case, 467
 Strode *v.* Falkland, Ld., 744
 — *v.* Parker, 732
 — *v.* Russel, 1298
 Strong, *Re*, 635
 — *v.* Bird, 265
 — *v.* Hawkes, 769
 — *v.* Strong, 290, 1077
 Strother *v.* Dutton, 1194, 1206
 Stroud *v.* Gwyer, 825
 — *v.* Norman, 917
 Stroughill *v.* Anstey, 696, 881, 1162
 Stroyan *v.* Knowles, 168
 Strugnell *v.* Strugnell, 514
 Stuart, *Re*, 780
 — *v.* Bute, Ms., 315, 324, 1327
 — *v.* Cockerell, 724, 739, 838
 — *v.* Kirkwall, Ld., 393
 — *v.* Wrey, 1214
 Stubbins, *Ex parte*, 294, 995
 Stubbs *v.* Holywell, 85
 — *v.* Sargon, 381, 969, 1269, 1366
 Studd *v.* Cook, 1261
 Studds *v.* Watson, 1056
 Stummvol *v.* Hales, 1383
 Stump *v.* Gaby, 310
 Sturge *v.* Dimsdale, 58
 — and G. W. R. Co., 1405
 — *v.* Starr, 329
 — *v.* Sturge, 1392
 Sturges *v.* Bridgeman, 173
 — *v.* Corp. 397
 Sturges *v.* Bridgman, 140
 — *v.* Pearson, 1206, 1225
 Sturges *v.* Champneys, 376, 377, 378, 379
 — *v.* Dunn, 1369
 Sturla *v.* Freccia, 1115
 Styles *v.* Guy, 271, 998
 Suburban Hotel Co., 469
 Suffield *v.* Brown, 140, 143, 145, 168
 — Ly. *v.* Suffield, Ld., 669
 Sugden *v.* Crossland, 935
 — *v.* St. Leonards, Ld., 1270
 Suggitt, *Re*, 383, 384
 Suggitt's Trusts, *Re*, 382
 Suisse *v.* Lowther, 926, 1336
 Sullivan *v.* Mitcalf, 413
 — *v.* Sullivan, 648
 Sumacacori Mining Co., *Re*, 468
 Summers, Goods of, 1274
 — *v.* Griffiths, 94, 1177, 1178
 Sumner *v.* Powell, 797
 Sumpter *v.* Cooper, 775
 Sunderland, *Re*, 1268
 Surcome *v.* Piniger, 613, 614, 1058
 Surman *v.* Surman, 1297
 Surtees *v.* Hopkinson, 1315
 Sury *v.* Pigot, 142, 145
 Sussex Peerage Case, 75
 — Ly. *v.* Wroth, 867
 Sutcliffe *v.* Booth, 166
 — *v.* Cole, 1351
 — *v.* Richardson, 966
 Sutherland, *Re*, 251
 — *Css. v.* Northmore, 890
 — *v.* Briggs, 1059
 — *v.* Cooke, 120
 Sutton *v.* Chetwynd, 620, 656
 — *v.* Sharp, 272
 — *v.* Smith, 738
 — *v.* Sutton, 596, 603
 — *v.* Temple, 553
 — to Church, Parish of, 61
 Swabey *v.* Swabey, 681
 Swaby *v.* Dickon, 752
 Swaine *v.* Burton, 201, 502
 — *v.* Denby, 515, 877
 — *v.* Kennerley, 1387
 Swainson *v.* Swainson, 1417
 Swaisland *v.* Dearsley, 80, 98, 1061, 1087
 Swallow *v.* Binns, 1230, 1232
 Swan, *Re*, 377, 1018, 1343
 — *v.* Holmes, 1366
 — *v.* North British, &c., Co., 441
 — *v.* Swan, 722
 Swannock *v.* Lifford, 370, 736
 Swansborough *v.* Coventry, 144
 Swansea Bank *v.* Thomas, 25, *Add.*
 — Mayor of, *v.* Thomas, 562
 Swayne *v.* Swayne, 727
 Sweet *v.* Benning, 129, 130
 — *v.* Combley, 761
 — *v.* Lee, 1057
 — *v.* Meredith, 194, 1118, 1134
 — *v.* Seager, 546

- Sweetapple v. Bindon, 338
 — v. Horlock, 664
 Sweeting v. Prideaux, 1314, 1366
 — v. Sweeting, 56, 57
 Swiffen v. Swifen, 990
 Swift, *Ex parte*, 654
 — v. Gregson, 904
 — v. Nash, 15
 — v. Pannell, 719
 — v. Swift, 321, 402, 1221, 1319
 — v. Wenman, 408, 633, 659, 676
 Swinbanks, *Ex parte*, 1160
 Swinburn v. Ainslie, 255, 1250
 Swinburne, *In re*, 897
 — v. Milburn, 234
 Swindon Waterworks Co. v. Wilts and
 Berks Canal Co., 163
 Swinfen v. Chelmsford, Ltd., 65
 — v. Swinfen, 65, 271, 681, 682,
 1323, 1324
 Swinton v. Bailey, 1279, 1284
 Syer v. Gladstone, 1420
 Syers v. Jones, 80
 — v. Syers, 787, 790, 792
 Sykes, *Re*, 397
 — Goods of, 1284
 — v. Beadon, 415
 — v. Bond, 1156
 — v. Schofield, 510
 — v. Sheard, 111, 850, 877, 886
 — v. Sykes, 250, 833, 1360, 1363,
 1364
 Sykes' Case, 466
 Symes v. Green, 1263
 — v. Hughes, 961
 Symmons, *Ex parte*, 719
 Symonds v. Hallett, 388
 — v. Marine Society, 52
 — v. Wilkes, 397, 616
 Symon's Case, 441, 442
 Symons v. James, 32, 1061
 Sympson v. Hornsby, 1366
 Synge v. Synge, 1330
 Synnot v. Simpson, 994
- T., *Re*, 278
 Taaffe v. Conmee, 1411
 Tabor v. Brooks, 989
 Taddy's Settled Estates, *Re*, 942, 997
 Taft v. Harrison, 438
 Taggart v. Taggart, 501, 618
 Tahiti Cotton Co., Sargent, *Ex parte*, 442
 Tait v. Lathbury, 876, 878
 Taite v. Gosling, 563
 — v. Swinstead, 882
 Taite's Case, 429
 Taitt, *Ex parte*, 827
 Talbot, E., v. Scott, 993, 1255
 — v. Braddell, 732, 737
 — v. Frere, 264, 772
 — v. Jevors, 7
 — v. Mansfield, 641
 — v. Radnor, E., 180, 991
 — v. Shrewsbury, E., 38, 316, 317
- Talbot v. Shrewsbury, D. of 933
 — v. Staniforth, 65
 Tallis v. Tallis, 87
 Taltarum's Case, 209
 Tambracherry Estates Co., *Re*, 417
 Tamplin v. James, 97, 1089, 1134, 1135
 Taniero v. Pearkes, 1383
 Tanner, *Ex parte*, 220, 506
 — v. Elworthy, 238
 — v. Heard, 780
 — v. Smart, 606
 — v. Smith, 1083
 — v. Tebbutt, 1204
 Tanqueray-Willlaume and Landau, *In re*,
 979, 1162
 Tantall v. Hankey, 1258
 Tapley v. Eagleton, 1297
 Tapling v. Jones, 157, 158
 Tapply v. Streather, 688
 Tarbuck v. Tarbuck, 1207, 1401
 Tardiff v. Robinson, 122
 Tardiffe v. Scrughan, 1172
 Targus v. Puget, 672
 Tarleton v. Bruton, 1356
 Tarsey's Trusts, *Re*, 390
 Tarte v. Darby, 1094
 Tasker v. Small, 738, 1126
 Tassell v. Smith, 740
 Taster v. Marriott, 238
 Tatam v. Williams, 809
 Tate v. Austin, 365, 366
 — v. Clarke, 1393
 — v. Hilbert, 136, 138
 — v. Leithhead, 137
 — v. Williams, 1041
 — v. Williamson, 306
 Tatem v. Chaplin, 555
 Tatham v. Drummond, 53, 54, 1349
 — v. Vernon, 199, 837, 963, 1278
 Tattersall v. Howell, 1246
 Taunton v. Morris, 378, 383
 — v. Roy. Ins. Co., 463
 Taurine Co., *Re*, 438, 441, 490
 Tayleur v. Dickenson, 666
 Taylor, *Ex parte*, 788, 793, 1038
 — *Re*, 322, 431
 — Goods of, 1262
 — v. Austen, 379, 1239
 — v. Beach, 613, 614
 — v. Beverly, 1406
 — v. Biddall, 1192
 — v. Brown, 1120
 — v. Chichester and Midhurst R. Co.,
 412, 1043
 — v. Clark, 119
 — v. Coenen, 291
 — v. Debar, 1181
 — v. Dulwich, 456
 — v. Frobisher, 837, 1190, 1191
 — v. George, 964
 — v. Gillott, 570
 — v. Graham, 1199
 — v. Grange, 515
 — v. Harewood, 1028
 — v. Hawkins, 697

- Taylor *v.* Haygarth, 187, 188, 281, 284
 — *v.* Hilary, 82
 — *v.* Horde, 585, 871
 — *v.* Johnston, 310, 1351
 — *v.* Lambert, 1196
 — *v.* Linley, 52, 53
 — *v.* McKeand, 717
 — *v.* Martindale, 11
 — *v.* Meads, 392, 888, 1034, 1263
 — *v.* Pillow, 129
 — *v.* Pilsen Joel and General Electric
 Light Co., 419
 — *v.* Plumer, 1004
 — *v.* Poncia, 957
 — *v.* Popham, 1204
 — *v.* Portington, 92
 — *v.* Pugh, 334
 — *v.* Richardson, 1303
 — *v.* Rundell, 807
 — *v.* St. Helen's, Corp. of, 141, 165
 — *v.* Shum, 563
 — *v.* Stibbert, 866, 1151, 1154
 — *v.* Tabrum, 270
 — *v.* Taylor, 11, 19, 20, 21, 32, 116,
 117, 258, 262, 284, 285, 475,
 504, 974, 1339
 — *v.* Turnbull, 524
 — *v.* Whitehead, 147
 Taylor's Estate, *Re*, 1311
 — Settlement, *Re*, 112
 Teague's Settlement, *Re*, 859
 Teape's Trusts, *Re*, 897
 Teasdale *v.* Braithwaite, 298
 — *v.* Sanderson, 509
 Teasdale's Case, 462
 Tebbitt *v.* Tebbitt, 675
 Tee *v.* Ferris, 57, 1301
 Teebay *v.* Manchester, &c., R. Co., 1177
 Teevan *v.* Smith, 778
 Telegraph Construction Co., *Re*, 491
 — &c., Co. *v.* M'Lean, 103
 Tempest, *Ex parte*, 293, 1009
 — *Re*, 1014
 — *v.* Camoys, Ltd., 651, 983
 — *v.* Tempest, 58
 Temple, E., *v.* Chandos, Dss., 1278
 Templeman *v.* Warrington, 1206
 Templer's Trusts, 783
 Tenant *v.* Goldwin, 143
 Tench *v.* Cheese, 6, 1359
 — *v.* Roberts, 795
 Tennant *v.* Heathfield, 1208
 — *Ex parte*, Howard, *In re*, 788
 Tennent *v.* City of Glasgow Bank, 430
 — *v.* Tennent, 63
 Tennent's Case, 433
 Tetlow *v.* Ashton, 1373
 Teuliere *v.* Vestry of St. Mary Abbott's,
 Kensington, 1047
 Tew *v.* Jones, 534
 Tewart *v.* Lawson, 226
 Teynham, Ltd. *v.* Webb, 860, 861, 1192
 Thacker *v.* Key, 920
 Thackeray *v.* Wood, 1179
 Thames, &c., R. Co. *v.* Brymer, 82
 Thames Haven, &c., Co. *v.* Rose, 448
 Tharp, *Re*, 722
 Tharp's Estate, *Re*, 1222
 Thatcher, *Re*, 1190
 Thatcher's Trusts, *Re*, 653, 840
 Theed *v.* Debenham, 160
 Theed's Settlement, *Re*, 861, 1195, 1218
 Thellusson *v.* Rendlesham, 4, 1307, 1372
 — *v.* Woodford, 4, 182, 183
 Thetford, Mayor of, *v.* Tyler, 533
 Theys, *Ex parte*, 483
 Thicknesse *v.* Liege, 1384
 Thomas, *Re*, 415
 — *v.* Bennet, 934
 — *v.* Britnell, 32
 — *v.* Brown, 1053
 — *v.* Buxton, 1092
 — *v.* Cross, 519
 — *v.* Davis, 1177
 — *v.* Dering, 92, 794, 877, 886,
 1055, 1128, 1129
 — *v.* Evans, 1279
 — *v.* Everard, 404
 — *v.* Griffith, 1347
 — *v.* Jones, 885, 891
 — *v.* Hayward, 554, 555
 — *v.* Howell, 43, 52, 1202, 1310
 — *v.* Patent Lionite Co., 479, 480,
 489
 — *v.* Powell, 1179
 — *v.* Roberts, 321
 — *v.* Thomas, 147, 171, 366, 577,
 584, 772, 904, 1227, 1289,
 1298, 1304, 1332
 — *v.* Wilberforce, 834, 836, 837,
 1215
 — *v.* Williams, 954
 Thomas's Case, 444
 Thomason *v.* Frere, 830
 Thomlinson *v.* Smith, 1161
 Thomond, Ltd. *v.* Suffolk, Ltd., 336, 1339
 Thompson, *Re*, and Curzon, 364
 — Goods of, 1301
 — *Re*, 189
 — *v.* Beasley, 1409
 — *v.* Bennett, 264
 — *v.* Blackstone, 93
 — *v.* Bowyer, 595
 — *v.* Burra, 371
 — *v.* Butler, 354
 — *v.* Cartwright, 1155
 — *v.* Cohen, 715
 — *v.* Cooper, 264
 — *v.* Corby, 43
 — *v.* Drew, 732, 733
 — *v.* Eastwood, 64, 589, 1387
 — *v.* Finch, 313, 983
 — *v.* Fisher, 623
 — *v.* Grant, 264
 — *v.* Griffin, 650
 — *v.* Hakewill, 74, 536, 555
 — *v.* Hardinge, 199
 — *v.* Harrison, 630
 — *v.* Harvey, 69
 — *v.* Heffernan, 137, 138

- Thompson v. Hudson, 72, 608, 737, 750,
 751
 — v. Lapworth, 546
 — v. Lawley, Ly., 1360
 — v. Percival, 819
 — v. Ringer, 1118
 — v. Robinson, 1376
 — v. Shakespear, 44, 56
 — v. Simpson, 616, 777, 860
 — v. Stanhope, 130
 — v. Thompson, 44, 52, 667,
 1222, 1296, 1385
 — v. Tomkins, 725
 — v. Towne, 37
 — v. Waithman, 808
 — v. Watts, 375
 — v. Webster, 291, 299
 — v. Whitelock, 1292, 1364, 1407
 — v. Whitmore, 82, 312
 Thompson's Trusts, *Re*, 1373
 Thomson v. Eastwood, 1349
 — v. Harding, 250
 — v. Miles, 1122
 — v. Thomson, 86
 — v. Waterlow, 146
 Thomson's Trusts, *Re*, 1366
 Thong v. Bedford, 219
 Thorild, Goods of, 1262
 Thornber v. Sheard, 306
 — v. Wilson, 43
 Thornbrough v. Baker, 744
 Thornbury v. Beville, 102
 Thorndike v. Hunt, 1004
 Thorne, Goods of, 1276
 — v. Kerr, 268, 269
 — v. Rooke, 1279
 — v. Thorne, 884
 — v. Watkins, 282
 Thornecroft v. Crockett, 740, 750, 772
 — v. Hall, 1365
 — v. Manning, 761
 Thornett v. Haines, 1069
 Thornhill v. Glover, 1093
 Thornton, *Ex parte*, 486, 830
 — v. Bright, 651, 858
 — v. Dixon, 806
 — v. Ellis, 120
 — v. Finch, 738
 — v. Hawley, 112
 — v. Howe, 43
 — v. Thornton, 897
 Thorp v. Booth, 605
 — v. Facey, 597
 — v. Owen, 205, 967, 1373
 Thorpe v. Bestwick, 1265
 — v. Brumfitt, 140, 154
 — v. Freer, 1091
 — v. Holdsworth, 767, 768, 1184
 — v. Thorpe, 1372, 1375, 1428
 Thrupp v. Collett, 44
 — v. Harman, 392, 639
 Thruston, *Re*, 1190, 1215
 Thrustout v. Coppin, 251
 Thunder v. Belcher, 535, 734, 746
 Thurlow v. Mackenson, 754
 Thursby v. Thursby, 121, 122
 Thwaites v. Forman, 1342
 Thynne, Ly. v. Gengal, E. of, 612, 614,
 926, 930, 931, 932, 933
 Tibbits v. Tibbits, 180, 964
 Tickle v. Brown, 152, 153
 Tickner v. Old, 119
 — v. Tickner, 1278
 Tidball v. James, 583
 Tidd v. Lister, 351, 356, 379, 769
 Tidey v. Mollett, 533
 Tidswell v. Whitworth, 547
 Tidwell v. Ariel, 1292
 Tierney v. Wood, 304, 962
 Tiffin v. Longman, 1408
 — v. Tiffin, 255, 679
 Tildesley v. Clarkson, 530, 1117
 — v. Lodge, 742, 1150
 Tilleard, *Re*, 412
 Tillett v. Charing Cross Bridge Co., 1060
 — v. Nixon, 752
 Tilley v. Simpson, 1322
 — v. Thomas, 1080, 1119, 1120
 Tilson v. Jones, 1212
 Times Life Assur., &c., Co., *Re*, 463,
 471
 Timewell v. Perkins, 1319, 1322, 1323
 Timins v. Stackhouse, 17
 Timson v. Ramsbottom, 725, 726
 Tindal v. Cobham, 1131
 Tinsley v. Lacy, 132
 Tippetts v. Heane, 607
 Tipping v. Eckersley, 556
 — v. Power, 780
 — v. Tipping, 374
 Tipton v. Tipton, 749
 Tissen v. Tissen, 1351
 Titley v. Davies, 740
 — v. Wolstenholme, 754
 Titterton v. Cooper, 564
 Tiverton Market Act, *Re*, 503
 — and N. D. R. Co. v. Loosemore,
 1047
 Todd, *Re*, 380
 — v. Bielby, 1341
 — v. Gee, 1130
 — v. Studholme, 1092
 — v. Wilson, 986
 Toft v. Stephenson, 588, 598, 599, 604
 — v. Stevenson, 1171
 Toker v. Toker, 308, 311
 Toler v. Slater, 539
 Tollemache v. Coventry, E. of, 245, 839
 Toller v. Attwood, 220, 979
 Tollett v. Tollett, 894
 Tolman v. Portbury, 558
 Tolson v. Collins, 933
 Tombes v. Elers, 317, 325
 — v. Roch, 37
 Tomkins v. Colthurst, 37
 — v. White, 1063
 Tomkyns v. Blane, 183
 — v. Ladbroke, 380
 Tomlinson, Goods of, 1271
 — v. Dighton, 849, 917

- Tomlinson v. Gill, 258
 — v. Gregg, 735
 — v. Leigh, 674
 Tompson v. Browne, 312, 884, 1267
 Toms v. Wilson, 735
 Tone v. Preston, 167
 Tonson v. Walker, 129
 Tooke v. Ely, Bp. of, 762
 — v. Hastings, 668
 Toole v. Young, 132
 Tootal's Estate, *Re*, 1362
 — Trusts, *Re*, 1260
 Topham v. Portland, D. of, 920
 Toplis v. Baker, 1292
 — v. Hurrell, 268
 Torrance v. Bolton, 1063, 1136
 Torre v. Browne, 21
 — v. Torre, 674, 675
 Torrington v. Lowe, 440
 Tothill's Case, 424
 Tottenham v. Townsend, 671
 Touche v. Met. Rail. Co., 412
 — La, v. Touche, La, 393
 Toulmin v. Copland, 801
 — v. Steere, 742
 Tourle v. Rand, 695, 765
 Tournay, *Ex parte*, 278
 Tourville v. Naish, 1150, 1179
 Toutt's Will, *Re*, 783
 Tower v. Rous, *Ld.*, 1415
 Townend v. Toker, 71, 298, 299
 — v. Townend, 265, 272, 818, 985
 Townley v. Bedwell, 44, 107, 1081, 1098
 — v. Bolton, 1366
 — v. Watson, 1284
 Towns v. Wentworth, 1402
 Townsend, *In re*, 712
 — v. Champernown, 1101, 1129
 — v. Earley, 1382
 — v. Westacott, 292
 — v. Wilson, 850
 Townshend *Ld.* v. Stangroom, 80
 — *Ld.* v. Windham, 639
 — v. Harrowby, 666
 — v. Mostyn, 1336, 1337, 1417
 — v. Townshend, 587
 Townson v. Tickell, 976
 Tracy v. Hereford, *Ly.*, 227
 — v. Lawrence, 756
 Traders, &c., Co., *Re*, 479
 Trafford v. Ashton, 645
 — v. Boehm, 1001, 1397
 — v. Trafford, 244
 Trail v. Bull, 1343
 Trappes v. Meredith, 1244
 Trash v. Wood, 198, 229, 961
 Travers v. Blundell, 1309
 — v. Travers, 661, 1298
 Travis v. Illingworth, 1010
 — v. Milne, 274, 825
 Tredwen v. Bourne, 427
 Treeby, Goods of, 1285
 Trees v. Savage, 533
 Trefusis v. Clinton, *Ld.*, 1092
 Tregonwell v. Sydenham, 968, 1351
- Treloar v. Bigge, 552
 Trench v. Harrison, 668, 1004
 Trent v. Hunt, 746
 Trestrail v. Mason, 1420
 Trethewy v. Helyar, 1363, 1406
 Trevanion, *Re*, 1275
 Trevelyan v. Charter, 590
 Treves v. Townshend, 272
 Trevor, *Ex parte*, 717
 — v. Trevor, 617, 620, 622, 624, 683,
 865, 1029, 1030
 Tribe v. Newland, 1214
 Tricker v. Kingsbury, 1234
 Trickey, *Re*, v. Trickey, 7
 Trigge v. Lavallee, 64
 Trimbey v. Vignier, 75
 Trimleston, *Ld.* v. Hamill, 749
 Trimmell v. Fell, 847, 891
 Trimmer v. Bayne, 40, 925, 926, 928, 937,
 1173
 — v. Danby, 26
 Trinnell, Goods of, 1276
 Trinder v. Trinder, 1290, 1310, 1326, 1332
 Trippet v. Eyre, 851
 Tristram or Tustian v. Baltinglass, *Ly.*, 868
 Tritton v. Foote, 234
 Trollope v. Linton, 853, 897
 — v. Routledge, 912
 Trotman v. Flesher, 894, 1055, 1056
 Trott v. Buchanan, 1415
 — v. Vernon, 1414
 Trotter v. Maclean, 590
 — v. Williams, 1210
 Troughton v. Hunter, 812
 — v. Troughton, 772, 847
 Troup's Case, 452
 Trowd's Settlement, *Re*, 664
 Trowell v. Shenton, 296, 614, 632, 634
 Trower v. Butts, 1382
 — v. Knightley, 882
 Truell v. Tyssen, 892
 Trueman v. Loder, 81
 Trueman's Estate, *Re*, 482, 489
 Trulock v. Robey, 594, 595
 Truman v. L. B. & S.C.R. Co., 172, 174, 444.
 — & Co. v. Redgrave, 751
 Trumper v. Trumper, 239, 683, 769
 Trura, *Ly.*, Goods of, 1287
 Truscott v. Diamond, &c., Co., 872
 — v. Merchant Tailors' Co., 152, 153
 Trye v. Gloucester, Corp. of, 55
 Tucker v. Boswell, 119
 — v. Burrow, 973, 974
 — v. Johnson, 980
 — v. Kayess, 1351
 — v. Linger, 543, 548
 — v. Sanger, 860
 — v. Wilson, 759
 Tucker-Enmanuel, *Re* v. Parfitt, 364
 Tuckey v. Henderson, 1336, 1337
 Tuckley v. Thompson, 763
 Tudor v. Anson, 895
 — v. Samyne, 343
 Tuer v. Turner, 113, 354
 Tuffnell, *Ex parte*, 693

- Tugman v. Hopkins, 391
 Tugwell, *In re*, 1044
 Tuite v. Birmingham, 1385
 Tulk v. Houlditch, 1203
 — v. Moxhay, 162, 1166, 1182
 Tull v. Parlett, 81
 Tullett v. Armstrong, 330, 387, 388 390
 397, 398
 Tullock v. Tullock, 1090
 Tunaley v. Roch, 1366
 Tunstall, *Re*, 1014
 — v. Boothby, 730
 — v. Bracheu, 1196
 — v. Trappes, 673, 776
 Turing v. Turing, 1231
 Turnbull v. Forman, 360
 Turner, *Ex parte*, 1005
 — *Re*, 981, 1406
 — Goods of, 1283
 — v. Alliday, 545
 — v. Bryans, 904
 — v. Buck, 1349
 — v. Collins, 309, 310
 — v. Gossett, 1190
 — v. Harvey, 877, 1050, 1135
 — v. Hellard, 1298
 — v. Hudson, 1377
 — v. Ince, 95
 — v. Major, 817, 818
 — v. Marriott, 1174
 — v. Martin, 1292
 — v. Mirfield, 175
 — v. Moor, 1210
 — v. Morgan, 509
 — v. Mullineux, 15
 — v. Nicholson, 512, 514
 — v. Oden, 43
 — v. Reynall, 795
 — v. Robinson, 135
 — v. Sargent, 619, 878
 — v. Spooner, 158
 — v. Turner, 10, 991, 1362
 — v. Whittaker, 1383
 — v. Wright, 1253
 — and Skelton, *Re*, 1175
 Turner's Case, 343
 — Settled Estates, *In re*, 919
 Turney v. Dodwell, 607
 Turpin, *Ex parte*, 1006
 — v. Chambers, 1084
 Turquand, *Ex parte*, 719
 — v. Kirby, 475
 — v. Marshall, 455, 457, 460, 462,
 465
 — v. Rhodes, 1062, 1089, 1117, 1135
 Turton v. Barber, 1157
 — v. Benson, 630
 — v. Lambarde, 1029
 Turvin v. Newcome, 6
 Tussand v. Tussand, 925, 929
 Tweddell v. Tweddell, 65
 Tweddle v. Atkinson, 71
 Tweedale, *Re*, 380
 Tweedie and Miles, *In re*, 878
 Twigg v. Fifield, 1092
 Twining v. Powell, 926
 Twisden v. Twisden, 932
 — v. Wise, 348
 Twiss, *Re*, 891
 Twogood, *Ex parte*, 830
 — v. Swanston, 808
 Twopenny v. Peyton, 1243
 Twycross v. Grant, 413
 Twyford v. Trail, 252
 Twynam v. Pickard, 562
 Twyne's Case, 290, 706
 Tylee v. Tylee, 751
 — v. Webb, 1179
 Tyler v. Lake, 390
 — v. Thomas, 1152
 — v. Yates, 689
 Tyndale v. Wilkinson, 1383
 Tynt v. Tynt, 375
 Tyrconnel, E. v. Ancaster, D. of, 865,
 921
 Tyrone, E., v. Waterford, Marq. of, 1322,
 1390
 Tyrrell v. Clark, 25, 26
 — v. Hope, 388
 — v. Lon., Bank of, 306, 1039
 — v. Marsh, 852
 Tyrrell's Case, Ly., 374
 Tyrwhitt v. Tyrwhitt, 682
 Tyson v. Jackson, 89, 598
 Tytche v. Tytche, 181, 183
 Tyte v. Willis, 1370
 Tytherleigh v. Harbin, 1355
 UDNY v. Udny, 1260, 1388
 Ulrich v. Litchfield, 673, 1299
 Underhill v. Roden, 1198, 1391
 Underwood, *Re*, 757, 1019
 — v. Courtown, Ld., 776
 — v. Joyce, 763
 — v. Morris, 1237
 — v. Stevens, 252, 1007
 — v. Wing, 1114, 1208, 1227
 Unett v. Wilkes, 182
 Ungley v. Ungley, 614
 Union Bank of Manchester, *Ex parte*, 718
 United, &c., Co., *In re*, 1018
 — Land, &c., Co. v. G. E. Ry. Co.,
 156
 — Merthyr Collieries Co., *Re*, 170
 Unity Bank Association, *Ex parte*, 789
 Universal Disinfecter Co., *Re*, 479, 480
 Unsworth v. Speakman, 1294
 Upperton v. Nickolson, 231, 1062, 1082,
 1100, 1103, 1134
 Upton v. Basset, 296
 — v. Brown, 124, 635, 658
 — v. Ferrers, Ld., 1365
 — v. Vanner, 20, 21
 Urch v. Walker, 975, 976
 Urquhart v. Macpherson, 94
 Uruguay, &c., Co., *Re*, 455, 470
 Usticke, *Re*, 1222
 — v. Bawden, 1285
 Utterson v. Utterson, 1284

Uvedale v. Halfpenny, 648
Uxbridge, Ld., v. Bayly, 554

VACHELL v. Roberts, 121
Vaisey v. Reynolds, 1324, 1328
Valentine v. Dickinson, 1131
Vallance v. Blagden, 88
Valpy and Chaplin, *Ex parte*, 450
Van v. Barnett, 111, 113, 118
— v. Clark, 1196
— v. Corpe, 551
Vance v. Vance, 972, 973
Vancouver v. Bliss, 1139, 1140
Vandenberg v. Palmer, 304
Vandenbergh v. Spooner, 81, 1053
Van der Donckt v. Thellusson, 75
Vandergucht v. Blake, 1226
— v. Blaquiére, De, 394, 400
Vanderplank v. King, 839, 1411
Vanderzee v. Aclom, 907
— v. Willis, 772
Vane v. Barnard, Ld., 1180, 1254
— E. v. Rigden, 262, 275, 276
— v. Cobbold, 414
— v. Vane, 317, 590, 1186
Van Gheluive v. Nerincke, 38, 519
— Gratton v. Digby, 627
Vansittart v. Vansittart, 323, 400, 402
Vardon's Trust, *Re*, 181, *Add.*
Varley v. Coppard, 552
— v. Winn, 1349
Varlo v. Faden, 8
Vaughan v. Buck, 121, 378
— v. Burslem, 244
— v. Foakes, 1365
— v. Hancock, 1053
— v. Headfort, Marq. of, 1390
— v. Vanderstegen, 37, 394, 399, 848
— v. Walker, 396
Vaux v. Henderson, 1373, 1405
Vawdry v. Geddes, 834, 836, 1214
Vawser v. Jeffery, 1277
Veal v. Veal, 137
Veale's Trusts, *In re*, 904
Veiga, *Re*, 252
Venezuela Ry. Co. v. Kisch, 428, 430
Verney v. Verney, 237
Vernon v. Curtis, 264
— v. Smith, 555
— v. Vawdry, 1003
— v. Wright, 203
Vesey v. Elwood, 1092
Vezey v. Jamson, 44
Viant's Settlement Trusts, *Re*, 663
Vickers v. Hand, 1081
— v. Pound, 1329, 1340
— v. Vickers, 1054, 1060
Vickery v. Evans, 1001
Vigers v. Pike, 96, 1178
Villareal v. Mellish, 320
Villers v. Beaumont, 292
Villiers v. Villiers, 617

Vincent v. Godson, 38, 279
— v. Going, 601
— v. Newcombe, 122, 1330
— v. Sodor and Man, Bishop of, 889
— v. Spicer, 1248, 1250
Vine v. Raleigh, 941
Viner v. Francis, 1378
— v. Vaughan, 1251
Viney v. Chaplin, 799, 1160, 1170
Vining's Case, 493
Vinnicombe v. Butler, 1275
Vint v. Padget, 740
Vivers v. Tuck, 93
Vivian v. Jegon, 869
— v. Mortlock, 846
Vizard, *Re*, 157
Vizard's Trusts, *Re*, 664
Vize v. Stoney, 1236
Voisey, *Ex parte*, 544
Volans v. Carr, 655
Voller v. Carter, 338
Von Brockdorff v. Malcolm, 897
Vorley v. Cooke, 743, 762
— v. Richardson, 1223
Vouillon v. States, 80
Vowles v. Young, 1115
Voyle v. Hughes, 302
Vron Coll. Co., *Re*, 479, 481
Vulliamy v. Noble, 822, 830
Vyse v. Foster, 270, 818, 824, 825, 1003
Vyvian v. Vyvyan, 884

WACE v. Bickerton, 638
Wacher, *Re*, 1020
Waddell, *Re*, 1139
— v. Wolfe, 1071, 1074
Wade v. Hopkinson, 326
— v. Jenkins, 817
— v. Paget, 669, 959
— v. Ward, 741
Wade-Gery v. Handley, 110, 205
Wadham v. Rigg, 1003
Wadley v. North, 1193
Wadman v. Calcraft, 549
Wagstaff v. Crosby, 1205, 1225
— v. Smith, 388, 393
— v. Wagstaff, 1290
Wain v. Warlters, 77
Wainwright, *Re*, 213
Wainford v. Heyl, 319, 394, 966, 1007
Wainman v. Field, 1363
Wainwright v. Waterman, 813
Waite v. Bingley, 510
— v. Jones, 401
— v. Littlewood, 1222
— v. Morland, 1308
— v. Webb, 53
Wake v. Varah, 1223
— v. Wake, 184, 371
Wakefield v. Buccleuch, D. of, 169
— v. Dyott, 1190
— v. Gibbon, 62, 65
— v. Maffet, 1230
Wakeham v. Merrick, 16

- Wakeman v. Dss. of Rutland, 1165, 1179
 Wala, &c., Co., *Re*, 471
 Walcot v. Botfield, 1246
 Walcott v. Hall, 1347
 Waldo v. Caley, 45
 — v. Waldo, 1250
 Waldron v. Sloper, 767
 Waldy v. Gray, 1155
 Walford v. Gray, 612, 854
 Walhampton Estate, 296
 — v. Walker, 273, 998
 Walker and Hughes' Contract, 1016
 Walker, *Re*, 107, 326, 782, 1227
 — Goods of, 1273
 — v. Bentley, 1106
 — v. Brewster, 172
 — v. Butler, 608
 — v. Denne, 111, 186, 187, 188
 — v. Giles, 736
 — v. Hardwick, 14, 15
 — v. Hirsch, 788
 — v. Jeffreys, 1130
 — v. Jones, 743, 777
 — v. Lon. Tram. Co., 447
 — v. Mackie, 899
 — v. Main, 1226, 1230, 1294
 — v. Milne, 52
 — v. Moore, 1124
 — v. Petchell, 1400, 1429
 — v. Shore, 1035, 1379
 — v. Smalwood, 991, 1036
 — v. Smith, 307
 — v. Symonds, 96, 257, 273, 984,
 998, 1007
 — v. Taylor, 269
 — v. Tipping, 1315
 — v. Walker, 1203, 1237
 — v. Ware, &c., R. Co., 1172
 — v. Wetherell, 642, 654
 — v. Woodward, 272
 Walker's Case, 439, 440, 444, 476
 — Mortgage Trusts, *Re*, 783
 Wall v. Cockerell, 688
 — v. Colshead, 116
 — v. Ogle, 66
 — v. Rogers, 66
 — v. Stubbs, 90
 — v. Tomlinson, 349, 1206, 1384
 — v. Wall, 182
 Wall's Case, 369, 421
 Wallace v. Anderson, 636, 1243
 — v. Att.-Gen. 45, 1148
 — v. Auldjo, 585
 — v. Greenwood, 110, 514
 — v. Patton, 234
 — v. Pomfret, 937
 — v. Wallace, 672
 Waller v. Childs, 1298
 — v. Turner, 519
 Wallgrave v. Tebbs, 57
 Wallinger v. Wallinger, 856
 Wallis v. Bastard, 1081, 1140
 — v. Campbell, 314
 — v. Hodson, 284
 — v. Morris, 519, 771
 Wallis v. Smith, 72
 — v. Warren, 73
 Wallis's Case, 421
 Wallop's Trusts, *Re*, 848
 Wallwyn v. Coutts, 993
 — v. Lee, 1184, 1185, 1186
 Walmesley v. Gerard, 1028
 Walmsley v. Foxhall, 18
 — v. Jowett, 853
 — v. Milne, 255
 Walpole v. Apthorp, 1334
 — *Ld. v. Cholmondeley, E.*, 1301
 — v. Oxford, *Ld.*, 91
 Walrond v. Hawkins, 1074
 — v. Rosslyn, Walrond v. Fulford,
 113
 — v. Walrond, 272, 323, 401
 Walsh v. Gladstone, 43, 254, 1344
 — v. Lonsdale, 528
 — v. Peterson, 1316
 — v. Studdart, 137
 — v. Wallinger, 856, 907
 — v. Walsh, 654
 Walsingham. *Ld.*, v. Goodricke, 1156, 1157
 Walter v. Howe, 130
 — v. Maunde, 29, 110, 864, 878, 1085
 — v. Pyman, 1140
 Walters v. N. Coal Mining Co., 529, 537
 — v. Walters, 264
 — v. Webb, 578
 — v. Woodbridge, 986
 Walton, *Ex parte*, 569
 Walton's Estates, *Re*, 1317
 Walworth v. Holt, 808
 Wankford v. Fotherley, 612
 — v. Wankford, 252
 Want v. Stallibrass, 1083
 Warbick v. Varley, 1345
 Warburg v. Tucker, 671
 Warburton v. Hill, 524, 726, 727
 — v. Sandys, 984, 1010
 — v. Tarn, 852
 — v. Warburton, 645
 Warbuton v. Warbuton, 371
 Ward, *Ld.*, v. Lumley, 565
 — *Ex parte*, 434
 — *Re*, 1001
 — v. Baugh, 183
 — v. Beck, 729
 — v. Beeton, 132
 — v. Byrne, 87
 — v. Carttar, 739
 — v. Day, 532
 — v. Dudley, *Ld.*, 648
 — v. Dyas, 673
 — v. Ghymes, 1083, 1101
 — v. Grey, 15, 1390
 — v. Lant, 285
 — v. Lenthal, 884
 — v. Mackinlay, 762, 780
 — v. Shallett, 298
 — v. Sittingbourne, &c., Ry. Co., 464
 — v. Swift, 752, 889
 — v. Trathen, 1092
 — v. Turner, 136, 138

- Ward *v.* Tyrrell, 904
 — *v.* Ward, 155, 377, 501, 992
 — *v.* Wolverhampton Water W. Co., 1042
 Ward's Case, 421
 — Estate, *In re*, 1045
 — Trusts, *Re*, 641, 1334
 — & Garfit's Case, 440
 — & Henry's Case, 434, 440
 Warde, *Re*, 997
 — *v.* Dickson, 1083, 1084
 — *v.* Warde, 322, 638, 668, 1157
 Wardell *v.* Wardell, 648
 Warden *v.* Jones, 377, 388, 611, 613, 614
 Warder *v.* Sitwell, 822
 Wardle *v.* Brocklehurst, 145, 147
 — *v.* Claxton, 390
 Wardroper *v.* Cutfield, 25
 Ware *v.* Cann, 1429
 — *v.* Great Junc. Co. 102
 — *v.* Ld. Egmont, 1150
 — *v.* Mallard, 966
 — *v.* Watson, 1091, 1211, 1226
 Waring *v.* Hoggart, 1063
 — *v.* Lee, 856, 1376
 — *v.* Man., Sheff. and Lin. Ry. Co., 100
 — *v.* Ward, 1168, 1416
 — *v.* Waring, 1263, 1264
 Warman *v.* Seaman, 971
 Warne *v.* Routledge, 129
 Warner, *Ex parte*, 321
 — *v.* Baynes, 509
 — *v.* Jacob, 588, 755, 757
 — *v.* Moir, 1246
 — *v.* Smith, 802
 — *v.* Willington, 1053, 1054, 1055
 Warner's Settled Estates, *In re*, 1148
 Warr, Earl de la, *v.* Miles, 149
 — *v.* Warr, 652, 863
 Warrant Finance Co.'s Case, 484
 Warren *v.* Davies, 33
 — *v.* Postlethwaite, 889
 — *v.* Rudall, 180, 225, 1208
 — *v.* Warren, 928, 929
 — *v.* Wright, 17
 Warren's Trusts, *Re*, 1395
 Warriner *v.* Rogers, 303
 Warrington *v.* Warrington, 503
 Warter *v.* Yorke, 325
 Warwick *v.* Warwick, 617, 622
 Warwicker *v.* Bretnall, 216
 Wason *v.* Wareing, 1150
 Wastney *v.* Chappell, 223
 Watson, *Re*, 783
 Waterer *v.* Waterer, 806
 Waterhouse *v.* Holmes, 55
 — *v.* Wilkinson, 1091, 1093
 Waterlow *v.* Bacon, 141
 Waters *v.* Taylor, 789, 813
 — *v.* Thanet, 607
 — *v.* Thorn, 307, 310, 1040
 Wathen *v.* Smith, 935
 Watherall *v.* Geering, 552
 Watkin, *Ex parte*, 489
 Watkins, *Re*, 1268
 Watkins *v.* Cheek, 1162, 1190
 — *v.* Land Co., 715
 — *v.* Lewis, 211
 — *v.* Nash, 1112
 — *v.* Weston, 963, 1205
 — *v.* Williams, 1240
 Watkyns *v.* Watkyns, 385, 386
 Watnough's Trusts, *Re*, 55
 Watney *v.* Wells, 801
 Watson, *Ex parte*, 794
 — *Re*, 112
 — *v.* Brickwood, 1415
 — *v.* Eales, 445
 — *v.* England, 1114
 — *v.* Foxon, 1411
 — *v.* Gray, 506
 — *v.* Hayes, 116, 968, 1214
 — *v.* King, 1112
 — *v.* Knight, 994
 — *v.* Lincoln, E., 926, 932
 — *v.* Marshall, 382, 383, 386
 — *v.* Marston, 95, 1130
 — *v.* Mid Wales Ry. Co., 453
 — *v.* Northumberland, D. of, 509
 — *v.* Parker, 38, 301
 — *v.* Pearson, 978, 984
 — *v.* Reid, 1130
 — *v.* Rose, 1174
 — *v.* Saul, 587
 — *v.* Spratley, 52, 1053
 — *v.* Watson, 925, 926, 927, 1210
 — *v.* Woodman, 809
 — *v.* Young, 840, 1380
 Watson's Trusts, *Re*, 1398
 Watt *v.* Creyke, 918
 — *v.* Wood, 8
 Watts, *Re*, 697
 — *v.* Ball, 338
 — *v.* Christie, 803, 830
 — *v.* Jeffreys, 524
 — *v.* Kelson, 140, 143, 146, 147
 — *v.* Nelson, 157
 — *v.* Porter, 519, 524
 — *v.* Symes, 740, 760
 — *v.* Watts, 1097
 Waugh *v.* Carver, 788, 791
 Way, *Re*, 302, 312
 — *v.* Bassett, 808
 — *v.* East, 59
 Way's Settlement, 1018
 — Trusts, *Re*, 57
 Wayne *v.* Hanham, 759
 Weakley *v.* Rugg, 1384
 Weale *v.* Olive, 301, 302, 845, 1240
 Weall *v.* Rice, 929, 930, 936
 Weatherall *v.* Geering, 83
 — *v.* Thornburgh, 7, 1193
 Weatherley *v.* Ross, 158
 Weaver, *Re*, 651
 — *v.* Maule, 186, 187, 188, 230
 Webb, *Re*, 724
 — Goods of, 1274
 — *v.* Austin, 1101
 — *v.* Bird, 162, 173
 — *v.* Byng, 1290, 1305

- Webb *v.* Earle, 467
 — *v.* Grace, 1233
 — *v.* Herne Bay, Commissioners of, 455
 — *v.* Honnor, 899
 — *v.* Hughes, 1119, 1120
 — *v.* Hunt, 159
 — *v.* Kirby, 1135, 1159
 — *v.* Ledsam, 984, 1161
 — *v.* Rorke, 689, 757
 — *v.* Russell, 680, 1182
 — *v.* Sadler, 918, 1243, 1406
 — *v.* Shaftesbury, *Ld.*, 852, 986, 1010
 — *v.* Webb, 6, 220, 225
 — *v.* Whiffin, 474
 — *v.* Wools, 964, 967
 Webb's Policy, *In re*, 1018
 Webber *v.* Corbett, 1304
 — *v.* Stanley, 1310, 1309, 1305
 Webster, *Ex parte*, 190, 717
 — *v.* Boddington, 834, 893
 — *v.* Bray, 802
 — *v.* Cecil, 97
 — *v.* Cook, 688
 — *v.* Dillon, 101
 — *v.* Hale, 1329, 1331
 — *v.* Le Hunt, 1006
 — *v.* Parr, 1396, 1429
 — *v.* Patteson, 761
 — *v.* Webster, 404, 677, 725, 822
 Webster's Case, 427, 340
 Weddall *v.* Capes, 565
 — *v.* Nixon, 253, 1110
 Wedderburn *v.* Wedderburn, 272, 817, 818, 1007
 Wedderburn's Trusts, *In re*, 997
 Wedgwood *v.* Adams, 95
 — *v.* Denton, 1290
 Weeding *v.* Weeding, 107, 1098
 Weeds *v.* Bristow, 1376
 Weeks *v.* Stourton, 780
 Weikersheim's Case, 436, 441, 722, 798
 Weir *v.* Barnett, 429
 — *v.* Bell, 458
 Welby *v.* Rockcliffe, 1416
 — *v.* Welby, 178, 183
 Welch, *Re*, 829, 1009
 Weld, *Re*, 514
 — *v.* Bradbury, 1378, 1381
 — *v.* S. W. R. Co., 1044
 Weldon *v.* Dicks, 128, 130
 Welford *v.* Beazely, 1057
 Wellesley *v.* Beaufort, *D. of*, 317, 321, 322, 324, 652
 — *v.* Mornington, *Ld.*, 863, 919
 — *v.* Wellesley, 865, 1254
 — *Visct. v.* Withers, 230, 231
 Wellington, Duke of, 216
 Wells, *Re*, 1387
 — *v.* Chelmsford, *Bd. of Health*, 1046
 — *v.* Foster, 730
 — *v.* Horton, 77
 — *v.* Kilpin, 521
 — *v.* Malbon, 1018
 — *v.* Maxwell, 1081, 1120
 Wells *v.* Partridge, 537
 — *v.* Wells, 1303, 1376
 Welman *v.* Welman, 311
 Welsh Flannel Co., *Re*, 488
 Wendover *v.* Smith, 135
 Wenlock, Lady *v.* River Dee Co., 450
 Wentworth *v.* Cock, 85
 — *v.* Lloyd, 1039
 West, *Ex parte*, 1226, 1273
 — *v.* Berney, 854
 — *v.* Dobb, 555, 558
 — *v.* Errissey, 615, 617, 618, 620
 — *v.* Holmesdale, *Visct.*, 130, 1031
 — *v.* Lawday, 1309
 — *v.* Miller, 1230
 — *v.* Moore, 1328
 — *v.* Orr, 1354
 — *v.* Ray, 888
 — *v.* Reid, 1111
 — *v.* Shuttleworth, 41
 — *v.* Skip, 815, 817
 — *v.* West, 1190, 1237
 West Bank of Scotland *v.* Addie, 458
 — Cumberland, &c., *Co. v.* Kenyon, 172
 — Devon Consols Mine, *Re*, 416
 — of England Bank, *Re*, 475, 476, 484, 1005
 — of England Bank *v.* Murch, 276
 — Hartlepool Ironworks Co., *Re*, 468, 470
 — Lon. Com. Bank *v.* Kitson, 449
 — — *v.* Rel. Perm. B. Soc., 758, 773, 778
 — Mid. R. Co. *v.* Nixon, 1126
 — Sur. Tan. Co., 472
 Westbech *v.* Kennedy, 1273
 Westbrook *v.* Blythe, 517, 522
 Westby *v.* Westby, 62, 63
 Westcott, *Ex parte*, 825, 828
 Western *v.* MacDermott, 1183
 — *v.* Russell, 1127, 1131
 — of Canada, &c., *Co.*, *Re*, 470
 Westmeath *v.* Westmeath, 401, 404
 Weston, Goods of, 1282
 — *v.* Arnold, 160
 — *v.* Collins, 1042
 — *v.* Met. Asylum District, 559
 — *v.* Savage, 1063, 1119, 1127
 Weston's Case, 426, 437, 440, 441, 473, 474, 488, 490, 494
 Westover *v.* Chapman, 272, 998
 Westwood *v.* Southey, 1214, 1401, 1402
 Wetherby *v.* Dixon, 926, 928
 Wethered *v.* Wethered, 90, 729
 Wetherell *v.* Collins, 777, 779
 — *v.* Langston, 976
 — *v.* Wilson, 965, 966
 Weyland *v.* Weyland, 284
 Whaley, Bridge & Co. *v.* Green, 411
 Whalley, *Ex parte*, 222
 — *v.* Lanc. & York. R. Co., 171
 — *v.* Whalley, 590
 Wharton, *Re*, 108, 113
 — *v.* Baker, 1405
 Whatford *v.* Moore, 1232

- Whatman *v.* Gibson, 1182
 Wheatecroft *v.* Hickman, 788
 Wheate *v.* Hall, 878, 1138
 Wheatley, *Re*, 181
 — *v.* Lane, 268
 — *v.* Furr, 304
 — *v.* Silkstone, &c., Co., 454
 — *v.* Slade, 1127
 — *v.* Williams, 605
 Wheeldon *v.* Burrows, 143
 Wheeler, *Ex parte*, 780, 806
 — *Re*, 1021
 — *v.* Adams, 659
 — *v.* Bingham, 1235
 — *v.* Howell, 600, 601, 1414
 — *v.* Smith, 57, 965, 971
 — *v.* Vernon, 1350
 Wheelwright *v.* Walker, 945, 954
 Wheldale *v.* Partridge, 106, 112
 Whetham *v.* Davey, 730
 Whichcote *v.* Lawrence, 1040
 Whicker *v.* Hume, 44, 50, 1260
 Whieldon *v.* Spode, 1415
 Whistler *v.* Webster, 178, 183
 — *v.* Whistler, 856
 Whiston *v.* Rochester, Dean of, 61
 Whitaker, *Re*, 1350
 — *v.* Wright, 279
 Whitbread, *Ex parte*, 692
 — *v.* Johnson, 690
 — *v.* Jordan, 1153
 — *v.* St. John, 1380, 1382
 Whiteher *v.* Penley, 1317
 Whitechurch *v.* Bevis, 1057
 Whitecomb *v.* Minchin, 1039
 — *v.* Whiting, 808, 809
 White, *Re*, 1020
 — Goods of, 1325, 1362
 — *v.* Baker, 1226
 — *v.* Barbe St., 354
 — *v.* Bass, 144
 — *v.* Birch, 1307
 — *v.* Bradshaw, 1064
 — *v.* Briggs, 963, 967, 1403
 — *v.* British Empire Co., 721
 — *v.* British Museum, 1274
 — *v.* Chitty, 1243, 1244
 — *v.* Cordwell, 262, 383, 379
 — *v.* Cox, 633
 — *v.* Foljambe, 532
 — *v.* Greenish, 679
 — *v.* Herrick, 326
 — *v.* Hight, 1398, 1401
 — *v.* Hill, 1105, 1384
 — *v.* Hillaere, 599, 740
 — *v.* Jackson, 989
 — *v.* James, 11
 — *v.* Nutts, 1096
 — *v.* Parkin, 81
 — *v.* Peterborough, Bp. of, 780
 — *v.* St. Barbe, 859
 — *v.* Springett, 1404, 1406
 — *v.* Thornborough, 615
 — *v.* Vitty, 1358
 — *v.* Wakefield, 1155, 1172, 1173
 White *v.* Wakley, 566
 — *v.* White, 43, 199, 235, 237, 238, 1415
 — *v.* Williams, 282
 — *v.* Wilson, 904
 White's Case, 435, 477
 White and Hindle's Contract, *Re*, 218
 Whitechurch *v.* Holworthy, 228
 Whitehead, *Ex parte*, 391
 — *v.* Izod, 490
 — *v.* Parkes, 165
 — *v.* Whitehead, 28
 Whitehouse & Co., *Re*, 483
 — *v.* Fellowes, 170
 Whitehouse's Case, 429
 Whiteley *v.* King, 1282
 — *v.* Whiteley, 181
 Whitlock *v.* Baker, 1115
 Whitfield *v.* Bewit, 1250, 1251
 — *v.* Clement, 1311
 — *v.* Hales, 321
 — *v.* Langdale, 1307, 1309
 — *v.* Parfitt, 687
 — *v.* Findar, 24
 — *v.* Prickett, 1242
 Whitgreave *v.* Whitgreave, 661
 Whithorne *v.* Harris, 1408
 Whiting *v.* Bassett, 1113
 — to Loomes, 1113
 Whitley *v.* Lowe, 607
 Whitlock's Case, 545, 866, 871
 Whitman *v.* Aitken, 1223
 Whitmarsh *v.* Robertson, 642, 892
 Whitmore, *Re*, 671
 — *v.* Empson, 704
 — *v.* Gilmour, 84
 — *v.* Humphreys, 566
 — *v.* Mason, 636, 826
 — *v.* Turquand, 994
 — *v.* Weld, 1007
 Whitney *v.* Smith, 999
 Whittaker, *Re*, 391
 — *v.* Howe, 87, 102
 Whitem v. Sawyer, 385
 Whitemore *v.* Whitemore, 1079
 Whitter *v.* Bremridge, 1205, 1218
 Whittingham *v.* Wooler, 132
 Whittington *v.* Corder, 1062
 Whittinham's Trusts, *Re*, 406
 Whittle *v.* Henning, 353, 354
 Whitton *v.* Peacock, 578
 Whitwell *v.* Arthur, 814
 Whitworth *v.* Gangain, 519, 693
 Whitworth's Case, 487
 Whopham *v.* Wingfield, 1343
 Whytall *v.* Kay, 1268
 Whyte *v.* Whyte, 1337
 Wichalse *v.* Short, 762
 Wick *v.* Parker, 239
 Wickenden *v.* Webster, 549
 Wickham *v.* Bath, Marq., 59
 — *v.* Harding, 810
 — *v.* Wickham, 821, 1250, 1254
 — *v.* Wing, 853
 Wicks *v.* Scrivens, 739

- Widdowson v. Duck, 1010
 Wigden v. Mello, 1354
 Widgery v. Tepper 346
 Widmore v. Woodroffe, 54, 1408
 Wigan v. Rowland, 1266
 Wigfield v. Potter, 415
 Wigg v. Nicholl, 58
 — v. Wigg, 1150, 1204, 1294
 Wiggins v. Lord, 1088, 1123
 Wigglesworth v. Dallison, 81
 Wightman v. Townroe, 274
 Wight's Devised Estates, *Re*, 1045
 Wigney v. Wigney, 677, 678
 Wigsell v. Smith, 849, 865
 — v. Wigsell, 681, 683
 Wilbraham v. Livesey, 530, 1155
 — v. Scarisbrick, 1029
 Wilby v. W. C. R. Co., 461
 Wilce v. Wilce, 1320
 Wild's Case, 1389, 1391
 Wilday v. Barnett, 901
 — v. Sandys, 119, 124
 Wildbore v. Gregory, 898
 Wilde v. Gibson, 95, 1140, 1178
 — v. Fort, 1119
 Wilder, *Re*, 506
 — v. Pigott, 181
 Wildes v. Davies, 8, 116, 1344
 Wilding v. Bolder, 961
 — v. Richards, 994
 Wildman v. Wildman, 344, 350
 Wiles v. Gresham, 989, 1001, 1003
 Wilkes, *Ex parte*, 726
 — v. Collin, 682
 — v. Groom, 1019
 — v. Saunion, 749
 Wilkes' Estate, *In re*, 953, 1046
 Wilkins v. Aikin, 132
 — v. Fry, 564
 — v. Hogg, 992, 1001, 1005
 — v. Jordell, 16, 18, 1210
 Wilkinson, *Re*, 900, 901
 — Goods of, 1285
 — v. Adam, 1387
 — v. Barber, 54
 — v. Calvert, 540
 — v. Chapman, 1368
 — v. Charlesworth, 348
 — v. Clements, 73
 — v. Collyer, 547
 — v. Dent, 178
 — v. Duncan, 121, 834, 837, 913
 — v. Gibson, 380, 408
 — v. Grant, 689
 — v. Hall, 734
 — v. Joberns, 511
 — v. Jonghni, 1313
 — v. Lindgren, 45
 — v. Lloyd, 438
 — v. Malin, 46, 542
 — v. Nelson, 674, 675
 — v. Page, 810
 — v. Parry, 1011
 — v. Rogers, 549, 555, 1183
 — v. Schneider, 909
 Wilkinson's Case, 429
 Wilks v. Bannister, 1228, 1377
 — v. Davis, 101
 — v. Groom, 782
 Willan v. Lancaster, 33
 — v. Willan, 98
 Willes v. Douglas, 1383
 — v. Greenhill, 725, 726, 1007
 Willesford, Goods, 1268
 — v. Watson, 810, 812
 Willet v. Sandford, 56
 Willett v. Blandford, 818
 — v. Chambers, 799
 Willetts v. Willetts, 1222
 Williams, *Ex parte*, 411, 429, 531, 651,
 735, 806, 812, 823, 826
 — *Re*, 56, 689, 713, 714, 1009,
 1386
 — Goods of, 1273
 — v. Allen, 1007
 — v. Arkle, 281
 — v. Ashton, 1284, 1404
 — v. Bagnall, 169
 — v. Bailly, 404
 — v. Bayley, 87, 94, 404
 — v. Bolton, D. of, 1250
 — v. Bosanquet, 693
 — v. Brisco, 1057
 — v. Burrell, 85, 553
 — v. Byrnes, 1053
 — v. Callow, 386
 — v. Cooke, 352, 354, 380
 — v. Corbet, 965
 — v. Earle, 555
 — v. Edwards, 1071, 1140, 1141
 — v. Evans, 691, 1059, 1280
 — v. Games, 511
 — v. Glenton, 1082, 1135, 1141
 — v. Goodtitle, 1197
 — v. Griffiths, 606
 — v. Haythorne, 1232
 — v. Hayward, 561
 — v. Headland, 279
 — v. Hensman, 502, 503, 515, 992
 — v. Hughes, 1333
 — v. James, 156
 — v. Jeykel, 502
 — v. Jersey, E., 175
 — v. Jones, 77, 281, 790, 794
 — v. Jordan, 1053
 — v. Kershaw, 44
 — v. Knipe, 1204
 — v. Lambe, 1185
 — v. Lewis, 6
 — v. Mayne, 182
 — v. Mercier, 336, 358, 663
 — v. Moore, 1376
 — v. Morgan, 1164
 — v. Nixon, 268, 984
 — v. Owen, 197, 687, 771, 1290
 — v. Phillips, 1105
 — v. Pigott, 411
 — v. Pott, 577, 585
 — v. Prince of Wales, &c., Co.,
 130

- Williams v. Raggett, 590
 — v. Rowlands, 813
 — v. Russell, 1232
 — v. St. George's Harbour, 412
 — v. Sorrell, 743
 — v. Springfield, 743
 — v. Stern, 717
 — v. Stevens, 985
 — v. Teale, 624, 839
 — v. Trye, 1039
 — v. Tyley, 1281
 — v. Walker, 395
 — v. Williams, 38, 62, 63, 102, 974, 1054, 1119, 1153, 1253, 1325
 Williams's Case, 434, 440, 443
 Williamson v. Adv.-Gen., 109
 — v. Barbour, 808
 — v. Naylor, 1292
 — v. Williamson, 530, 552, 563
 Willing v. Baine, 1294
 Willis v. Black, 670
 — v. De Castro, 809
 — v. Hiscox, 990, 1240, 1241, 1370
 — v. Kymer, 965
 — v. Palmer, 728
 — v. Plaskett, 1225, 1325
 — v. Shorral, 851
 — v. Willis, 370, 647, 970
 Willmott v. Barber, 97, 159, 557
 — v. Jenkins, 1340
 Willmott's Trusts, *Re*, 1230
 Willock v. Noble, 1263
 Willoughby v. Backhouse, 82
 — v. Middleton, 177, 178, 181, 661, 662
 — Osborn v. Holyoake, 909
 Wills v. Bourne, 58
 — v. Palmer, 203, 1372
 — v. Sayers, 390
 — v. Slade, 508
 — v. Stradling, 1058
 — v. Wills, 18, 1320, 1383
 Willson v. Leonard, 563, 1168
 Willyams v. Bullmore, 689
 Wilmer v. Currey, 797
 Wilmot, *Re*, 898
 — v. Pike, 727, 764, 765, 773
 — v. Wilkinson, 1070
 — v. Wilmot, 1222
 Wilmot's Trusts, *Re*, 1239
 Wilson, *Ex parte*, 441, 442, 745
 — *Re*, 232, 1409
 — Goods of, 1275
 — v. Allen, 1113, 1140
 — v. Atkinson, 658
 — v. Beddard, 1273
 — v. Bell, 966
 — v. Bennett, 754
 — v. Birchall, 64
 — v. Brownsmith, 1331
 — v. Clapham, 1139
 — v. Cluer, 750
 — v. Coles, 117
 — v. Coxwell, 261, 263
 — v. Darlington, E., 647
 Wilson v. Duguid, 923
 — v. Dunsany, Ly., 38
 — v. Eden, 1361
 — v. Foreman, 668
 — v. Greenwood, 826
 — v. Halliley, 645
 — v. Harman, 23, 732
 — v. Hart, 551, 555, 556
 — v. Hoare, 231, 982
 — v. Johnstone, 804
 — v. Keating, 768
 — v. Maddison, 16, 17, 18, 966, 1349
 — v. Major, 115
 — v. Metcalfe, 748, 750
 — v. Moore, 697, 1003
 — v. Morley, 1311
 — v. Mushett, 404
 — v. Northampton Ry. Co., 1157
 — v. Northampton and Banbury Junc. Ry. Co., 103
 — v. O'Leary, 1336, 1346
 — v. Paul, 673
 — v. Peake, 990
 — v. Piggott, 640, 669, 887, 894, 895, 904
 — v. Sewell, 867
 — v. Short, 89
 — v. Spencer, 1191
 — v. Townend, 158
 — v. Townshend, Ld. J., 177, 183
 — v. Tumman, 1035
 — v. Turner, 651
 — v. Waddell, 170
 — v. West Hartlepool Ry. Co., 100, 456, 1058, 1059
 — v. Williams, 1066, 1127, 1135
 — v. Wilson, 6, 395, 400, 547, 729, 837, 859
 Wilson's Trusts, *Re*, 1388
 Wilton v. Colvin, 662, 663
 — v. Dunn, 748
 — Ld. de v. Saxon, 556
 Wilts, &c., Ry. Co., *Ex parte*, Brewer, 324
 Wiltshire v. Marshall, 94
 — v. Rabbits, 727
 Wimbledon, &c., Conservators v. Dixon, 156
 Winch v. Brutton, 964, 967
 — v. James, 325
 — v. Keeley, 982
 — v. Winchester, 80, 1067, 1087, 1140
 Winchester, Bp. of v. Mid Hants Ry. Co., 1173
 — v. Paine, 761, 1137
 Wind v. Jekyl, 1288
 Winder, *Ex parte*, 1046
 Windham v. Graham, 861
 Windsor's, Dean, &c., Case, 555
 Wing v. Angrave, 1114, 1227
 — v. Tottenham, 1172
 Wingfield v. Newton, 1363
 — v. Wingfield, 1317, 1374, 1405
 Winkworth v. Winkworth, 1205
 Winn v. Bull, 1055

- Winn v. Fenwick, 857, 907
 Winscom, *Re*, 322
 Winship v. Hudspeth, 152
 Winsor v. Pratt, 1273
 Winstone's Case, 435
 Winter, *Re*, 754
 — v. Ld. Anson, 1160, 1171, 1172
 — v. Innes, 822
 — v. Loveday, 867
 — v. Mouseley, 10
 — v. Rudge, 1009
 — v. Winter, 1287, 1295
 Winterbottom v. Ingham, 1095
 — v. Taylor, 737
 Wintour v. Clifton, 178, 179
 Wisden v. Wisden, 33, 1295, 1369
 Wise v. Piper, 619, 878
 Withall v. Blyton, 740
 Witham v. Bland, 883
 Withernsea Brickworks, *R.*, 481
 Withers v. Kennedy, 32
 — v. Withers, 969, 962
 Withington v. Tate, 743
 — v. Withington, 1009
 Withy v. Cottle, 1133
 — v. Mangles, 502, 1404
 Witt v. Amis, 137
 Witts v. Dawkins, 397
 Witty v. Marshall, 316
 Wolf v. Hill, 1254
 Wolfe v. Findlay, 83
 Wollaston, *Re*, 1263
 — v. Berkley, 1227
 — v. Hakewell, 1109
 — v. King, 179, 184, 913, 914
 — v. Tribe, 309, 310, 656, 657
 Wollaston's Settlement, 1223, 1232
 Wolley v. Jenkins, 882, 1138
 Wolverhampton, &c., Co. v. L. & N. W.
 Ry. Co., 101
 Wolveridge v. Steward, 1168
 Wolverton Estates, *Re*, 1313
 Wombwell v. Hanrott, 640
 Wood, *Ex parte*, 806
 Re, 251, 293, 1311, 1354, *Add.*
 — v. D. of Argyll, 794
 — v. Baron, 1389
 — v. Beetlestone, 1021
 — v. Boosey, 131
 — v. Braddick, 819
 — v. Briant, 935
 — v. Cox, 964, 965, 968
 — v. Dixie, 290
 — v. Douglas, 202
 — v. Downes, 88, 307, 1136
 — v. Griffith, 101
 — v. Hardisty, 1003
 — v. Hewett, 139
 — v. Lambuth, 373
 — v. Leadbitter, 141, 532
 — v. Machu, 1133
 — v. Midgeley, 1053, 1056
 — v. Ordish, 36
 — v. Penoyre, 1193, 1349
 — v. Patteson, 537
 Wood v. Rowcliffe, 730
 — v. Saunders, 156
 — v. Scarth, 80, 1054, 1124, 1129
 — v. Scoles, 801, 816
 — v. Sutcliffe, 175
 — v. Wand, 162, 163, 166
 — v. Weightman, 260
 — v. Wilson, 810
 — v. Wood, 502, 638, 686, 812, 860,
 882, 892, 1282, 1356, 1403
 — v. Wood, Wood v. Chart, 134
 Wood's Case, 422
 — Estates, *Re*, 123
 — Settled Estates, *Re*, 112
 Woodcock v. Dorset, D. of, 1231, 1232
 — v. Monckton, 619, 621, 622
 — v. Kenneck, 856, 857, 911
 Woodbourne v. Woodbourne, 1229
 Woodbridge v. Swan, 826
 Woodburn v. Grant, 724
 Woodburn's Will, *Re*, 1018
 Woodford v. Charuley, 301, 302
 Woodgate v. Unwin, 502
 Woodhams v. Ang.-Aust., &c., Co., 722
 Woodhouse v. Herrick, 1382, 1392, 1394
 — v. Jenkins, 1180
 — v. Meredith, 1039
 — v. Walker, 1251
 — v. Woodhouse, 589
 Woodley, Goods of, 1273
 Woodroffe v. Johnston, 690
 Woods, *Re*, Ditton, *Ex parte*, 570
 — v. Hyde, 107, 1012
 — v. Woods, 965
 Woodward, Goods of, 1281
 — v. Dowse, 370
 — v. Miller, 1069
 — v. Pratt, 382
 — v. Woodward, 390
 Woodyatt v. Gresley, 1006
 Woolf v. Oxholm, 75
 Woollam v. Kenworthy, 1319
 Woollaston's Case, 445
 Woolcomb v. Woolcomb, 1324, 1325
 Woollen v. Turner, 904
 Woolley v. Colman, 763
 Woolmore v. Burrows, 1248
 Woolridge v. Woolridge, 184, 916
 Woolstencroft v. Woolstencroft, 1418
 Wootton v. Wootton, 312
 Wootton's Estate, *In re*, 953, 1046
 Wordsworth v. Wood, 1223
 Workman v. Petgrave, 897, 898
 Worley v. Frampton, 531, 1165
 — v. Worley, 1280
 Wormald v. Maitland, 775
 — v. Muzeen, 20
 Wormsley v. Church, 172
 Wormsley's Estate, *Re*, 1418
 Worrall v. Harford, 986
 — v. Jacob, 401
 Worsley v. E. of Scarborough, 1152, 1156
 — v. S. Devon R. Co., 1047
 — v. Worsley, 676
 Worssam v. Vandenbrande, 576

- Wortham v. Pemberton, 378, 379
 Worthington v. Curtis, 720
 — v. Evans, 1238, 1239
 — v. German, Fraser v. Hill,
 768
 — v. Gimson, 146
 — v. Grimsditch, 607
 — v. M'Creer, 654
 — v. Morgan, 766, 768, 1153
 — v. Warrington, 1070, 1071,
 1124
 — v. Wiginton, 180, 185
 Wragg, *Re*, 1021
 Wragge, *Ex parte*, 472
 Wrangham's Trusts, 1218
 Wray v. Hutchinson, 814
 — v. Steele, 979
 Wreck Recovery & Salvage Co., *Re*, 482
 Wren v. Kirton, 1092
 Wrench v. Jutting, 1323, 1362
 Wright, *Re*, 992
 — v. Atkyns, 1368, 1403
 — v. Burroughes, 562
 — v. Callendar, 19, 20
 — v. Englefield, 339
 — v. Englefield, or Cadogan, 886
 — v. Goff, 674
 — v. Holford, 1411
 — v. Howard, 163, 1140
 — v. Kirby, 780
 — v. Lambert, 121
 — v. Mayer, 1157
 — v. Monarch Invest. Build. Soc.,
 701
 — v. Morley, 378
 — v. Naylor, 317
 — v. Pearson, 220, 616, 623, 977
 — v. Rattray, 155
 — v. Rogers, 1275
 — v. Rose, 757
 — v. Sanderson, 1275
 — v. Shelton, 1320
 — v. Snowe, 1007
 — v. Stanfield, 774
 — v. Tuckett, 24
 — v. Vanderplank, 65, 309, 310, 317
 — v. Vernon, 1370, 1371
 — v. Wakeford, 889, 1273
 — v. Weston, 1342
 — v. Wilkin, 56, 1201
 — v. Williams, 139, 151, 165
 — v. Wright, 117, 393, 398, 1316,
 1425
 Wright's Case, 431
 — Trusts, *In re*, 953, 1009, 1018
 — Trustees & Marshall, *Re*, 853
 Wrightson v. Calvert, 1314
 — v. Hudson, 777
 — v. Macaulay, 1372, 1375
 Wrigley v. Swainson, 335
 — v. Sykes, 32, 880
 Wrixon v. Vize, 586, 597
 Wroe v. Seed, 987
 Wrottesley v. Wrottesley, 1239
 Wrout v. Dowes, 262, 768, 1172
 Wryghte's Case, 485
 Wyatt, Goods of, 1287
 — v. Barnard, 130, 776
 — v. Harrison, 167
 Wyche, *Re*, 986
 Wycherley v. Wycherley, 65, 70
 Wycombe R. Co. v. Donnington Hosp.,
 1044
 — Union v. Eton Union, 608
 Wykham v. Wykham, 24, 673, 978
 Wylde, *Re*, 503
 — v. Radford, 692
 Wyllie v. Pollen, 1155, 1156
 Wylly's Trusts, *In re*, 1018
 Wynch, *Ex parte*, 1393
 — *Re*, 218
 — v. Grant, 264, 1003
 — v. Wynch, 1350
 Wyndham v. Egremont, E. of, 683
 — v. Ennismore, 324
 — v. Fane, 1384
 — v. Way, 543
 — v. Wyndham, 1350
 Wyndham's Trust, *Re*, 662, 664
 Wynn v. Morgan, 1120, 1127
 — Hall Co., *Re*, 450
 Wynne v. Fletcher, 1246
 — v. Styan, 594, 738
 — v. Wynne, 1201
 Wynne's Case, 422, 423
 Wynter v. Bold, 644
 Wythe v. Henniker, 40
 Wythes v. Lee, 1088, 1174
 YARDLEY v. Arnold, 249
 — v. Holland, 577, 745
 Yarmouth, Roy. Hot. Co. of, 467
 Yarnold v. Moorhouse, 1243
 Yarrow v. Knightly, 963
 Yates v. Aston, 687
 — v. Compton, 17, 879
 — v. Farebrother, 1089
 — v. Finn, 802
 — v. Haddan, 16
 — v. Hambly, 594, 687
 — v. Jack, 159, 161
 — v. Maddan, 16
 — v. Pym, 81
 — v. University College, 1203
 — v. Yates, 22, 110, 111, 122
 Yearwood's Trusts, 1386
 Yeates v. Groves, 694
 Yeatman v. Reed, 763
 Yeats v. Yeats, 1313
 Yellowley v. Gower, 871
 Yelverton v. Yelverton, 1260
 Yescombe v. Landor, 518
 Yglesias v. Yglesias, 676
 Yielding and Westbrook, *In re*, 1119,
 1140, *Add.*
 Yockney v. Hansard, 1335
 Yonge, *Ex parte*, 829
 York v. Brown, 985, 987
 — v. Stone, 503
 — Tram. Co. v. Willows, 423

TABLE OF CASES.

CXV

York, &c. Co. *v.* Hudson, 457
 Yorkshire Bank Co. *v.* Beatson, 797
 Youde *v.* Cloud, 1002
 Young, *Re*, Trye *v.* Sullivan, 350
 — *v.* Davies, 1266, 1409
 — *v.* Hassard, 37
 — *v.* Mackintosh, 624, 1217
 — *v.* Martin, 964
 — *v.* Peachy, 971, 1026
 — *v.* Roberts, 754, 1138
 — *v.* Robertson, 1191, 1223
 — *v.* Smith, 661, 662

Young *v.* Waterpark, Ltd., 588, 649, 904
 — *v.* Wilton, 588
 — *v.* Young, 510, 764, 1415
 — & Harston's Contract, 1082, 1119
 Younge *v.* Furse, 1237
 Younghusband *v.* Gisborne, 1241, 1242

ZETLAND, E. *v.* Lord Advocate, 1146
 Zouch *v.* Parsons, 538
 Zouche, Ltd. *v.* Dalbiac, 573
 Zulueta's Claim, 460, 462

TABLE OF STATUTES REFERRED TO.

* * *The mark — between two sections indicates that they and the intermediate sections are referred to. Sometimes one of these may be separately referred to.*

	PAGE		PAGE
13 Ed. 1, c. 1 (St. de Donis), st. 1,		29 C. 2, c. 3 (St. of Frauds)	
c. 18 (Westminster 2nd).	208, 516	ss. 5, 7—9	962, 1262, 1272
c. 34	370	s. 6	1278, 1284
17 Ed. 2, st. 1, c. 16	188	ss. 7, 8	968
31 Ed. 3, st. 1, c. 11	249	s. 16	517
1 Ed. 6, c. 14	41	s. 17	77
5 & 6 Ed. 6, c. 16, ss. 2, 3, 4	86	ss. 19, 22	1276, 1278
11 H. 7, c. 20	211	s. 25	283
21 H. 8, c. 4	879	30 C. 2, c. 7	267, 268
26 H. 8, c. 13, s. 5	188	1 W. & M. c. 18	42
27 H. 8, c. 10, s. 3 11, 632, 637, 843, 1024	1024	3 & 4 W. & M. c. 14	31
c. 20	194	4 & 5 W. & M. c. 16, ss. 2, 3	736
31 H. 8, c. 1	508	c. 20	517
c. 13	194	c. 24, s. 12	249, 267, 268
32 H. 8, c. 1	1261	7 & 8 W. 3, c. 36	517
c. 7	194	c. 37	50
c. 9	90	10 & 11 W. 3, c. 16, s. 1	642
c. 28	538, 539	4 & 5 A. c. 16 (Ruff.)	504
c. 32	508	s. 9	562
c. 34	554, 561, 562	s. 19	604
33 H. 8, c. 20	188	5 A. cc. 3, 4	216
34 & 35 H. 8, c. 5	1261	5 & 6 A. c. 18	222, 521
s. 14	1262, 1264	6 A. c. 35	521
c. 20, ss. 18, 19	211	c. 2 (Ir.)	774, 777
1 El. c. 19	539	c. 35	777
c. 5	288, 294, 295, 301, 656, 972	s. 15	1107
c. 10	539	7 A. c. 20, ss. 9, 10	1107
c. 20	730	s. 18	521
14 El. c. 8	207	8 A. c. 19 (Copyright)	125
cc. 11, 14	539	2 G. 2, c. 22, s. 13	262
18 El. c. 6	544	s. 5	10
c. 11	539	s. 6	680
27 El. c. 4	972	7 G. 2, c. 8	87
ss. 2, 4	295	8 Geo. 2, c. 20, ss. 1, 3	754
ss. 5—6	297	ss. 1, 33	521
43 El. c. 4	42, 61	s. 17	1107
c. 8	249, 264	c. 13	135
c. 29	539	9 G. 2, c. 36 (St. of Mortmain)	48, 60
1 J. 1, c. 3	539	ss. 1, 2, 3	49
21 J. 1, c. 16	572, 604, 607, 808	ss. 4, 5	50
ss. 3, 7	604	10 G. 2, c. 8	87
12 C. 2, c. 24	1261	11 G. 2, c. 17, s. 5	194
s. 8	314	c. 19, s. 15	24
s. 9	317	14 G. 2, c. 20, s. 9	223
22 & 23 C. 2, c. 10 (St. of Distribu-		17 G. 2, c. 29	50
tions) ss. 3, 7—8	283	25 G. 2, c. 6, s. 1	1265
29 C. 2, c. 3 (St. of Frauds),		26 G. 2, c. 22, s. 14	50
ss. 1, 2	553, 1052	5 G. 3, c. 17	539
s. 3	564	7 G. 3, c. 38	134
s. 4	77, 611, 1052, 1058	c. 48	720

TABLE OF STATUTES REFERRED TO.

cxvii

	PAGE		PAGE
14 G. 3, c. 78, s. 83	547	2 & 3 W. 4, c. 71 (Prescnp. Act)	
17 G. 3, c. 53	730	ss. 7, 8	151
c. 57	135	s. 9	149
36 G. 3, c. 52, s. 32	1343	c. 100	1106
38 G. 3, c. 60, s. 78	352	c. 115, s. 1	42
c. 71	134	3 & 4 W. 4, c. 15 (Copyrt.) ss. 1, 2	126, 127
c. 87, s. 1	249	c. 27 (Limitations)	371, 824, 1346
ss. 6, 7	250	ss. 1, 2, 3	573, 596
39 & 40 G. 3, c. 41	539	s. 2	592
c. 56	112	s. 3	574, 575, 576
c. 88, s. 12	190	s. 4	584, 590
c. 98, ss. 1—3	5	s. 5	584
c. 99, s. 23	795	s. 6	253, 580
41 G. 3, c. 59, s. 6	216	ss. 7, 8	580, 581, 589
c. 109 (Inclosure Act)	195	s. 9	581
s. 35	1111	ss. 10, 11, 12	582, 587
42 G. 3, c. 116	55	s. 12	339, 501, 506, 507
ss. 38, 40, 98, 123	1111, 1112	ss. 13, 14	583
c. 116, ss. 38, 40, 98	1112	s. 14	599
43 G. 3, c. 84	730	s. 15	577
c. 107	54	s. 16	584
c. 108	50	ss. 17, 19	584, 603
47 G. 3, c. 74	31, 267	ss. 20, 21	579, 695
49 G. 3, c. 126, ss. 1, 8, 9	86	ss. 21, 23	585
52 G. 3, c. 101	1037	s. 24	586, 597
c. 146	1111	s. 25	580, 587, 588, 589, 755
53 G. 3, c. 141	13	s. 26	590
c. 192	504	s. 27	591
54 G. 3, c. 56, ss. 1, 3, 6	134	s. 28	593, 599, 755
c. 145	188	ss. 29—33	592
c. 156 (Copyright)	125	s. 32	592
c. 161, s. 28	216	s. 33	592, 1104
c. 184	109	s. 34	573
c. 192	229, 1360	s. 35	582
57 G. 3, c. 29, ss. 80—82	1047	ss. 36—44	592
c. 99	730	ss. 36—38	695, 1251
58 G. 3, c. 45, s. 33	50	s. 40	595, 597, 598, 599
4 G. 4, c. 76, s. 23	330	s. 41	374
c. 83	730	s. 42	573, 599, 600, 601
5 G. 4, c. 39	50	c. 42 (Limitns.)	226, 572, 601, 1251
6 G. 4, c. 17, s. 1	190	s. 3	601, 603
c. 87	1113	s. 4	603
7 G. 4, c. 45	112	s. 5	603, 606
c. 46	475	c. 74 (Fns. & Recov. Ab. Act)	667, 781
9 G. 4, c. 14	593	ss. 1, 2	210, 355, 782
s. 1	603, 606, 607, 809	ss. 15—23	211, 853
s. 5	69	ss. 15, 40, 41	538
s. 7	77	ss. 16—19	211
c. 32, s. 3	189	s. 21	211, 695
c. 78, s. 2	108	ss. 24—32	212
c. 85, s. 1	59	ss. 33—39	213
c. 94	194	s. 38	695
10 G. 4, c. 25, s. 37	48	ss. 40—47	214
c. 56, s. 21	699	s. 47	896
11 G. 4, c. 20, s. 47	54, 655	ss. 50, 51	232, 342
11 G. 4 & 1 W. 4, c. 46, s. 3	904, 905	ss. 52, 53, 54	233
c. 60	1046	ss. 50—54, 56—69	215
c. 65, s. 9	230	s. 53	342
ss. 16, 17	238, 538	ss. 56—73	216
2 & 3 W. 4, c. 71 (Prescnp. Act)	148, 572	ss. 70, 71	112, 215
s. 1	149	ss. 73, 74	215
ss. 2—3	150, 152, 166, 167	s. 77	113, 339, 342, 854
s. 3	153	ss. 78, 79, 80	340, 855
ss. 3—6	150	ss. 77, 79	395, 539

	PAGE		PAGE
3 & 4 W. 4, c. 74 (Fns. & Recov. Ab. Act).		1 V. c. 26 (Wills Act)	
s. 83	340	s. 24 902, 934, 1097, 1099, 1262, 1264, 1289, 1290, 1332, 1359	
s. 90	342	s. 25 115, 1295, 1351, 1352, 1359, 1360	
s. 91	340	s. 26	1360, 1361
s. 92	209	s. 27	898, 899
c. 87, ss. 2, 4	1111	s. 28	1315, 1369
c. 104 31, 33, 34, 39, 188, 264, 266, 375, 772		s. 29 219, 833, 1371, 1391, 1398, 1399	
c. 105 (Dower Act)		ss. 30, 31	981
ss. 1—9	372	s. 32	1291, 1295
ss. 10—14	373	s. 33	664, 670, 1294, 1295
s. 12	1341	c. 28, s. 34	504, 596, 597, 1287
c. 106 (Inheritance Act)	200, 1116	1 & 2 V. c. 64, s. 1	194, 1106
ss. 1, 2	202, 205	ss. 3, 4	1106
ss. 3—7	203, 1266	c. 94	1009
ss. 9—12	204	ss. 1, 12, 13	1111
4 & 5 W. 4, c. 22, ss. 1, 2, 3	25, 26	c. 106, ss. 29, 31	795
c. 23, ss. 3, 5	189	c. 110, s. 1	524, 771, 775
c. 29	999	ss. 11, 13	289, 517, 518, 519
c. 30, ss. 24, 25	1104	s. 14	523
c. 38	50	ss. 14—16	524
c. 40, ss. 3, 4, 5	699	s. 16	472, 1050
c. 92 (Fns. & Recov. Ab. Ir.)	210	ss. 18, 19	518
5 & 6 W. 4		2 & 3 V. c. 11	520
c. 65, ss. 1, 5	131	ss. 1, 2	517
c. 76	539, 960	s. 4	519
6 & 7 W. 4, c. 20, ss. 2, 3		ss. 7, 10, 11	1144
s. 64	539	c. 13	126
c. 32	698, 699	c. 17	126
c. 32 (Build. Soc.), s. 1	698	c. 54, ss. 1, 4	321, 322
c. 71 (Tithes)	26	c. 62, ss. 1, 2, 4, 6	195
ss. 67, 70, 71	194	s. 7	1106
s. 71	1105, 1106	ss. 19—21	1001
s. 86	25	3 & 4 V. c. 72	1009
c. 85	330, 1111	c. 82, s. 1	524
c. 86	1111	s. 2	519
7 W. 4 & 1 V. c. 22		c. 92	592
c. 28	572, 586	c. 113, s. 50	592
1 V. c. 26 (Wills Act)	37, 58, 108, 182, 887, 894, 896, 900, 906, 910, 978, 1098, 1099, 1232, 1265, 1270, 1394	4 & 5 V. c. 14, s. 1	795
s. 1	1272, 1318, 1322	c. 21	1012
s. 2	229, 962	c. 35	229, 231
s. 3 223, 1099, 1265, 1272, 1289, 1359, 1360		s. 50	25
s. 4	1264	s. 85	509
s. 6	223	ss. 87, 90	229
s. 7	682, 1264	c. 38	59
s. 8	891	5 & 6 V. c. 45 (Copyright Act), s. 2	125
s. 9	1272, 1275	ss. 2, 3, 4, 5, 20, 21	126
s. 10	887, 888	ss. 15, 17, 18, 19, 24	127
ss. 11, 12	1276	s. 13	128
s. 13	889, 1273	ss. 14, 18, 22	129
ss. 14, 16, 17	1274	s. 26	132
s. 15	1265	c. 100	126
ss. 18, 19	1277	c. 108	539, 1037
s. 20	1278, 1280	6 & 7 V. c. 18, s. 74	982
s. 21	1284	c. 23	231
s. 22	1285	c. 54, s. 3	592
s. 23	1278	c. 65	126
		c. 73, s. 39	983
		7 & 8 V. c. 12 (Int. Copyright Act)	
		ss. 5—8, 14, 19	133
		c. 37, s. 3	59

	PAGE		PAGE
7 & 8 V. c. 12 (Int. Copyright Act)		12 & 13 V. c. 83, s. 11	1104
c. 45, s. 2	42, 46	c. 106 (Bankcy. Act, 1849)	646
c. 55	231	s. 125	826
c. 66, s. 5	960	s. 141	84
s. 16	369	s. 143	775
c. 76, s. 8	1425	s. 171	483, 830
c. 110, s. 54	442	13 & 14 V. c. 17	868, 872
8 V. c. 16, ss. 14, 16	442	ss. 2, 3	874
s. 121	467	c. 21, s. 4	544
c. 18 (Lands Cl. Cons. Act, 1845)	1100	s. 7	1110
ss. 1—3, 6—8	1043	c. 28, s. 1	47, 1017
s. 7	224	c. 35	279, 280, 1018
ss. 9, 10, 11—14	1044	c. 60 (Trustee Act, 1850)	781, 1019
ss. 16, 17	1044	s. 2	278, 781, 782, 1020
ss. 18—68	1044	ss. 3, 4, 7—10	782
s. 68	1045	ss. 3—10	783
ss. 69, 73	1045	ss. 9—16	1019
ss. 74—80	122, 1046	s. 19	783, 784
ss. 81, 82	1160	s. 20	1019
ss. 82, 83	1046	ss. 20—37	784
s. 84	1046	ss. 22—25	1020
s. 85	1047, 1172	ss. 26, 27, 31	783
ss. 92, 94	1047	s. 28	784, 1019
ss. 95—123	1047	s. 29	1021
s. 121	1048	s. 30	509, 1021, 1184
ss. 124—131	1048	s. 31	702
s. 132	1164	ss. 32—34	1012
c. 20 (Railway Clauses Cons.)	1043, 1044	ss. 35—36	1013
ss. 42—44	1048	s. 37	1021
s. 77	1160	ss. 41, 44, 45	1021
8 & 9 V. c. 56	223	ss. 46—47	189, 981
c. 106, s. 2	199	s. 48	784
s. 3	515, 533, 534, 564, 1034	ss. 51, 54, 56	784
s. 4	553, 1104, 1164	ss. 55—57	785
s. 5	69	c. 65, s. 3	50
s. 6	7, 90, 340, 534, 729	14 & 15 V. c. 25	224
s. 7	976	c. 99, s. 14	1111
s. 8	1425, 1428	c. 104	936
s. 9	680	15 & 16 V. c. 12, ss. 2, 3, 5, 6	133
c. 109, s. 18	87	ss. 7, 8	134
c. 112	370, 1107	s. 14	135
ss. 1, 2	240	c. 24, s. 1	1272
c. 113, s. 3	1110	c. 49	59
c. 118 (Inclosure Act), s. 3	195, 1105	c. 51	229
ss. 90, 91	509	s. 48	231
s. 147	1104	c. 55 (Trus. Ex. Act, 1852), s. 1	514, 1021
9 & 10 V. c. 59	43	s. 2	781, 1019
c. 70, s. 9	1104	ss. 3, 4, 5	1020
c. 73, ss. 18—20	194, 1106	ss. 6, 7	783
10 & 11 V. c. 17, s. 18	1160	s. 8	189, 1013
c. 95	128	s. 9	1012
c. 96	278	s. 13	1021
c. 111, s. 4	1104	c. 76, ss. 210—212	546
11 & 12 V. c. 36, s. 41	5, 8	ss. 219, 220	754
c. 96, ss. 1, 2	1017, 1018	c. 79, ss. 31, 32	1104
c. 99, ss. 13, 14	509	s. 32	1012
12 & 13 V. c. 26	868, 872	c. 86, s. 22	1113
s. 2	874	s. 48	762
ss. 4—7	875	s. 55	1090
c. 49, s. 4	59	c. 87, s. 15	782
s. 15	330	16 & 17 V. c. 45	22, 83
c. 74	278, 1017	c. 51 (Succ. Dut. Act), s. 1	1145
		s. 2	1146
		s. 4	848, 1146

	PAGE		PAGE
16 & 17 V. c. 51 (Succ. Dut. Act)		20 & 21 V. 77, s. 79	252
s. 15	1147	c. 85 370, 398, 1263	
s. 18	1147	ss. 16, 25	406
s. 29	1148	s. 21 348, 405, 406	
s. 42 882, 1148		s. 25 665, 789	
ss. 44, 45	1147	ss. 26, 32, 33, 45	407
s. 52	1149	s. 33 655	
c. 70, s. 108	230	s. 35 655	
s. 113	538	s. 45 655	
s. 116	1163	s. 52 518	
s. 119	108	21 & 22 V. c. 25, s. 3	484
s. 122 1034, 1163		c. 27 99	
s. 123	813	c. 42 (Prescript. Act, Ireland)	149
s. 136	850	c. 44 539, 1037	
ss. 195—197	1144	c. 56, s. 12 1087	
c. 117, s. 1	1112	c. 57 539	
c. 137 (Charitable Trusts Act) 61, 1037		c. 77 99	
ss. 1—6, 9, 10, 11, 19, 21	61	s. 8 539	
c. 147, ss. 28, 30, 32	1014	ss. 61, 62, 64 1110	
17 & 18 V. c. 36	706	c. 94 229	
c. 83	633	s. 14 231, 1103	
c. 90 13, 14, 730		c. 95, s. 16 252	
c. 97, ss. 10—14	29	s. 18 249	
c. 104, ss. 30, 66, 69	728	c. 108, ss. 6, 7 405, 789	
c. 113 40, 374, 1098, 1099, 1420		ss. 8, 10 406	
ss. 1, 2 1418		22 & 23 V. c. 21, s. 25 188	
ss. 1—3 1419		c. 35 33, 258, 276, 992, 1036	
c. 125 104, 1059, 1122		ss. 1, 2 558	
s. 11 810		s. 3 562	
s. 18 1054		ss. 4—8 548	
18 & 19 V. c. 15	520	s. 10 13, 638	
s. 4, 6	519	s. 11 1144	
s. 11 1144		s. 12 883, 888, 889, 890, 894	
ss. 12, 14	14	s. 13 877	
c. 43 181, 325, 631, 633		ss. 14—18 880, 881	
ss. 1—4 634		ss. 19, 20 202	
c. 91, s. 11	728	s. 21 1025	
c. 122, s. 82	160	s. 22 996, 1144	
c. 124, ss. 31, 32—35	61	s. 23 698, 985	
c. 194 (Charitable Trusts Act)	61	s. 24 1074, 1101	
19 & 20 V. c. 9	223	s. 26 259	
c. 19, ss. 12, 13	605, 606	ss. 27, 28, 29 260	
c. 94	285	s. 30 278, 976, 999	
c. 97, s. 3	77	s. 31 270, 276, 279	
s. 9 604, 808		s. 32 996, 997	
s. 10 599, 603, 604		c. 39 996	
s. 13 809		c. 43 195	
s. 14 808		ss. 10, 11 509	
c. 119, s. 19	330	c. 61, s. 4 655	
c. 120, s. 23	942	s. 5 676, 677	
s. 32	538	c. 63, ss. 1—4 76	
s. 35	538	23 & 24 V. c. 28 87	
s. 43	537	c. 38 776, 997	
ss. 32, 33, 44, 46	539	ss. 1, 2 38, 519	
20 & 21 V. c. 31	195	ss. 3, 4, 5, 6, 7 520	
ss. 7—11	509	s. 6 558	
c. 54	1008	s. 7 906, 1026	
c. 57 182, 263, 345, 353		s. 9 278, 992	
ss. 1—4 354, 355		ss. 10—12 996	
c. 77, s. 3	249	s. 13 598	
ss. 61, 62 1110, 1271		c. 59 539, 1037	
s. 73	251	c. 83 634	
s. 74	249	c. 93, ss. 20, 31—39 195	
ss. 77, 78	1110	c. 106, ss. 2—5 1043, 1044	

	PAGE		PAGE
23 & 24 V. c. 114, s. 6	407	25 & 26 V. c. 89 (Jt. St. Co.'s Act, 1862), s. 47	449
c. 115, s. 1	1144	s. 48	416
s. 2	1144—1145	ss. 50—66	447
c. 124, s. 20	235	s. 51	487
c. 126, s. 1, 3—11	546	ss. 62, 63	421
c. 127, s. 28	727	ss. 67—73	448
c. 134, ss. 1, 3, 10	43	s. 74	473
c. 136 (Charitable Trusts Act).	61	ss. 75—77	475
c. 144, s. 6	407, 655	s. 78	476
c. 145	642, 883, 1001	s. 79	468, 469
ss. 8, 9	235	s. 80	469
s. 11	730, 752	s. 81	417, 469, 470
ss. 11—16	758	s. 82	468, 471
s. 26	652	ss. 83—89	478
s. 27	1008, 1014	ss. 85—87	479, 480
s. 28	915	ss. 90—94	481
s. 29	698, 985	s. 91	470
s. 30	258	ss. 95—101	482
c. 154, s. 104	224	s. 99	475
24 & 25 V. c. 9, ss. 1, 2	51, 59	s. 101	467
ss. 3, 4	60	ss. 102—109	485
c. 10, s. 11	729	ss. 104, 105	475
c. 11, ss. 1—3	76	ss. 110—114	486
c. 62	574	s. 115	487
c. 96, s. 80	269, 1002, 1008	ss. 117—129	487
ss. 81—84	459	s. 124	487
c. 101	134	s. 129	487
c. 105	539, 1037	ss. 130—133	488
c. 114	887	s. 133	493
s. 1	888	ss. 134—149	489
c. 121, ss. 1—5	1259	s. 138	467
ss. 1—4	1259	ss. 150—153	490
c. 134 (Bankr. Act, 1861)	775	ss. 154—160	491
s. 154	671	ss. 159, 160	492
s. 192	552	s. 160	474
25 & 26 V. c. 17, s. 5	60	ss. 161, 162	493
c. 42	104	ss. 163—165	479, 494
c. 52	539, 1037	s. 163	481
c. 63, s. 3	729	ss. 164, 165	494
c. 68, s. 1	135	s. 165	425, 467, 494, 495
ss. 1, 12	126, 133	ss. 166—168	496
c. 86, s. 13	1163	ss. 167, 168	459, 496
c. 89 (Jt. St. Co.'s Act, 1862)		ss. 170—173	496
s. 3	415, 416	ss. 179—188	497
s. 4	415, 498	s. 182	497
s. 5	498	ss. 194—198	497
ss. 6—9, 14	416	s. 196	497
ss. 9—11, 15, 16, 18	417, 498	ss. 197, 198	497
ss. 10, 12	416, 417, 498	ss. 199—204	498
ss. 12, 13	417, 462	s. 203	498
ss. 14, 17	417	ss. 205—212	499
s. 14	419	s. 209	473
ss. 19, 20	417	c. 108	877
ss. 21, 22	417—420	c. 112 (Charitable Trusts Act).	61
s. 22	431, 442	26 & 27 V. c. 92	1043
ss. 23—30	433	c. 106, s. 1	60
s. 24	443	c. 118, s. 8—10	444
ss. 31—36	434	c. 120	194
ss. 35, 37	435	27 & 28 V. c. 13, ss. 1—4	80
s. 33	436, 437, 443, 445, 473, 477	c. 43	22, 83
ss. 39—49	446	c. 44	406
s. 43	450	c. 112	518, 519
		ss. 1—7	520, 738

	PAGE		PAGE
27 & 28 V. c. 112, s. 14	776	32 & 33 V. c. 17 (Bank. Act, 1869)	
c. 114	11, 223, 1144	s. 83 (sub-s. 8)	775
c. 120	997, 1000, 1043	s. 87	481
28 & 29 V. c. 69	730	s. 91	630
c. 72	1276	s. 95	1144
c. 78	451, 1144	s. 100	826
s. 3	452	s. 104	828
c. 86, ss. 1—6	792, 793	s. 105	827
c. 99	1136	s. 111	84
c. 104, s. 48	1144	s. 117	1009, 1013
29 & 30 V. c. 32, s. 1	407	ss. 125, 126	552
c. 57	60	c. 107	195
c. 96, s. 4	706	33 & 34 V. c. 14 (Aliens' Prop. Act),	
c. 122	195	s. 2	108, 369, 960
30 & 31 V. c. 29	195	c. 20, s. 4	452, 1144
c. 29, ss. 1, 2	439	c. 23 (Convicts' Property Act)	
c. 47	486, 1145	ss. 1, 5—9	190
c. 48, ss. 2—7	1093	ss. 9, 10, 12—30	191
ss. 3—8	1069, 1070	c. 28, s. 16	692
c. 69	1098, 1099, 1417, 1420	c. 34, ss. 1, 2, 3	53
ss. 1—3	1419	c. 35, ss. 1—5	27
c. 71	195	ss. 6, 7	28
c. 131 (Jt. St. Co.'s Am. Act,		c. 56	1144
1867)	414	c. 61, s. 2	498
ss. 4, 7, 8	436	s. 22	499
s. 5	475	c. 71, s. 29	1001
ss. 7, 8	436	c. 93 (Mar. Wom. P. Act, 1870)	
s. 9	417	ss. 1—3, 4	357
s. 12	417	ss. 5—12	358
s. 23	416	s. 7	345, 359
ss. 24, 25	431, 432, 477	s. 8	337
s. 26	439	s. 12	399
ss. 27—36	433	ss. 13—15	359
s. 37	456	c. 97, s. 48	694, 1159
s. 38	412, 429	c. 104, ss. 1—4	492
s. 39	446	34 & 35 V. c. 27, ss. 1, 2	1000, 1001
s. 40	471	c. 47, s. 13	1001
ss. 41—45	476	c. 84	223
c. 132, s. 1	996	35 & 36 V. c. 24, s. 13	60, 61
s. 2	997	c. 93, s. 13	795
c. 142, s. 9	1136	36 V. c. 12, ss. 1, 2	322, 402
c. 144, ss. 1, 3, 8	83, 721	s. 2	402
31 & 32 V. c. 4	1033	36 & 37 V. c. 52	254
ss. 1, 2, 3	688, 689	c. 66 (Judicature Act, 1873)	
c. 40, ss. 3, 4, 5—7	510, 511	s. 15	587, 588
c. 44, ss. 1, 2, 3	60	s. 24	1, 2, 3, 472
c. 54, ss. 1—7	522, 523	s. 25	225, 680, 694, 746, 1082,
c. 116, s. 1	800		1119, 1255
& 33 V. c. 46	261, 263	s. 34	3
ss. 1, 2	31, 32, 33, 35, 38	37 & 38 V. c. 33	939
c. 71 (Bkey. Act, 1869), s. 6	292,	c. 37, ss. 1, 2	903, 905
	717, 775, 995	c. 38, s. 2	1077
s. 15	84, 704, 826, 850, 857, 982	c. 42 (Build. Soc. Act, 1874)	698
s. 22	529	ss. 2, 7	699
s. 23	445, 475, 567	ss. 5, 9, 13—27, 34—36	700
s. 24	567	s. 16	701
s. 25	1037, 216, 529	ss. 28—30, 32—36, 39, 41,	
s. 25	1037	42	701
s. 27	698	s. 42	699, 779
s. 31	85, 475, 671	c. 50 (M. Wom. Pro. Am. Act)	
s. 37	829	s. 1	336
s. 39	483	c. 57 (Real Pro. Ltn. Act, 1874)	
s. 40	827	s. 1	573
s. 50	831	s. 2	579

	PAGE		PAGE
37 & 38 V. c. 57 (R. P. L. Act, 1874)		44 & 45 V. c. 41 (Conv. Act, 1881)	
ss. 3—5	584	s. 3 1071, 1072, 1073, 1077, 1078,	1100
s. 6	585	s. 4	1098
s. 7	593	s. 5 (1)	1142
s. 8	596	s. 6	1164
s. 9 573, 578, 584, 596		s. 7 734, 855, 1164, 1165	
s. 10 587, 588, 600		s. 8	1170
c. 62 (Infants' Relief Act, 1874)		s. 9	1167
ss. 1, 2	69	ss. 10, 11	562
c. 50 336, 357		s. 12	563
c. 78 (V. and P. Act, 1874) s. 1	1102	s. 13 529, 1072	
s. 2 1071, 1116		s. 14 546, 559, 560	
ss. 2, 3 1076, 1077		s. 15 778, 857	
s. 6 1160		s. 16	703
s. 7 770		s. 17	741
s. 8 1107		s. 18	746
s. 9 1118		s. 19 733, 748, 752, 758	
38 & 39 V. c. 9	699	s. 20	758
c. 12 133		s. 21	758
c. 27 254		s. 22	759
c. 53 128		s. 23	734
c. 66 87, 875		s. 24	752
c. 77 (Judicat. Am. Act, 1875)		s. 25	763
s. 10 39, 480, 481, 483		ss. 26—29	690, 734
c. 87, s. 127 774, 1171		s. 30 741, 1019, 1353	
s. 139 770		s. 31 619, 1014	
39 & 40 V. c. 17 (Part. Am. Act, 1876)		s. 32	1015
ss. 3, 4, 5	513	ss. 33, 34	1016
ss. 6, 7	514	s. 35	881
c. 30	939	s. 36	698, 985
c. 36 (Copyright), ss. 42, 44,		s. 37	258, 259
45, 152	128	s. 38	259
40 & 41 V. c. 18 (Set. Est. Act, 1877)		s. 39	358, 399
ss. 2, 3	939	s. 40	364, 1169
ss. 4—15	940	ss. 41, 42	318
ss. 16, 18—27	941	s. 43 642, 652, 653, 1350, 1351	
ss. 28—40	942	ss. 44, 45	12
ss. 41—47	943	ss. 46—48	1169
s. 46	538	ss. 49—51	199, 1163
s. 48	940	s. 50 908, 1027, 1160	
ss. 49—52	943	s. 52 (1)	851
ss. 53—60	944	s. 53	1159
s. 58 537, 538, 939		ss. 54—56	1160
c. 26	417, 418	s. 57	1159
c. 33	1426, 1428	ss. 58, 59	1165
c. 34 1098, 1417, 1420		s. 60	731
c. 39	730	s. 61	697
c. 48, s. 60	50	s. 62	142
c. 63, ss. 3, 4	700, 701	s. 63	1164
41 & 42 V. c. 19	476	s. 65	240
ss. 2, 3, 4 706, 707, 720		s. 67	785
c. 31 (Bills of Sale Act, 1878)		s. 70	785
ss. 5—8	708	s. 71 733, 752, 758	
ss. 9, 10, 14—16	709	s. 73	666
ss. 8, 20	711	45 & 46 V. c. 31, ss. 3—5, 9, 10	523
ss. 10, 20	720	c. 38 (Settled Land Act, 1882)	
s. 23	706	s. 2	945, 946
c. 49	1067	ss. 3—8	947
42 & 43 V. c. 76, s. 6	497	ss. 9—14	948
ss. 4, 5, 9, 10	497, 498	ss. 15—20	949
43 V. c. 19, ss. 3—6	418	ss. 21, 22	950
s. 7	499	ss. 22—26	951
43 & 44 V. c. 18, s. 2	728	ss. 27—32	952, 1043
c. 46	1037		

	PAGE		PAGE
45 & 46 V. c. 38 (Set. L. Act, 1882)		46 & 47 V. c. 52 (Bank. Act, 1883)	
ss. 33—45	953	s. 30	831
ss. 46—54	954	s. 37	403, 407, 671
ss. 55—58	955	s. 38	483
ss. 59—63	956	s. 40	1005
ss. 64, 65	957	s. 44	529, 552, 569, 704, 718, 826, 850, 857, 982
c. 39 (Conveyancing Act, 1882)		s. 47	293, 629
s. 2	523, 768, 776, 1145	s. 48	293
s. 3	529, 768, 776, 1150	s. 50	84, 724
s. 4	1072	s. 54	775
s. 5	1017	s. 55	84, 85, 475, 567, 568
s. 6	855	s. 56	216, 850, 1037
s. 7	339, 539, 855	s. 57	698
s. 8	1169	s. 59	828
s. 9	1170	s. 105	568
s. 10	1399	s. 110	826
s. 11	242	s. 113	827
s. 12	773	s. 147	960, 1009, 1013
c. 40, ss. 1—4	127	s. 148	825
c. 43 (Bills of Sale Am. Act, 1882)		s. 168	569
ss. 2—7	710	s. 183	1037
s. 3	718	2 sch. (9—19)	827
ss. 7—18	711	(18)	829
s. 7	717	c. 57	135
s. 15	718	c. 61 (Agric. Hold. Act, 1883)	
c. 50 (Municipal Corporations)	1037	ss. 1, 2, 62	539
s. 5	960	ss. 3—45	340
ss. 108—110	539	ss. 54—59	341
c. 75 (Mar. Wom. Pro. Act, 1882)		47 & 48 V. c. 41, s. 2	702
ss. 1, 2	337, 344, 360, 364	c. 54 (Yorkshire Registration)	
ss. 2, 5	341, 344, 360	ss. 3, 5, 6	521
ss. 2—7	361	ss. 6, 11, 12	1107
ss. 8—12	362	s. 7	775
ss. 13—24	363	ss. 7, 14	775
ss. 25, 26	364	s. 14	777
46 & 47 V. c. 28, ss. 4, 5	484	s. 15	776
c. 30, s. 4	436	s. 16	774
c. 49, s. 3	279, 280	s. 51	521
s. 7	104	c. 68	404
c. 52 (Bankruptcy Act, 1883)	1143	c. 71, ss. 4, 6, 7	187
s. 4	292, 717, 995	48 & 49 V. c. 26 (York. Reg. Am. Act)	
s. 6	995	s. 4	775, 777
s. 16	827	ss. 4, 5	776
s. 29	629	c. 72, s. 11	951

ADDENDA ET CORRIGENDA.

The references are generally to a paragraph or some line of it. Part of a paragraph, if at the top or bottom of a page, is reckoned as a paragraph. When no paragraph is referred to, the line is counted from the top or bottom of a page.

The word "suit" will be frequently found in connection with cases decided prior to the Judicature Acts. In similar cases since the Act of course the word "action" would be proper.

PAGE

- 25, par. 5.—*Swansea Bank v. Thomas* is under the Act of 1870, s. 2, 33 & 34 Vict, c. 35.
- 33, par. 2.—*After* "this Act," *read* "32 & 33 Vict. c. 46."
- 39, end par. 2.—*See* the judgment in *Webb v. Smith*, 30 Ch. D. 192.
- 52, par. 2.—*Martin v. Lacon* is reported 30 Ch. D. 544.
- 78, line 21, from top.—*For* "212," *read* "214."
- 109, par. 4.—*Before* "*De Geer v. Stone*," *add* "that is by the Common Law. But it would seem that by the provisions of the statutes referred to, children born abroad of soldiers in the British service abroad would be considered as natural-born subjects. See the judgment, p. 254."
- 109, par. 6.—*For* "Geo. 4," *read* "Geo. 3."
- 114, line 4.—*To* "*Roberts v. Godson*," *add* "See *In re Lewis*, 30 Ch. D. 654."
- 124, end.—*Add* "*In re Clapham*, W. N. 1886, p. 54."
- 131, par. 4.—"*Chatterton's Case*, 2 C. P. D. 42, aff. 3 App. C. 483"; also loco, "10, Ex. 572," line 5 from bottom.
- 143, line 2 from bottom.—"*Russell v. Watts* on app. 10 App. C. 590."
- 151, par. 2.—*To* "*Laird v. Briggs*," *add* "*Symons v. Leaker*, 15 Q. B. D. 629."
- 152, par. 3.—*After* "*Flight v. Thomas*," *add* "*Chamber Coll. Co. v. Hopwood*, W. N. 1886, p. 72."
- 156, par. 2, line 4.—*For* "L. R. 5 Ex.," *read* "5 Ex. D."
- 158, end par. 1.—The right acquired under the Prescription Act, s. 3, is a right to the access and use of the whole or a substantial part of the particular cone of light which has passed for the statutory period over the servient to the dominant tenement. *Scott v. Pape*, 31 Ch. D. 554.
- 159, par. 2.—*After* "*Robson v. Whittingham*," *add* "*Raper v. Fortescue*, W. N. 1886, p. 78."
- 163, par. 1.—"*Kensit v. G. E. R. Co.*, aff. 27 Ch. D. 122."
- 168, par. 4, line 2 from bottom.—*For* "*Drain*," *read* "*Dixon*."
- 170, par. 1.—"*Mitchell v. Darley Main Co.*, aff. 11 App. C. 127."
- 174, par. 2.—"*Truman v. L. B. S. C. R. Co.*, 25 Ch. D., aff. 29 Ch. D. 89."
- 177, par. 3.—*After* "*Wilson v. Lord Townsend*," *add* "See *In re Lord Chesham*, 31 Ch. D. 466."
- 180, par. 4, line 3.—*After* "respect," *add* "But see *Cooper v. Cooper*, *post*, p. 181.
- 181, par. 4.—"*In re Vardon's Trusts*, reversed 31 Ch. D. 275."

PAGE

- 194, par. 1.—*Crompton v. Jarratt*, reported 30 Ch. D. 298.”
- 199, par. 1, line 4 from bottom.—*For* “Judicature,” *read* “Conveyancing.”
- 202, line 5 from bottom.—*After* “2 Cl. & Fin.,” *add* “7 Cl. & Fin. 895.”
- 215, end par. 1.—“*Hall Dare v. Hall Dare*, reversed 31 Ch. D. 251.”
- 219, end par. 1.—*Add* “This point often turns upon the question whether trustees take the legal fee to enable them to perform the duties of their trust; as to this, see the cases, *post*, Trusts, 978 *et seq.*”
- 222, par. 2.—*After* “*Re Owen*,” *add* “*In re Stevens*, 31 Ch. D. 320.”
- 226, par. 1.—*To* “*Tewart v. Lawson*,” *add* “*Norton v. Johnstone*, 30 Ch. D. 649.”
- 228, par. 2.—*Add* “*Johnstone v. Earl Spencer*, 30 Ch. D. 581.”
- 238, par. 3, line 14.—*For* “4th ed.,” *read* “7th ed.”
- 261—263.—*Norton v. Compton* is reported 30 Ch. D. 315. See *In re Jones*, 31 Ch. D. 440, which must be read in connection with *Norton v. Compton*, *supra*.
- 266, par. 2, line 8.—*For* “Chapter V.,” *read* “Chapter IV.”
- 270, line 1.—*After* “*Marsden v. Kent*,” *add* “*In re Johnson*, W. N. 1886, p. 72.”
- 271, par. 2, line 3.—*After* “*Re Speight*,” *add* “on app. nom. *Speight v. Gaunt*, 9 App. C. 1 *infra*.”
- 277, par. 1.—*After* “*Harben v. Darby*.”—“But if the solicitor executor is an attesting witness to the will he will not be entitled to his ordinary costs, these being an interest or benefit of which the 1 Vict. c. 26, s. 15, deprives him. *In re Barber*, 31 Ch. D. 665. The direction giving his usual costs to a solicitor executor seems inoperative as against creditors where the estate is insolvent. *Semble, ib.*”
- 291, par. 3, line 4.—*For* “3 D. G. & S.,” *read* “3 D. J. & S. ;” and end par. 3, *add* “*Ex parte Mercer, Re Wise*, W. N. 1886, p. 82.”
- 293, end par. 1.—“A gift of money to a son, made for the purpose of enabling him to commence business on his own account, is not a ‘settlement of property’ within the meaning of this section. *In re Player*, 15 Q. B. D. 682.”
- 296, last line.—*For* “*ante*, p. 292,” *read* “*post*, p. 301.”
- 308, line 13 from bottom.—*After* “Ch. D.,” *add* “188.”
- 315, end par. 2.—*Add* “It is no objection to an appointment by the court that the infant is resident abroad, and has no property in this country. *In re Willoughby*, 30 Ch. D. 324.”
- 337, par. 2, line 11.—*For* “Ch. D. 13,” *read* “13 Ch. D.”
- 358, par. 5, line 7.—*For* “Chapter X.,” *read* “Chapter XI.”
- 361, end par. 1.—*Add* “See *In re Armstrong*, W. N. 1886, p. 98.”
- 361, end par. 3.—“When a married woman seeks to prove under her husband’s bankruptcy for money lent by her to him, she must show that the money was not lent for the purpose of his trade or business. *In re Genese*, 16 Q. B. D. 700.”
- 364, par. 4, line 10 from bottom.—*For* “he,” *read* “she.”
- 364, par. 4.—*After* “*In re Hughes’ Trusts*,” *add* “The preceding cases were reviewed and commented upon in *Reid v. Reid*, 31 Ch. D. (C. A.) 402; and it was held, overruling *Baynton v. Collins*, *supra*, that for a case to come within s. 5, there must be an accruer of title after and not before the passing of the act, and the title must be considered as accruing, when the married woman first acquires her interest, whether in possession, reversion, or remainder. See *ib.*, 408, *per Cotton, L.J.*”
- 364, par. 4.—“*Butler v. Butler*, aff. 16 Q. B. D. 374.”
- 396, end par. 1.—“But these decisions would not, it is considered, apply where a married woman holds property as a *feme sole* without the intervention of a trustee under the Act of 1882, *ante*, p. 360.”
- 399, end par. 2.—“The court has no power to take from a married woman the protection

PAGE

- arising from the restraint clause, unless under the Act of 1882. *Quære*, if it has under that act. *In re Glancill*, 31 Ch. D. (C. A.) 532."
- 404, par. 2, line 13.—*For* "such deeds," *read* "such suits."
- 404, par. 3.—"*Nicol v. Nicol*, aff. 31 Ch. D. 524. In this case it was held that after cohabitation put an end to an agreement made in contemplation of judicial separation, a dictum on the point of Lord Campbell in *Randle v. Gould*, 8 E. & B. 457, was questioned."
- 413, par. 1.—*After* "*Bagnall v. Carlton*," *add* "comp. *Arkwright v. Newbold*, 17 Ch. D. 301; *Lydney, &c., Ore Co. v. Bird*, 31 Ch. D. 328."
- 415, par. 3.—*For* "487," *read* "497."
- 425, end par. 2.—*Add* "See *Gilman's Case*, 31 Ch. D. 420."
- 427, par. 3, line 4.—*Before* "H. L.," *read* "L. R."
- 433, par. 4.—"*Soc. Gen., &c. v. Tramways Union*, aff. 11 App. C. 20."
- 442, par. 3.—*To* "*Hebblewhite v. McMorine*," *add* "*Soc. Gen., &c. v. Walker*, 11 App. C. 20."
- 461, par. 2.—*To* "*Harrison v. Mexican R. C. Co.*," *add* "*South Durham Brewery Co* 31 Ch. D. 261."
- 462, 467.—"*Ashbury v. Watson*, on app. 30 Ch. D. 376."
- 472, line 4.—*After* "such," *read* "Act of 1862."
- 488, par. 2, line 9.—*For* "Clive," *read* "Cleve."
- 494, par. 5, line 3 (s. 165).—"The solicitor of a company is not an official within the meaning of this section. *Carter's Case*, 31 Ch. D. 496."
- 498, 499.—The Life Assurance Companies Act, 1870, is 33 & 34 Vict. c. 61.
- 519, par. 1.—*After* "*Beaman v. Lord Oxford*," *add* "*In re Bell*, W. N. 1886, p. 46."
- 519, line 21.—*For* "c. 18," *read* "c. 15."
- 529, par. 2.—The Conveyancing Act, 1882, s. 3, is stated, p. 768.
- 547, end par. 1.—*Add* "*Aldridge v. Ferne*, W. N. 1886, p. 88."
- 548, line 3.—*For* "s. 10," *read* "Sec. 10, *post*, pp. 559, 560."
- 568, par. 2.—*Ex parte Lovering*, L. R. 9 Ch. D., *dele* "D."
- 593, par. 1.—*After* "1874," *read* "37 & 38 Vict. c. 57."
- 600, line 1.—*After* "Will. 4," *add* "c. 27."
- 605, par. 4.—*Mitchell v. Darley Main Co.*, aff. 11 App. C. 127.
- 605, line 7 from bottom.—*For* "13," *read* "26."
- 611, end par. 1.—"The court will, if necessary, order a deed executed on consideration of the intended marriage to be cancelled if the marriage does not take place. *Bond v. Walford*, W. N. 1886, p. 68."
- 620, par. 3.—*After* "*Sutton v. Chetwynd*," *add* "See *Mackie v. Herbertson*, 9 App. C. 303; *In re Anstis*, 31 Ch. D. 596."
- 629, par. 7.—*After* "s. 47," *add* "(1)."
- 651, par. 4, last line.—*For* "17 Ch.," *read* "17 Ch. D."
- 655, end par. 1.—*Add* "See *In re Hamilton*, 31 Ch. D. 291; comp. *In re Howarth*, L. R. 8 Ch. 415."
- 656, par. 2, lines 8, 9.—*Dele* "See *supra*, p. 873."
- 662, par. 1.—*After* "*Kane v. Kane*," *add* "See *In re Currey's Estate*, W. N. p. 64."
- 694, end.—*Add* "*Webb v. Smith*, 30 Ch. D. 192."
- 701, end par. 3.—"*In re Mutual, &c., B. S.*, on app. 30 Ch. D. 434."
- 711, pars. 4 (s. 9) and 14 (form).—*Add* "an assignment by a person 'as beneficial owner' (see Conv. Act, s. 7) avoids the bill of sale. *Ex parte Stanford, In re Barber*, W. N. 1886, p. 83."
- 711, end par. 4.—"A bill of sale void under s. 9 is wholly avoided, not merely as to the

PAGE

chattels comprised in it, but a covenant for payment of principal and interest is also made void. *Davies v. Rees*, W. N. 1886, p. 94."

712, end par. 1.—"A document giving a license to take immediate possession of goods as a security for a debt is a bill of sale within s. 4 of the Bills of Sale Act, 1878, and is, therefore, also a bill of sale within the Bills of Sale Act, 1882, and void under s. 9. *In re Townsend*, 16 Q. B. D. 532. The *ratio decidendi* of *Ex parte Close* (14 Q. B. D. 386) and *In re Cunningham & Co.* (28 Ch. D. 682) disapproved of 16 Q. B. D. 532."

712, par. 2.—After "*Chapman v. Knight*," add "*See Walrond v. Goldman*, 16 Q. B. D. 121."

713, par. 2.—To "*Davis v. Burton*," add "*Myers v. Elliott*, 16 Q. B. D. 526. In this case *Thorpe v. Cregeen*, 55 L. J. (Q. B.) 80, was questioned."

713, par. 2.—To "*Melville v. Stringer*," add "*Cons. Cr. Corp. v. Gosney*, 16 Q. B. D. 24."

713, par. 2.—To "*In re Williams*," add "*Myers v. Elliott*, W. N. 1886, p. 29."

716, line 9 from bottom.—After "ss. 8 and 10," add "of Act of 1878."

723, par. 2.—"*Soc. Gen., &c. v. Tramways Union*, aff. 11 App. C. 20."

732, line 8 from bottom.—For "P. B.," read "B. P."

740, par. 2.—After "*Selby v. Pomfret*," add "*Hall v. Heward*, W. N. 1886, p. 95."

741, end par. 2.—"When a mortgagee brings an action to foreclose two mortgages or two distinct estates, but which mortgages are by force of the statute or otherwise not liable to be consolidated, the costs of the action are not to be charged against each estate, but must be apportioned rateably between the two estates. *De Caux v. Skipper*, *Tee v. De Caux*, 31 Ch. D. 625."

741, par. 3, line 1.—For "and," read "of."

752, end par. 2.—Add "*Mason v. Westoby*, W. N. 1886, p. 84."

756, par. 1.—To "*Cockburn v. Edwards*," add "comp. *Pooley v. Whetham*, W. N. 1886, p. 41."

762, par. 1, line 9.—For "necessary," read "material."

762, end par. 2.—"As to opening the foreclosure by reason of a receipt of rent by the mortgagee or his receiver, see *Jenner Fust v. Needham*, 31 Ch. D. 500; comp. *Arthy v. Stamford Bank*, W. N. 1886, p. 63."

762, par. 3, line 1.—For "a mortgagee could not impeach," read "a mortgagor could not in general impeach."

762, par. 3, last line.—After "Judicature Act," add "See Forms of Pleadings."

768, end par. 3.—Add "See *In re Cousins*, 31 Ch. D. 671."

768, end par. 3.—"See as to notice under this Act. *In re Cousins*, 31 Ch. D. 671."

769, end par. 2.—"See *Nat. Prov. Bank of England v. Jackson*, W. N. 1886, p. 94."

771, par. 1.—"*Bradford Bank Co. v. Briggs*, reversed 31 Ch. D. p. 19; *Miles v. N. Z., &c., Co.*, on app. W. N. 1886, p. 54."

774, par. 2.—After "Middlesex Act," read "7 A. c. 20."

779, par. 4.—*Nat. Prov. Bank of England v. Games*, is reported 31 Ch. D. 582. For "proceedings taken," in the text, read "proceedings reasonably taken." The case cited shows what proceedings would come under this description.

799, par. 1.—After "*St. Aubyn v. Smart*," add "See *Hughes v. Twisden*, W. N. 1886, p. 64."

815, par. 1.—After "*Butchart v. Dresser*," add "and a surviving partner can charge partnership property as security for a debt of the firm. *In re Clough*, 31 Ch. D. 324."

850, line 5 from bottom.—Before "(s. 25, sub-s. 5)," read "Act of 1869."

855, line 5.—Dele "*infra*."

897, par. 2.—After "*Re Teape's Trusts*," add "*In re Batchellor*, W. N. 1886, p. 64."

906, line 3.—Dele "& 2."

PAGE

- 907, end par. 1.—Add "*Richardson v. Harrison*, 16 Q. B. D. 85, correcting the observations of Malins, V.-C., in *In re Jefferys*, L. R. 14 Eq. 136, 139."
- 908, par. 4.—After "*In re Meredith's Trusts*," add "*In re Hunt's Trusts*, 31 Ch. D. 308."
- 912, line 1.—After "*Trollope v. Routledge*," add "*Wilson v. Kenrick*, 31 Ch. D. 658."
- 915, line 8.—After "*Ingram v. Ingram*," add "And if there is a valid appointment to objects, and a subsequent appointment to persons not objects, the first appointment will be unaffected. *Duguid v. Fraser*, 31 Ch. D. 449."
- 933, end par. 2.—Add "*Montagu v. E. of Sandwich*, W. N. 1886, p. 45."
- 946, end par. 2.—Add "See *In re Esdaile*, W. N. 1886, p. 47."
- 946, par. 3.—"*Atkinson v. Bruce*, aff. 31 Ch. D. 577."
- 948, end par. 4, and page 956, end par. 5.—Add "See *In re Redge*, 31 Ch. D. 505."
- 950, par. 2.—*D. of Marlborough v. Marjoribanks*, aff. 32 Ch. D. 1.
- 965, end par. 1.—"Cons. *Fitzgerald v. Noad*, W. N. 1886, p. 97."
- 970, par. 1.—"*Standing v. Bowring*, aff. 31 Ch. D. 282."
- 976, end.—"*Scotney v. Lomer* was affirmed 31 Ch. D. 380 ; but as to the point in the text no decided opinion was given, and *Bush v. Aldam* was not dissented from. See 31 Ch. D. p. 386."
- 979, end par. 1.—Add "*Richardson v. Harrison*, 16 Q. B. D. 85."
- 980, end par. 1.—"Where there is a limitation of an estate in fee to trustees and their heirs with power to sell with consent, they take the legal estate. *Richardson v. Harrison*, 16 Q. B. D. 85."
- 1000, line 1.—After "*In re Boyd's Settled Estates*," add "*In re Whiteley*, W. N. 1886, p. 62."
- 1003, par. 3.—"*Scotney v. Lomer*, aff. 31 Ch. D. 380."
- 1005, end par. 2.—"See further as to the liability for the breach of trust of a co-trustee, *Bakin v. Hughes*, 31 Ch. D. 390."
- 1005, par. 2.—*Scotney v. Lomer*, aff. 31 Ch. D. 380.
- 1007, par. 2.—After "*Wainford v. Heyl*," add "Her husband will be liable for her breach of trust, whether arising from negligence or active misconduct. *Bakin v. Hughes*, 31 Ch. D. 390."
- 1008, line 4 from bottom.—For "c. 45," read "c. 41."
- 1011, par. 2.—After "*In re Martyn*," add "*Davies v. Hodgson*, W. N. 1886, p. 51."
- 1012, par. 2.—After "*Lemann's Trusts*," add "*In re Phelp's Settlement Trusts*, 31 Ch. D. 351."
- 1075, par. 2.—"*Nottingham, &c., Tile Co. v. Butler*, aff. 16 Q. B. D. 778."
- 1079, par. 2, *Whittemore v. Whittemore* and *Cordingley v. Cheesborough* were commented upon in *In re Terry and White's Contract*, 32 Ch. D. 14.
- 1084, par. 2.—After "*Dames v. Wood*," add "*In re Terry and White*, W. N. 1886, p. 30."
- 1093, par. 2.—*Boswell v. Coaks* was reversed, nom. *Coaks v. Boswell*, W. N. 1886, p. 34. The ground of reversal is not stated in the brief note of the case in W. N.
- 1116, end par. 4.—Add "*The Aylesford Peerage*, 11 App. C., 1."
- 1140, par. 2.—After "*Rose v. Calland*," add "Where the vendor does not show a good title the court can order him to pay the purchaser's costs, and charge them upon his interest in the property. *In re Higgins and Hitchman's Contract*, 21 Ch. D. 95 ; *In re Yeilding and Westbrook*, 31 Ch. D. 344."
- 1142, table of contents, line 8.—For "1881," read "1882."
- 1143, par. 5.—After "c. 52," add "s. 49."
- 1151, par. 1, line 9.—For "1158," read "1154."
- 1159, par. 2, line 12.—For "he," read "the vendor."

PAGE

- 1164, par. 5, line 1.—*After* “1881,” *add* “s. 6.”
- 1165, par. 4, line 5.—*For* “device,” *read* “devise.”
- 1166, par. 2, line 11.—*For* “*sup.*,” *read* “*infra.*”
- 1176, end par. 2.—*After* “Y. & C.,” *add* “Ex.”
- 1183, par. 1.—“*Nottingham, &c., Tele. Co. v. Butler*, aff. 16 Q. B. D. 778.”
- 1213, par. 2.—“*Scotney v. Lomer*, aff. 31 Ch. D. 380.”
- 1224, end par. 1.—“*In re Daves’ Trusts* the bequest was to the children of B. ‘or their descendants;’ and the substitutionary gift was held not to take effect. But this case was not followed in *In re Gilbert’s Estate*, W. N. 1886, p. 96.”
- 1243, par. 1.—“*Scotney v. Lomer*, aff. 31 Ch. D. 380.”
- 1244, end par. 1.—*Add* “See *Robertson v. Richardson*, 30 Ch. D. 623.”
- 1255, par. 2, line 1.—*Before* “(3),” *read* “s. 25.”
- 1265, par. 4.—“*Burgess v. Vennicombe, In re Barker*, is reported 31 Ch. D. 665. There it was held that a solicitor, who is an attesting witness, is not entitled to his ordinary professional charges, although there is a direction in the will that he should have such charges, *ultra* costs, out of pocket (see *ante*, p. 277) being in the nature of a bounty, and an interest within s. 15.”
- 1283, end par. 3.—*After* “statute,” *read* “of Frauds, s. 4.”
- 1303, end par. 2.—*Add* “*In re Bacon’s Will*, 31 Ch. D. 460.”
- 1311, end par. 4.—“But in *In re Wood*, W. N. 1886, p. 97, it was held that an erroneous^s statement as to advances to children to whom benefits were given by the will¹ was binding upon them.”
- 1356, par. 5.—*After* “*Wood v. Wood*,” *add* “See *In re Gilbert’s Estate*, W. N. 1886’ p. 96, and cases there cited.”
- 1376, last line.—*To* “*Grieves v. Rawley*,” *add* “*In re Hammersley*, W. N. 1886, p. 64.”
- 1383, end par. 4.—*Add* “*In re Campbell’s Trusts*, 31 Ch. D. 685.”
- 1387, par. 2.—*After* “*Thompson v. Eastwood*,” *add* “*In re Haseldine*, 31 Ch. D. 511, in which the LLJJ. differed in opinion.”
- 1388, end par. 2.—“But such a gift would not be valid where the bequest is in terms which could, according to the rules previously stated, comprise legitimate children only. *In re Bolton*, 31 Ch. D. 542. In this case *In re Goodwin’s Trust*, L. R. 17 Eq. 345, was observed upon by Cotton, L.J.”
- 1894, par. 1.—*After* “*Bradley v. Cartwright*,” *add* “See *Richardson v. Harrison*, 16 Q. B. D. 85.”
- 1898, line 4.—*After* “A.,” *read* “of a share of personalty by will since the 1 Vict. c. 26,” and next line *before* “personalty,” *read* “the share of.”

COMPENDIUM OF EQUITY, &c.

PRELIMINARY.

THE JUDICATURE ACTS.

<i>Judicature Acts</i>	1	<i>Equitable estates, &c., to be recog-</i>	
<i>Jurisdiction of High Court</i>	1	<i>nised</i>	2
<i>Effect to be given to equitable rights,</i>		<i>Prohibition—Injunction</i>	2
<i>&c.</i>	2	<i>Effect given to legal claims</i>	2
<i>Equitable rights, &c., available for</i>		<i>Rules of equity to prevail</i>	3
<i>defence</i>	2	<i>Where exclusive Chancery Jurisdic-</i>	
<i>Relief against third persons</i>	2	<i>tion</i>	3

BEFORE proceeding to the consideration of the various titles which form the subject-matter of this work, it will be convenient to refer very briefly to the Judicature Acts. By far the greater number of the sections in them relate to matters of practice and other matters which do not fall within the scope of this work. But there are a few which call for notice. The Act of 1873, 36 & 37 Vict. c. 66, after stating the provisions for the transfer of the various jurisdictions theretofore existing in the several Courts of Chancery, Queen's Bench, &c., to the High Court of Justice, ss. 16, 18, enacts (in substance):—

S. 24. In every civil cause or matter commenced in the High Court of Justice, law and equity shall be administered by the High Court of Justice and the Court of Appeal respectively, according to the rules following:—

- (1.) If any plaintiff or petitioner claims to be entitled to any equitable estate or right, or to relief upon any equitable ground against any deed, instrument, or contract, or against any right, title, or claim whatsoever asserted by any defendant or respondent in such cause or matter, or to any relief founded upon a legal right, which heretofore could only have been given by a Court of Equity, the said Courts respectively, and every Judge thereof, shall give to such plaintiff or petitioner such and the same relief as ought to have been given by the Court of Chancery.

- (2.) If any defendant claims to be entitled to any equitable estate or right, or to relief upon any equitable ground against

any deed, instrument, or contract, or against any right, title, or claim asserted by any plaintiff or petitioner in such cause or matter, or alleges any ground of equitable defence to any claim, effect is to be given to it as if it had been relied on by way of defence in any suit or proceeding in Chancery before the Act.

- (3.) Such relief is to be granted in respect of any equitable estate or right, or other matter of equity, and also in respect of any legal estate, right, or title claimed or asserted against any plaintiff or petitioner by the defendant as he shall have properly claimed by his pleading, as in any suit instituted for that purpose by the same defendant against the same plaintiff or petitioner; and also all such relief relating to or connected with the original subject of the cause or matter, and in like manner claimed *against any other person*, whether already a party to the same cause or matter or not, who shall have been duly served with notice in writing of such claim pursuant to any Rule or Order of the Court, as might properly have been granted against such person if he had been made a defendant. Every person so served shall be deemed a party to such cause or matter.
- (4.) All equitable estates, titles, and rights, and all equitable duties, and liabilities appearing incidentally in the course of any cause or matter, are to be recognised in the same manner in which the Court of Chancery would have recognised them before the Act.
- (5.) No cause pending in the High Court shall be restrained by prohibition or injunction; but every matter of equity on which an injunction against the prosecution of any cause or proceeding might have been obtained before the Act, either unconditionally or on any terms or conditions, may be relied on by way of defence thereto; the Court may direct a stay of proceedings in any cause or matter pending before it, if it shall think fit.
- (6.) Subject to the aforesaid provisions for giving effect to equitable rights and other matter of equity in manner aforesaid, and to the other express provisions of the Act, effect is to be given to all legal claims and demands, estates, titles, rights, duties, obligations, and liabilities, as before the Act.
- (7.) The High Court shall grant, either absolutely or on reasonable terms and conditions, all such remedies whatsoever as any of the parties thereto may appear to be entitled to in respect of any and every legal or equitable claim properly brought forward by them respectively in such cause or matter.

S. 25 recites that it is expedient to take occasion of the union of the several courts whose jurisdiction is transferred to the High Court

of Justice to amend and declare the law to be thereafter administered in England as to the matters next thereafter mentioned. This is followed by certain enactments which, so far as material, will be stated hereafter in their appropriate places. The section concludes that, "Generally in all matters not hereinbefore particularly mentioned, in which there is any conflict or variance between the Rules of Equity and the Rules of the Common Law with reference to the same matter, the Rules of Equity shall prevail."

By s. 34 it is enacted that there shall be assigned to the Chancery Division : (1.) Pending causes ; (2.) Causes where the Court of Chancery has exclusive statutory jurisdiction (except County Court appeals) ; (3.) Causes for the following purposes :—

The administration of the estate of deceased persons ;

The dissolution of partnerships or the taking of partnership or other accounts ;

The redemption or foreclosure of mortgages ;

The raising of portions, or other charges on land ;

The sale and distribution of the proceeds of property subject to any lien or charge ;

The execution of trusts, charitable or private ;

The rectification, or setting aside, or cancellation of deeds or other written instruments ;

The specific performance of contracts between vendors and purchasers of real estates, including contracts for leases ;

The partition or sale of real estates ;

The wardship of infants and the care of infants' estates.

The Chancery Division of the High Court may now perhaps be considered as representing the Court of Chancery as it existed prior to the Judicature Acts, with the addition of an enlarged jurisdiction, and a simpler mode of procedure.

ACCUMULATIONS.

<i>Prior to 39 & 40 Geo. 3, c. 98</i> 4 <i>Case of Thellusson v. Woodford</i> . 4 39 & 40 Geo. 3, c. 98 4 <i>Same construction as to Wills and Deeds</i> 5 <i>What Accumulations within and not within Act</i> 5 <i>Accumulations by operation of Law</i> 5 <i>Accumulations to raise a gross Sum</i> 6 <i>Commencing after Testator's Death</i> 6 <i>Time allowed for Accumulations—Excess</i> 6 <i>Only one of several Periods to be taken</i> 6 <i>For an indefinite Period are void</i> 6	<i>Time allowed, &c.—continued.</i> <i>During Minority of unborn Child</i> 7 <i>Direction in excess of permitted Period</i> 7 <i>Who entitled to Income on Accumulation ceasing to be lawful</i> 7 <i>Accumulation of Residue</i> 7 <i>Blended realty and personalty</i> ... 8 <i>Effect of Heir taking</i> 8 <i>Accumulations for Payment of Debts and portions</i> 8 <i>Direction to accumulate entire Income</i> 8 <i>Portions, how charged</i> 8 <i>Alternative Events</i> 9 <i>What Children within Exception</i> 9 <i>What Interest their Parents must take</i> 9
--	--

Prior to 39 & 40 Geo. 3, c. 98.] Before the 39 & 40 Geo. 3, c. 98, frequently termed the Thellusson Act, trusts for accumulation might have been co-extensive with, but could not exceed, the limits of executory devises, viz., a life or lives in being and twenty-one years after. *Ld. Southampton v. Marq. Hertford*, 2 V. & B. 61. In the celebrated case of *Thellusson v. Woodford*, 4 Ves. 227; aff. H. L., 11 Ves. 112 (see Fea. Con. Rem. p. 436, n.), Mr. Thellusson, by his will, directed the rents of certain estates to be accumulated and invested in land during the lives of all his sons, grandsons and their issue who should be living at his decease, or born in due time afterwards; after the death of the survivor of *such descendants*, the estates were directed to be divided into three parts, to be respectively settled in strict settlement on the then eldest male lineal descendants of the testator's three sons, one part for each of such descendants. Accumulations were thus directed during the lives of a considerable number of persons, some living at the testator's death, several of whom were infants, and some then unborn, but born in due time afterwards. The will gave rise to a great deal of litigation, but was eventually established in the House of Lords (see 11 Ves. 112), in 1805, and the parties entitled ascertained in 1859. *Thellusson v. Rendlesham*, 7 H. L. C. 429.

39 & 40 Geo. 3, c. 98.] In consequence of this decision (11 Ves. 112), the 39 & 40 Geo. 3, c. 98, was passed, by which it is enacted

that no person shall, after the passing of this act, by any deed, surrender, will, codicil, or otherwise settle or dispose of any real or personal property so that the rents, profits or produce thereof shall be wholly or partially accumulated for any longer term than, (1) the life or lives of any such grantor or settlor; (2) or the term of twenty-one years from the death of any such grantor, settlor, deviser or testator; (3) or during the minority or respective minorities of any person or persons who shall be living or in *rente sa mere* at the time of the death of such grantor, deviser or testator; (4) or during the minority or respective minorities only of any person who under the uses or trusts of the deed, surrender, will, or other assurance directing such accumulation would for the time being, if of full age, be entitled to the rents, profits, interest, dividends or annual produce so directed to be accumulated; and in every case where any accumulation shall be directed otherwise than aforesaid such direction shall be null and void, and the rents and produce of such property so directed to be accumulated shall, so long as the same shall be directed to be accumulated contrary to the provisions of the act, go and be received by such person as would have been entitled thereto if such accumulation had not been directed (s. 1).

Nothing in the act is to extend to any provision for payment of the debts of any grantor, settlor or deviser or other person, or for raising portions for any child or children of any grantor, settlor or deviser, or any child or children of any person taking any interest under any such conveyance, settlement or devise, or to any direction touching the produce of timber upon any lands (s. 2). The act does not extend to any disposition of *heritable* property in Scotland (s. 3). But this section was repealed by the 11 & 12 Vict. c. 36, s. 41; and the 39 & 40 Geo. 3, c. 98, now applies to all Scotch property, personal as well as heritable. The act does not apply to Ireland, nor to an Irish settlement made by a domiciled Irishman. *Heywood v. Heywood*, 29 Bea. 9; and see *Ellis v. Maxwell*, 12 Bea. 104. A will disposing of leaseholds in England is governed by the law of England and not by the domicile of the testator, and if the leaseholds are directed to be sold, and the income of the proceeds accumulated, the accumulation beyond the permitted period will be void. *Freke v. Ld. Carbery*, L. R. 16 Eq. 461.

The same construction of the act is applicable to wills and deeds. *Re Rosslyn's Trusts*, 16 Sim. 391.

What Accumulations are within and not within the Act.] It cannot, perhaps, be considered as quite settled whether an accumulation which arises, not by the *direction* of the settlor or testator but by *operation of law*, is within the act. See the judgment in *Mathews v. Keble*, L. R., 4 Eq. p. 471, aff. 3 Ch. 691. The cases of *Lombe v. Stoughton*, 12 Sim. 304; *Elborne v. Goode*, 14 Sim. 165; corp. *Bridgnorth v. Collins*, 15 Sim. 538, and *Mathews v. Keble* (*sup.*), are in favour of the view that an accumulation simply by operation of law is not within the act. That is, an accumulation not directed by the testator, but, *e.g.*, an accidental accumulation, see 15 Sim. 540; or, an

accumulation under an executory devise, where rents and profits immediately accruing, are preserved by way of accumulation for the person ultimately taking under the executory devise; see 14 Sim. 176. On the other hand, *M'Donald v. Bryce*, 2 Ke. 276, the opinion of Ld. Cranworth in *Tench v. Cheese*, 6 D., M. & G. 453, and some observations of L. C. Westbury, in *Ctss. Bective v. Hodgson*, 10 H. L. C. 656, lead to an opposite conclusion. See, however, L. R., 4 Eq. 472, and perhaps the *dictum* of Ld. Cranworth (*sup.*) has reference solely to a direction to accumulate *on a contingency*, which, therefore, is an express direction to accumulate *when* the contingency happens. See *Mathews v. Keble*, L. R., 3 Ch. p. 696, per Wood L.J.

It is not necessary, to bring a case within the act, that the word *accumulation* should be used. A direction to *invest*, or the like, for a period longer than is authorized, is clearly a direction to accumulate within the act. See *Mathews v. Keble*, *sup.* A charge on property, by which the rents are directed to be accumulated to raise a gross sum, is within the act if such period exceed the limit allowed, and the direction is void for the excess of time beyond the twenty-one years. *Oddie v. Brown*, 4 D. & J. 179. A direction by will to keep up the premiums on a policy of assurance effected by the testator on the life of another person is not an accumulation within the act. *Basil v. Lister*, 9 Ha. 177. Although the accumulations may be directed to *commence* at a period subsequent to the testator's death, they must nevertheless cease at the expiration of the twenty-one years after his death. *Webb v. Webb*, 2 Bea. 493; *Shaw v. Rhodes*, 1 M. & C. 135; 5 Cl. & F. 114. But the period of distribution will not be *accelerated* so as to take effect at the time when the accumulation ceases to be lawful. *Nettleton v. Stephenson*, 3 De G. & Sm. 366.

In computing the period of accumulation from a testator's death, the day of his death is to be excluded. *Gorst v. Lowndes*, 11 Sim. 434.

Time allowed for Accumulation—Excess.] Only one of the several periods allowed for accumulation can be taken. Thus in a will an accumulation cannot be directed for twenty-one years after the testator's death and thenceforth during the minority of the person entitled under the limitation. *Wilson v. Wilson*, 1 Sim., N. S. 288; *Jagger v. Jagger*, 25 Ch. D. 729.

The act has made no difference with respect to trusts for accumulation capable of enduring beyond the period allowed by the rule against perpetuities, that is, lives in being and twenty-one years after. Such trusts would have been absolutely void before the act, and are not the less so since the act. *Ld. Southampton v. Marq. Hertford*, 2 V. & B. 54; *Marshall v. Holloway*, 2 Sw. 450; *Browne v. Stoughton*, 14 Sim. 369; *Boughton v. James*, 1 H. L. C. 406; *Turrin v. Newcome*, 3 K. & J. 16. Thus a trust to accumulate during successive minorities, which may endure for an indefinite period, would have been void before the act, and is so now. *Scarisbrick v. Skelmersdale*, 17 Sim. 187; comp. *Williams v. Lewis*, 6 H. L. C. 1013. So a trust for accumula-

tion during the minority of an unborn child. *Haley v. Bannister*, 4 Madd. 275; *Ellis v. Maxwell*, 3 Bea. 587. See *Bryan v. Collins*, 16 Bea. 17. A direction to accumulate, which is not absolutely void as infringing the rule against perpetuities, but is only *in excess* of the period allowed by the act, will be good for such period and void only for the excess. *Griffiths v. Vere*, 9 Ves. 127; *Longdon v. Simson*, 12 Ves. 295; *Marshall v. Holloway*, 2 Sw. 450.

When the accumulation ceases to be lawful under the act, but the period of distribution has not arrived, the question arises, who is entitled in the meantime to the future income of the original fund, and also to the income of the accumulations lawfully made? Where there is a vested interest *in possession* in the property, subject only to the trust for accumulation, the person so entitled in possession will take such future income and the income of the accumulations. *Trickey v. Trickey*, 3 M. & K. 560 (marg. note is incomplete); *Re Chulow*, 1 J. & H. 639. See *Combe v. Hughes*, 2 D., J. & S. 657. But if there is no one so entitled by reason of the possession or vesting under a will being postponed until the expiration of the period of accumulation, the future income, after the legal period for accumulation has ceased, of the original fund or property, *if personal*, and of the accumulations, will go to the residuary legatee, if any (*Ellis v. Maxwell*, 3 Bea. 587; *Jones v. Maggs*, 9 Ha. 605); *Simmons v. Pitt*, L. R., 8 Ch. 978; *if real*, to the heir, where the will is subject to the old law, even though the accumulations may be specifically bequeathed and there is a residuary devisee. *Smith v. Lomas*, 10 Jur., N. S. 742; see *Nettleton v. Stephenson*, 3 De G. & Sm. 366; *Green v. Gascoigne*, 4 D., J. & S. 565. But where the will is under the 1 Vict. c. 26, a residuary devise has the same operation on realty as a residuary bequest on personalty (s. 25). *Cogswell v. Armstrong*, 2 K. & J. 227; *Carter v. Haswell*, 3 Jur., N. S. 788. But if the residue be not given *absolutely*, but only the *interest* of it in the first instance to a tenant for life, such future income, and income of accumulations, will be added to the *capital of the residue*, the interest only going to the person entitled to the interest of the residue. See *Crawley v. Crawley*, 7 Sim. 427; *Morgan v. Morgan*, 4 De G. & Sm. 164.

Where there is no residuary devise or bequest the income beyond the authorized period of accumulation goes to the next of kin or heirs, as the case may be, according to the nature of the property. See *Nettleton v. Stephenson*, 3 De G. & Sm. 366; *Simmons v. Pitt*, L. R. 8 Ch. 978; *Talbot v. Jevers*, L. R. 20 Eq. 255, 261; *Weatherall v. Thornburgh*, 8 Ch. D. 261.

In cases where the *residue itself*, or the surplus income of the residue, is directed to be accumulated beyond the permitted period, the income of such residue or surplus, if personalty, after such period, belongs to the next of kin of the testator (*Macdonald v. Bryce*, 2 Ke. 276; *Oddie v. Brown*, 4 D. & J. 179; *Burt v. Sturt*, 10 Ha. 425); if realty, to his heirs (*Halford v. Stains*, 16 Sim. 488; *Eyre v. Marsden*, 2 Ke. 564; see *Sewell v. Denny*, 10 Bea. 315); if the residue consists partly of real and partly of personal estate, the income of it

will go to the heirs and next of kin according to their interests in such residue. *Edwards v. Tuck*, 3 D., M. & G. 40.

In *Pursell v. Elder*, 3 Sc. Sess. Ca., 3rd Ser., H. L. 59, under a Scotch will (made before the 11 & 12 Vict. c. 36, *ante*, p. 5), by which the realty and personalty were given so as to form one blended mass, and accumulations were directed for a period which became in excess of the permitted period, one of the questions in the case was, to whom the accumulations went which were in excess of this period, there not being any residuary gift. It was held that the accumulations of the personal estate went to the next of kin of the testator, no question arising as to the real estate, to which the Thellusson Act did not at that time apply.

In those cases in which the heir, if living, would be entitled to the income of property after the accumulation ceases to be lawful, his *personal* representatives would seem to be entitled in the event of his death. *Sewell v. Denny*, 10 Bea. 315.

Accumulations for Payment of Debts and Portions.] The provision in the act for payment of debts applies as well to the debts of the grantor or testator as to those of third persons (*Barrington v. Liddell*, 2 D., M. & G. 480), and has reference not only to debts due at the testator's death, but also to contingent liabilities becoming debts after his decease. *Varlo v. Faden*, 1 D., F. & J. 211. Portions for children are generally understood to mean sums secured to them out of property springing from or settled upon their parents, though there might be cases where the provisions for children out of property in which their parents took no interest, might be called portions. Per Turner, V.-C., *Jones v. Maggs*, 9 Ha. 605. There is, however, some difficulty in saying what are portions within the meaning of the act. See *Edwards v. Tuck*, 3 D., M. & G. 57; *Bacon v. Proctor*, T. & R. 31. A direction to accumulate the income of a testator's entire property, or of the residue of it, and to add the accumulations to capital, followed by a bequest of the entire fund, comprising accumulations and capital, is not a provision for raising portions within the act. *Eyre v. Marsden*, 2 Ke. 564; *Bourne v. Buckton*, 2 Sim., N. S. 91; *Edwards v. Tuck*, 3 D., M. & G. 40; *Jones v. Maggs*, 9 Ha. 605; comp. *Middleton v. Losh*, 1 Sm. & G. 61. This is, in fact, a mode of increasing the amount of the fund which the children are to take. 2 Sim., N. S. 99. See *Burt v. Sturt*, 10 Ha. 415; *Drewett v. Pollard*, 27 Bea. 196; *Re Clulow*, 1 J. & H. 639; *Watt v. Wood*, 2 Dr. & Sm. 56. In *Mathews v. Keble* (L. R., 3 Ch. 691), the accumulated investments were bequeathed after the testator's son's death to his children, and it was held that such accumulations were not within this exception of the act. See also *Wildes v. Davies*, 1 Sm. & G. 475.

It was at one time a question whether the portions referred to were exclusively portions *previously charged* upon the property by some instrument prior to the will or settlement directing the accumulations (*Holford v. Stains*, 16 Sim. 488, 496), or, exclusively, portions

charged by the very will or instrument itself (*Bourne v. Buckton*, 2 Sim., N. S. 91; *Barrington v. Liddell*, 10 Ha. 429, 431); or whether the section contemplated portions of both kinds. The last construction has eventually been held to be the true one. *Barrington v. Liddell*, 2 D., M. & G. 480, 498; *Beech v. Ld. St. Vincent*, 3 De G. & S. 678; *Middleton v. Losh*, 1 Sm. & Giff. 61. Where a will containing an accumulation clause declares the trusts of such accumulations so as to meet *alternative* events, the question whether such trusts fall within the exception of the Thellusson Act in favour of portions depends upon the events which *actually occur*. *Re Clulow*, 1 J. & H. 639.

The words "child or children" are not confined to children living at the date of the deed or at the death of the testator, but will comprise children who may afterwards come into existence. *Beech v. Ld. St. Vincent*, 3 De G. & Sm. 678, 685. Where a gift is to a class, *e.g.*, grandchildren, to bring the case within the exception in the second section it must be shown that *all* the grandchildren are children of a person or persons taking an interest under the instrument. *Eyre v. Marsden*, 2 Ke. 573; *Edwards v. Tuck*, 3 D., M. & G. 40; *Burt v. Sturt*, 10 Ha. 415; comp. *Middleton v. Losh*, 1 Sm. & G. 61. The interest which parents are required to take under the second section is not restricted to an interest in the *very property* in respect of which the accumulations are directed, but may be an interest in any other property comprised in the instrument directing the accumulations. *Barrington v. Liddell*, 2 D., M. & G., 480; see *Burt v. Sturt*, 10 Ha. 415; *Edwards v. Tuck*, 3 D., M. & G. 40, overruling on this point *Morgan v. Morgan*, 4 De G. & S. 164; *Bourne v. Buckton*, 2 Sim. N. S. 91. Any interest, however small, given to the parents will, it seems, be sufficient. *Evans v. Hellier*, 5 Cl. & F. 114, 126; see *Barrington v. Liddell* and *Edwards v. Tuck*, *sup.*, and comp. *Burt v. Sturt*, *sup.*

ANNUITIES AND RENT-CHARGES.

CH. 1.—OF ANNUITIES AND RENT-CHARGES IN GENERAL, p. 10.

CH. 2.—OF ANNUITY DEEDS, p. 13.

CH. 3.—OF ANNUITIES AND RENT-CHARGES UNDER WILLS, p. 15.

CHAPTER I.

OF ANNUITIES AND RENT-CHARGES IN GENERAL.

<i>Nature of</i> 10 <i>Where Person only charged</i> 10 <i>Where issue out of Lands</i> 10 <i>How may be Limited</i> 11 <i>Annuity in Fee Tail, Life, or Years</i> 11 <i>Statute of Uses</i> 11 <i>Under Lands Improvement Act</i> . 11 <i>Leviable upon any part of Lands charged</i> 11 <i>Grant by joint Tenants</i> 11 <i>By Co-parceners</i> 11	<i>Remedies for recovery of</i> 11 <i>Distress—Suit in Equity</i> 11 <i>Grants of Rent-Charges by Railway Companies</i> 12 <i>Conveyancing Act, 1881</i> 12 <i>Powers of Distress, Entry, &c.</i> 12 <i>Release and Extinguishment of</i> 12 <i>Purchase or devise of part of Land</i> 13 <i>Descent of</i> 13
---	---

Nature of.] An annuity is, in the strict legal sense of the term, a yearly payment of a certain sum of money granted by one person to another in fee, for life, or for years, charging the *person* of the grantor only (Co. Litt. 144 b); such payment, however, not being the *interest* of a mere debt. *Winter v. Mouseley*, 2 B. & Al. 802. Where the annuity issues out of land, with a clause of distress, it is a rent-charge; without such a clause, a rent-seck, for the recovery of which, however, a right of distress is given by the 4 Geo. 2, c. 28, s. 5, and the court will not in general appoint a receiver, as the annuitant may distrain. *Sollory v. Leaver*, L. R., 9 Eq. 22; *Kelsey v. Kelsey*, L. R., 17 Eq. 494; unless where the rents are insufficient, or the annuity has been long in arrear, so that a distress would not be sufficient to enable the annuitant to raise the amount due, *ib.*, 500.

In the case of an annuity granted by way of rent-charge, it may be limited so as to charge both the land and person of the grantor or the land only (see Litt. s. 220; 2 Byth. Conv., Sweet's ed., 5), and the annuitant may proceed at his option against either the land or person chargeable. *Turner v. Turner*, Amb. 782. An annuity, although merely personal, may be granted in fee, in tail, for life or for years,

and, if granted with words of inheritance, it descends to the *real* and not the personal, representatives of the grantee. *Turner v. Turner*, *sup.*; *E. of Stafford v. Buckley*, 2 Ves. sen. 179; see *Ramsay v. Thorngate*, 16 Sim. 575; Wms. Exors. 8th ed. 816. But an annuity (though charged on real and personal estate) to A. for ever (without words of inheritance) goes to the personal representatives of A. *Taylor v. Martindale*, 12 Sim. 158. So an annuity to A. "*or his heirs*," the words in italics being words of substitution. *Parsons v. Parsons*, L. R., 8 Eq. 260. The *heirs* of the grantor are not bound by the grant of an annuity or rent-charge unless named. Co. Litt. 144 b; and see *Ib.* n. (2).

Rents are within the Statute of Uses (27 Hen. 8, c. 10, s. 3), and are executed in the same way as uses of corporeal hereditaments. Thus, where lands are conveyed to A. and his heirs, to the use that B. and his heirs may receive a certain rent, the use is executed in B. and his heirs (Sug. Gilb. Uses, 193); and if in such a case a declaration is superadded that B. and his heirs shall be seised to the use of C. for life with remainders over, C. and the remaindermen take only the trust of the rent. *Chaplin v. Chaplin*, 3 P. W. 229.

As to rent-charges under the Lands Improvement Act, 1864 (27 & 28 Vict. c. 114, see ss. 51 *et seq.*), memorials of the absolute orders of the commissioners creating them are to be registered in the office of the Land Registry in England, and in Ireland in the proper office for the registration of deeds and wills (s. 56). The whole of a rent-charge issuing out of particular lands is leviable upon any part of such lands though belonging to different persons. 1 Roll. Abr. 671, fol. 12. A rent-charge granted by one of several joint tenants affects his interest while living, but is no charge upon the property if he die leaving any other of his joint tenants surviving, but is a charge upon the whole property if he himself be the last survivor. Litt. s. 286; Co. Litt. 184 b. But where one of several *co-parceners* grants a rent-charge and dies, the survivors are bound by it. *Ib.*

Remedies for Recovery of.] The remedies for the recovery of a rent-charge are by distress (as to which see 2 Byth. Conv. Sweet's ed. p. 32 *et seq.*) and entry on the premises charged pursuant to the clause or proviso for entry; usually, if the rent-charge should be in arrear for a certain number of days. *Ib.* p. 46. Where there is no clause of distress, see *ante*, p. 10. It has been held also, that there is a remedy in equity in some cases for the recovery of arrears (*Cupit v. Jackson*, M'Clel. 495; see *D. of Leeds v. Corp. New Radnor*, 2 B. C. C. 338, 518); but this would seem to be only in cases where the remedy at law is imperfect. See 2 Byth. Conv. 50; *Brady v. Fitzgerald*, 12 Ir. Eq. 273. The court will sometimes order the property to be sold to satisfy the arrears. *White v. James*, 26 Bea. 191; *Horton v. Hall*, L. R., 17 Eq. 437. But not where the charge is upon the income of property and it is settled in strict settlement. *Graves v. Hicks*, 11 Sim. 551; *Taylor v. Taylor*, L. R., 17 Eq. 324.

See now Conveyancing Act, 1881, *post*, p. 12.

Where land had been conveyed to a railway company in consideration of a rent-charge, with power of distress on the land conveyed, or any other lands of the company, for arrears of the rent-charge; the court gave the grantee leave to distrain on the land conveyed by him to the company, notwithstanding the appointment of a receiver of the tolls, profits and income of the undertaking of the company. *Eyton v. Denbigh, &c., R. Co., L. R., 6 Eq. 14.* In a later case, arising out of the transactions of the same company, which had also assigned superfluous lands and chattels to trustees for the benefit of creditors of the company, the court, though allowing the grantee of the rent-charge (who had in this case no express power of distress) to distrain on the land conveyed by him to the company, refused him permission to do so on the property comprised in the *trust deed*. *Ib.; Rickman v. Johns, ib. 488.*

Conveyancing Act, 1881.] By the Conveyancing Act, 1881, 44 & 45 Vict. c. 41, s. 44—(1.) Where a person is entitled to receive out of any land, or out of the income of any land, any annual sum, payable half-yearly or otherwise, whether charged on the land or on the income of the land, and whether by way of rent-charge or otherwise, not being rent incident to a reversion, then, subject and without prejudice to all estates, interests, and rights having priority to the annual sum, the person entitled to receive the same shall have such remedies for recovering and compelling payment of the same as are described in this section, as far as those remedies might have been conferred by the instrument under which the annual sum arises, but not further. The remedies given by the Act are,

(2.) A power of distress if the annual sum or any part thereof is unpaid for twenty-one days.

(3.) A power of entry into possession if the annual sum or any part thereof is unpaid for forty days, such possession when taken shall be without impeachment of waste.

(4.) A power, whether taking possession or not, by deed to demise the land charged, or any part thereof, to a trustee for a term of years on trust, by mortgage, or sale, or demise, to raise and pay the annual sum and all arrears thereof due or to become due, and all costs.

(5.) This section applies only if and as far as a contrary intention is not expressed in the instrument under which the annual sum arises, and shall have effect subject to the terms of that instrument and to the provisions therein contained; and

(6.) Only where that instrument comes into operation after the commencement of this Act. (1 January, 1882.)

S. 45 enables the owner of the land, subject to a quit rent, chief rent-charge, or other annual sum, to redeem the same, the price to be fixed by the copyhold commissioners.

Release and Extinguishment of.] Formerly a release of *part* of the land from a rent-charge to which the land was subject was an extinguishment of the rent-charge. See 5 Bac. Ab. 6th ed. 694, 713.

Now, by the 22 & 23 Vict. c. 35, s. 10, such a release shall not extinguish the whole rent-charge, but shall only bar the right to recover any part of the rent-charge out of the hereditaments released without prejudice to the rights of all persons interested in the hereditaments remaining unreleased, and not concurring in or confirming the release. The effect of this section is that where the owner of land, subject to a rent-charge, conveys the land in separate portions to different persons, and the person entitled to the rent-charge joins in the conveyance of one only of such portions and releases it from the rent-charge, without the concurrence of the person to whom the other portion has been conveyed, the whole of such rent-charge is not extinguished, but only a proportionate part of it can be recovered from the person to whom the unreleased portion was conveyed. *Booth v. Smith*, 14 Q. B. D. 318. A release of part of the *rent-charge* extinguishes such part only. Co. Litt. 148 a; 5 Bac. Ab. 6th ed. 694.

If a person entitled to a rent-charge purchase any *part* of the land out of which it issues, the whole rent-charge is at law extinguished. Litt. s. 222. So if there be a devise to the grantee of part of the land charged (*Dennett v. Pass*, 1 B. N. C. 388), but otherwise where the rent-charge descends upon the owner of part of the land, or part of the land descends upon the owner of the rent-charge, for descent is the act of the law, which injures no man, and in such cases there will be an apportionment. Litt. s. 224; Co. Litt. 149 b.

The grant of a rent-charge to a man and his heirs determines by his death intestate and without heirs. Co. Litt. 298 a, n. (2); *Reeve v. Att.-Gen.*, 2 Atk. 223.

As to the apportionment of rent-charges and annuities, see tit. "APPORTIONMENT."

CHAPTER II.

OF ANNUITY DEEDS.

<i>Enrolment formerly necessary</i>	13	<i>Repurchase or Redemption</i>	14
<i>Registration necessary to bind Lands</i>	14	<i>Where Annuities cumulative</i>	14
<i>Does not apply to Wills</i>	14	<i>Conveyancing Act, 1881</i>	14

PRIOR to the 17 & 18 Vict. c. 90, it was necessary, under the 53 Geo. 3, c. 141, to enrol memorials of annuity deeds (with some exceptions) in Chancery within thirty days after their execution. By the last-mentioned act various minute particulars as to dates, names of parties, witnesses, consideration, &c., were required to be inserted in the memorial; omissions or inaccuracies in which were often fatal to the validity of the annuity deed. See the cases collected,

Chitty's Statutes, 3rd ed., vol. i., pp. 72 *et seq.* This act, however (with some other explanatory acts), was repealed by the 17 & 18 Vict. c. 90, repealing the usury laws. Enrolment in Chancery of annuity deeds is no longer necessary, therefore, to give them validity. By the 18 & 19 Vict. c. 15, however, annuities or rent-charges granted *otherwise* than by *marriage settlement* for lives or years, or greater estate determinable on lives, will not affect any lands or hereditaments as to purchasers, mortgagees, or creditors, unless a minute containing the name, place of abode, and title or calling of the person whose estate is to be affected, date of the assurance, and amount of annuity, is duly registered (s. 12). The act does not apply to annuities or rent-charges given by will (s. 14). Annuity deeds although unregistered are valid as against subsequent incumbrancers who take with notice of them, and against the trustee in bankruptcy of the grantor. *Greaves v. Tofield*, 14 Ch. D. 563.

Where in the grant of an annuity there is a contract of re-purchase, the terms of such contract must be strictly complied with. *Joy v. Birch*, 4 Cl. & F. 57; see Sug. Law of Prop. 667 *et seq.* The grant of an annuity with a right of re-purchase on payment of the consideration money and all arrears of the annuity, does not create the relation of debtor and creditor so as to give the grantor, upon re-purchase of the annuity, the right to a policy effected by the grantee on the life of the grantor as a security or indemnity; or, after the death of the grantor, to entitle his representatives to the surplus proceeds of the policy after satisfaction of the consideration money and all arrears of the annuity. *Gottlieb v. Cranch*, 4 D., M. & G. 440; *Knox v. Turner*, L. R. 5 Ch. 515; *Preston v. Neele*, 12 Ch. D. 760. See *Lea v. Hinton*, 5 D., M. & G. 823; *Drysdale v. Piggott*, 8 D. M. & G. 546; *Courtenay v. Wright*, 2 Giff. 337.

Annuities granted by two or more deeds may, like annuities or legacies given by will, be cumulative if an intention to that effect can be collected; as where they are of different amounts, are differently secured, and, as regards females, differently settled—for instance, to their separate use by one deed, but not by the others; or to their separate use with restraint on anticipation by one deed, and to their separate use by the other. *Palmer v. Newell*, 8 D., M. & G. 74; *Paget v. Grenfell*, L. R., 6 Eq. 7.

As to the powers given by the Conveyancing Act, 1881, see *ante*, p. 12.

CHAPTER III.

OF ANNUITIES AND RENT-CHARGES UNDER WILLS.

<i>Generally</i>	15	<i>Payable out of Corpus, &c.—continued.</i>	
<i>Are in general considered as</i>		<i>Payable out of Rents or by Sale</i>	19
<i>Legacies</i>	15	<i>Trust to keep down Annuities ...</i>	19
<i>Where liable to Income Tax and</i>		<i>Intention that Corpus should go</i>	
<i>Legacy Duty</i>	15	<i>over intact</i>	19
<i>Whether perpetual or for Life only..</i>	16	<i>Charge on Income, Rents, &c....</i>	20
<i>Charge on Land—Pur autre</i>		<i>Fund to produce Annuity.....</i>	20
<i>Vic.</i>	16	<i>Reduction under Act of Parlia-</i>	
<i>Direction to Purchase</i>	16, 17	<i>ment</i>	21
<i>Gift of Produce of Fund, gift of</i>		<i>Receipt of reduced Annuity ...</i>	21
<i>Fund itself</i>	16	<i>Arrears by reason of charges ...</i>	21
<i>To pay out of Property</i>	17	<i>On what property a charge</i>	21
<i>After Life Interest</i>	17	<i>Specific—Demonstrative</i>	21
		<i>Abatement of</i>	21
<i>Joint or several</i>	18	<i>Commencement—Payment</i>	21
<i>Lives and Life of Survivor</i>	18	<i>One Year after Death</i>	21
<i>To A. and her Children</i>	18	<i>Made Payable Quarterly, &c....</i>	21
<i>To Husband and Wife and Sur-</i>		<i>When charged on Reversionary</i>	
<i>vivor</i>	18	<i>Property</i>	22
<i>To several respectively and Share</i>		<i>Several Properties—Contribu-</i>	
<i>of each to Children</i>	18	<i>tion</i>	22
<i>Payable out of Corpus or Income only</i>	19	<i>Purchase of Government An-</i>	
<i>Annuity a charge on Property</i> .	19	<i>nuities</i>	22

Generally.] As a general rule *annuities* are comprised under the denomination of, and are subject to the same rules as, *legacies* (*Sibley v. Perry*, 7 Ves. 534; *Swift v. Nash*, 2 Ke. 20; *Ward v. Grey*, 26 Bea. 491), unless it can be collected from the will that the testator intended to make a distinction between them. See *Gaskin v. Rogers*, L. R., 2 Eq. 284.

An annuity will be liable to income tax, though made payable "without any deduction whatever." *Abadam v. Abadam*, 33 Bea. 475; see *Lethbridge v. Thurlow*, 15 Bea. 334; *Sadler v. Rickards*, 4 K. & J. 302. Unless in a previous part of the will there is a gift of an annuity free from income tax or other deductions. *Turner v. Mullineux*, 1 J. & H. 334. So the annuity will be subject to income tax where it is given free from deductions or abatements. *Gleadow v. Leatham*, 22 Ch. D. 269. But not where it is to be free from all taxes or deductions whatsoever. *Festing v. Taylor*, 3 B. & S. 217; *Ld. Lovat v. Duchess of Leeds*, 2 De & Sm. 62; *Re Bannerman's Estate*, 21 Ch. D. 105.

Under a bequest of a *clear* yearly rent-charge or annuity, the annuitant takes it free of legacy duty. *Baily v. Boulton*, 14 Bea. 595; *Haynes v. Haynes*, 3 D., M. & G. 590; *Re Coles' Will*, L. R., 8 Eq. 271. But otherwise where money is directed to be invested so as to produce a clear yearly sum, which is given to several in succession who stand in different degrees of relationship; as the duties in such a case would be different, it would be impossible to ascertain the

precise sum to be invested to answer the legacy duty in every case. *Sanders v. Kiddell*, 7 Sim. 536; *Pridie v. Field*, 19 Bea. 497.

Whether Perpetual or for Life only.] An annuity *eo nomine*, or specific sum per annum given generally, is for life only. *Savery v. Dyer*, Amb. 140; see *Blewitt v. Roberts*, Cr. & Ph. 274; *Kerr v. Middlesex Hospital*, 2 D., M. & G. 583; *Hicks v. Ross*, L. R., 14 Eq. 141. And if an annuity given *simpliciter* be charged on an estate in fee, it will only be a life annuity. *Mansergh v. Campbell*, 3 D. & J. 237; comp. *Stokes v. Heron*, 12 Cl. & F. 161. Even when an annuity is given specifically to one *for life*, and after his death to another generally, the latter has it for life only (*Yates v. Maddan*, 3 Mac. & G. 532; *Re Groves*, 1 Giff. 74; see *Lett v. Randall*, 2 D., F. & J. 388; *Yates v. Haddan*, 13 Jur. 331); or to one for life with remainder to a class, or the survivors or survivor of them (*Blewitt v. Roberts*, *sup.*; *Blight v. Hartnoll*, 19 Ch. D. 294. The cases of *Evans v. Walker*, 3 Ch. D. 211, and *Bent v. Cullen*, L. R., 6 Ch. 235, are *contra*, but were not followed in *Blight v. Hartnoll*, *sup.* The cases on the point, therefore, are not uniform. Where an intention to that effect can be collected from the will, the annuity in remainder will be perpetual. Thus, in *Mansergh v. Campbell*, 3 D. & J. 232, where an annuity was given to A. for life, then to her children for maintenance, and on the youngest child attaining twenty-one it was directed to be sold and the *proceeds* divided among the children, it was held that the annuity to the children was perpetual. See *Hedges v. Harpur*, *Hedges v. Blick*, 3 D. & J. 129, overruling S. C., 9 Bea. 479; *Pawson v. Pawson*, 19 Bea. 146. And under a devise of all the testator's property to A. "except 500*l.* a-year" to B., the annuity is perpetual. *Hill v. Rattey*, 2 J. & H. 634. A gift to a class for their maintenance and education is not perpetual, but for their joint lives and the lives and life of the survivors and survivor. *Wilkins v. Jodrell*, 13 Ch. D. 564.

If an annuity out of personal estate be given to one person during the life of another, and the latter be the survivor of the two, during the remainder of his life the representatives of the former will be entitled to it; but otherwise, if it be a rent-charge on real estate. *Savery v. Dyer*, Amb. 139; *In re Ord*, 12 Ch. D. 22. See *Bayne v. Crowther*, 20 Bea. 400; *Attwood v. Alford*, L. R. 2 Eq. 479.

If a *fund or money* be given to purchase an annuity, as the legatee will be entitled to the annuity absolutely, he may take the fund or money in lieu of the annuity to be purchased with it (*Ford v. Batley*, 17 Bea. 303; *Kerr v. Middlesex Hosp.*, 2 D., M. & G. 583; *Pawson v. Pawson*, 19 Bea. 146; *Ross v. Borer*, 2 J. & H. 469; cons. *Lett v. Randall*, 2 D., F. & J. 392), the whole of the principal being dedicated to the payment of the annuity. *Wakeham v. Merrick*, 37 L. J., Ch. 45. A bequest of the interest or produce of a fund *simpliciter*, without limitation as to continuance, is a gift of the fund itself. *Phillips v. Chamberlaine*, 4 Ves. 51; *Stokes v. Heron*, 12 Cl. & F. 161; see *Adamson v. Armitage*, 19 Ves. 416; *Wilson v.*

Maddison, 2 Y. C. C. 375. And where property is given in order to produce an annuity, *primâ facie* it will be a perpetual annuity. *Stokes v. Heron*, 12 Cl. & F. 161; see *ib.*, p. 192. And a gift of an annuity out of the dividends or interest of a fund is a gift of so much of the principal as will produce the annuity. *Bent v. Cullen*, L. R., 6 Ch. 235.

A direction to purchase an annuity for A., or a gift to him of a perpetual specific annuity, entitles him to receive such a sum as will purchase an annuity of that amount *in the funds*; for he is entitled to the best security. *Hill v. Rattey*, 2 J. & H. 634; see *Timins v. Stackhouse*, 27 Bea. 434. It makes no difference that there is a declaration in the will that he is not to receive the capital in lieu of the annuity. *Stokes v. Cheek*, 28 Bea. 620. And where the annuity is to be in trust for the separate use of a female, with restraint on anticipation, and she is *unmarried*, she will be entitled to the sum required to purchase it (*Re Browne's Will*, 27 Bea. 324); even though the trustees have a discretionary power as to its application for her maintenance in case of her incapacity or illness. *S. C.*, see *Stokes v. Cheek*, *sup.*; cons. *Power v. Hayne*, L. R., 8 Eq. 262. So a direction to purchase an annuity in government securities is a gift of a perpetual annuity (*Kerr v. Middlesex Hosp.*, 2 D., M. & G. 576; *Ross v. Borer*, 2 J. & H. 469; comp. *Re Groves*, 1 Giff. 74), and entitles the annuitant to receive the purchase-money if he chooses.

But a mere direction to pay an annuity *out of* a particular fund (*Wilson v. Maddison*, 2 Y. C. C. 372) or general effects (*Innes v. Mitchell*, 6 Ves. 464), or to invest in government securities sufficient to produce a particular sum per annum and pay it to the legatee (*Re Groves*, *sup.*), does not amount to a gift of a perpetual annuity, and such an annuity, if given to one for life, with remainder to another, or a class, is limited to their respective lives. *Lett v. Randall*, 2 D., F. & J. 388. See *Warren v. Wright*, 12 Ir. Ch. R. 401; comp. *Mansergh v. Campbell*, 3 D. & J. 232. An annuity directed to be purchased out of the proceeds of the sale of an estate in which a life interest is given to another, being in the nature of a legacy, the representatives of the annuitant will be entitled to it if he dies in the lifetime of the tenant for life. *Bayley v. Bishop*, 9 Ves. 6; see *Yates v. Compton*, 2 P. W. 308; *Pulmer v. Craufurd*, 3 Sw. 482. In *Day v. Day*, 1 Drew. 569, there was a direction, after the death of the tenant for life, to lay out part of the property in the purchase of an annuity *for the life of A.*, with a gift over of the annuity if A. should assign, dispose of, or anticipate it. A. died in the lifetime of the tenant for life without having assigned, &c., the annuity, and the portion set apart to purchase it, was held to vest in his representatives. In *Power v. Hayne*, L. R., 8 Eq. 262, however, which was not distinguishable from *Day v. Day*, Malins, V.-C., declined to follow it, and held, that on A.'s death in the lifetime of the tenant for life, there being no express gift over in that event, there was an intestacy as to the share directed to be applied in the purchase of the annuity. In *Hatton v. May*, 3

Ch. D. 148, Malins, V.-C., decided in accordance with *Power v. Hayne*, *sup.*

Joint or several.] An annuity to two "during their natural lives" is joint and does not lapse by the death of one in the lifetime of the testator. *Alder v. Lawless*, 32 Bea. 72. So an annuity to three during their lives and the lives of the survivors and survivor during their and his natural life, and after the decease of the survivor, over, vests in them as joint tenants. *Pearson v. Cranswick* and *Cranswick v. Pearson*, 31 Bea. 624. But in commenting on this and some other similar cases in *Bryan v. Twigg* (L. R., 3 Ch. 183), Rolt, L.J., observes, that the representatives of the deceased annuitant were not before the court, and that the question was between the survivors and persons claiming under the gift over. *Ib.*, p. 186; see *Blewitt v. Roberts*, Cr. & Ph. 274, and the cases, *infra*.

An annuity to A., in the event of her death to her children for their maintenance and education, is not confined to the minorities of the children, but is payable to them during their joint lives and to the survivors and survivor of them during their lives or his life, the children for the time being entitled, taking as joint tenants. *Soames v. Martin*, 10 Sim. 287; *Wilkins v. Jodrell*, 13 Ch. D. 564; see *Gardner v. Barker*, 18 Jur. 508; and *Knapp v. Noyes*, Amb. 661.

An annuity to A., and her children for their joint maintenance enures for the benefit of all jointly and of the survivors and last survivor. *Wilson v. Maddison*, 2 Y. C. C. 372. If given to the husband and wife jointly and to the survivor, this does not make them tenants by entireties so as to entitle the wife surviving to arrears accrued during their joint lives. *Knox v. Wells*, 2 H. & M. 674. The adultery of the wife, and dissolution of the marriage in consequence, will entitle the husband to the whole annuity if derived under the will of his father, the benefit of the son being the motive of the gift. *Ib.*

Where interests are given to several for their lives, and after *their deaths respectively* the share of each is given to his children or issue, this will in general be construed distributively, the share of each on his death devolving on his children or issue. *Brown v. Thompson*, 11 Jur., N. S. 922. See *Bignold v. Giles*, 4 Drew. 343; *Ayscough v. Savage*, 13 W. R. 373; *Wills v. Wills*, L. R., 20 Eq. 342. And in cases in which the representatives of a deceased annuitant have raised the question as to the devolution of his share, it has been held that an annuity to two, or two equally share and share alike, to continue during their joint lives and the life of the survivor, is a gift to them as tenants in common, and not as joint tenants. The *share* of the one first dying therefore goes to his representatives during the life of the other. *Jones v. Randall*, 1 J. & W. 100; *Eales v. E. Cardigan*, 9 Sim. 384; *Bryan v. Twigg*, L. R., 3 Ch. 183 (comp. *Armstrong v. Eldridge*, 3 B. C. C. 215; *Hatton v. Finch*, 4 Bea. 186; and see *Lill v. Lill*, 23 Bea. 446; *Walmsley v. Foxhall*, 1 D., J. & S. 605), though there would seem not to be much difference between *Jones v. Randall*

and cases of that class and *Cranswick v. Pearson*, ante, p. 18, and cases of that class. See post, tit. "WILLS," ch. 24.

Payable out of Corpus or Income.] It frequently becomes an important question, and sometimes a difficult one to determine, whether, in the event of the *income* of a fund becoming insufficient to pay the annuity, the annuitant has a right to resort to the capital fund or corpus itself to make good the deficiency.

In the absence of any special direction in the will, the general rule on the subject is, that when the annuity is charged upon real (*Picard v. Mitchell*, 14 Bea. 103) or personal (*Gordon v. Bowden*, 6 Madd. 342) property, the corpus will be liable if the income prove insufficient. Where an annuity is expressly charged on the corpus of an estate, subsequent words tending to show that the testator contemplated that it should abate in the event of the income of the property being insufficient, will not deprive the annuitant of the right to have the corpus applied towards making good any deficiency of income to meet the annuity. *Pearson v. Helliwell*, L. R., 18 Eq. 411.

The rule is the same where the annuity is to be paid out of rents, or disposal by valuation or auction of property (*Howarth v. Rothwell*, 8 Jur., N. S. 69), or out of the income of residuary estate, and after the decease of the annuitant the fund to fall into the general residuary personal estate, it will be a charge on the corpus. *Perkins v. Cooke*, 2 J. & H. 393. So where the annuity is charged upon real estate, with powers of entry, distress and sale. *Byam v. Sutton*, 19 Bea. 556 (comp. *Taylor v. Taylor*, L. R., 17 Eq. 324). So if the trusts of the will are to receive the rents and pay the annuity and raise a sum of money, and after performance of these trusts to assign over the premises, or so much as shall be undisposed of. *Phillips v. Gutteridge*, 8 Jur., N. S. 1196. And a direction to convert and invest enough to produce a certain annuity and pay it to A. for life, with a gift over of the residue, makes the annuity a charge on the corpus. *Percy v. Percy*, 35 Bea. 295; see *Hickman v. Upsall*, 2 Giff. 124; *Prowett v. Prowett*, 12 W. R. 819. So if the annuity is payable out of a fund to be provided by an investment for payment of it. *May v. Bennett*, 1 Russ. 370; *Mills v. Drewitt*, 20 Bea. 632; *Wright v. Callender*, 2 D., M. & G. 652; *Carmichael v. Gee*, 5 App. C. 588; see *Miner v. Balduin*, 1 Sm. & G. 522. The rule is the same where there is a direction to pay it out of income, and from and after the payment of the annuity and subject thereto the capital fund is given over. *Birch v. Sherratt*, L. R., 2 Ch. 644; *Prowett v. Prowett*, 12 W. R. 819. So where a testator bequeaths life annuities to various persons, and then bequeaths his general personal estate to trustees, "upon trust out of the income thereof to pay and keep down" the annuities, and "subject thereto" upon certain trusts. *Mason v. Robinson*, 8 Ch. D. 411; comp. *Salvin v. Weston*, 12 Jur., N. S. 700.

But where there was a devise to trustees in trust to pay an annuity out of rents, and subject to the trusts aforesaid the residue of the rents was given over, it was held that the annuity was not charged on the

corpus. *Sheppard v. Sheppard*, 32 Bea. 194; comp. *Phillips v. Gutteridge*, 8 Jur., N. S. 1196. And if an intention can be collected that the annuity is to be paid out of the rents and profits only as they arise or accrue, the annuity will not be a charge on the corpus, but a continuing charge on the income until the annuity is satisfied. *Booth v. Coulton*, L. R., 5 Ch. 684. So where a testator devises his real estate, subject to and charged with annuities, with powers of distress and entry, the arrears and the annuities are not charged upon the corpus, but upon the income, and must be paid out of the income and future income, so far as any might be required. *Taylor v. Taylor*, L. R., 17 Eq. 324. Where a testator directed his trustees to pay an annuity out of the rents and profits of a trust estate by half-yearly payments, and he bequeathed the remainder of such rents and income in trust for his sister for life, with remainder to her children, it was held that the annuity was a continuing charge on the rents and profits. *Wormald v. Muzeen*, 17 Ch. D. 167. Where, however, there is a charge of an annuity on rents and the property is given over "from and immediately after" the death of the annuitant, the annuity is only a charge on rents accruing during the life of the annuitant. *Foster v. Smith*, 1 Ph. 629. See *Miller v. Huddleston*, 3 Mac. & G. 513, 530; *Salvin v. Weston*, 12 Jur., N. S. 700; *Clifford v. Arundell*, 27 Bea. 209. See *Forbes v. Richardson*, 11 Ha. 357. If an annuity be given to be issuing and payable out of leaseholds and personalty, with power to recover by distress or sale, as rents are recoverable (*Addcott v. Addcott*, 29 Bea. 460), or out of the annual income of a given fund, the surplus income of the fund being given over during the annuitant's life and the residue of the fund after his decease (*Stelfox v. Sugden*, Johns. 234; see *Bright v. Larcher*, 3 D. & J. 148), the annuity will be chargeable on the income only. So where an intention appears, that on the death of the annuitant the estate or property, the income of which is applicable to the payment of the annuity, shall go over intact and not subject to any arrears. *Foster v. Smith*, sup. *Earle v. Bellingham*, 24 Bea. 445. So where the testator does not give an annuity, but directs a sum to be set apart sufficient to pay an annual sum, and then directs the income of the sum set apart to be paid to a person for life. *Baker v. Baker*, 6 H. L. C. 616; see *Michell v. Wilton*, L. R., 20 Eq. 269; *Sheppard v. Sheppard*, 32 Bea. 194.

Where, however, there is in effect a direction to invest sufficient of the testator's estate to produce an annuity it is a charge on the corpus. *Gee v. Mahood*, 11 Ch. D. 891, 894. Where a sufficient sum is directed to be set apart to produce the annuity, and a fund is designated for the purpose, but is insufficient (*Wright v. Callender*, 2 D., M. & G. 652; *Miner v. Baldwin*, 1 Sm. & G. 522), or the fund set apart becomes insufficient by reason of a reduction of interest arising from the conversion of government stock or otherwise (*May v. Bennett*, 1 Russ. 370; *Mills v. Drewitt*, 20 Bea. 632; *Upton v. Vanner*, 1 Dr. & S. 594; *Brayne v. Rees*, 15 W. R. 195), the corpus is liable to make good the deficiency. *Ibid.* But where there is a direction to invest a specific sum, the interest to be paid to one person for life, with

remainder, as to the corpus of the fund, to others, and the rate of interest is reduced by act of parliament, the annuitant must submit to the abatement, and cannot come on the corpus. *Att.-Gen. v. Poulden*, 3 Ha. 555; *Mills v. Drewitt*, 20 Bea. 632.

Under a gift of an annuity to several, with, on the death of any, a gift over of his share; if there has been a deficiency so that the annuitants have not been paid in full, on the death of one, his share is not available to make good the deficiency, but devolves at once on the legatee in remainder. *Scott v. Salmond*, 1 M. & K. 363; see *Farmer v. Mills*, 4 Russ. 86; *Arnold v. Arnold*, 2 M. & K. 374.

Where an annuity is payable out of the corpus in the event of the interest being insufficient, if the annuitant accept during his life payment of a reduced annuity, without claiming to have the deficiency made good out of the capital, which he allows to be dealt with upon the footing that it is not liable, his representatives will be estopped from any claim. *Upton v. Vanner*, 1 Dr. & Sm. 594; comp. *Mills v. Drewitt*, 20 Bea. 632.

In general, interest on arrears of annuities will not be allowed where the annuities have been unpaid by reason of debts or charges on the property. *Torre v. Browne*, 5 H. L. C. 577; *Taylor v. Taylor*, 8 Ha. 120; *Mansfield v. Ogle*, 4 D. & J. 38; *Booth v. Coulton*, 2 Giff. 514.

On what Property a Charge.] With reference to annuities as well as legacies, the same questions may arise as to their being specific, demonstrative, or general. (See tit. "WILLS," where the cases are collected.) As a rule, bequests of annuities, or money to purchase annuities, are only general. *Alton v. Medlicott*, cited 2 Ves. sen., p. 417. But if the annuity be specifically given out of either land or the rents of land, or other specific fund, and the property or fund on which it is charged fails, the annuity will fail, as where it is given and charged upon and to be issuing and payable out of real estates. *Creed v. Creed*, 11 Cl. & F. 491; see *Dickin v. Edwards*, 4 Ha. 273. And an annuity may be demonstrative, that is, primarily payable out of an estate or fund, but secondarily out of the general estate, so that on failure of the first fund the annuity falls on the other. *Mann v. Copland*, 2 Madd. 223; see *Attwater v. Attwater*, 18 Beav. 330; *Paget v. Huish*, 1 H. & M. 663.

As to the abatement of annuities, see tit. "WILLS."

Commencement and Payment of.] Annuities as a rule commence from the death of the testator, and the first payment becomes due and is to be made one year after his death, no other time of payment being fixed. *Gibson v. Bott*, 7 Ves. 89; see *Collyer v. Ashburner*, 2 De G. & S. 404. Where the testator directs the annuity to be paid quarterly or monthly, the first payment to be made at the end of a quarter or month after his death, it will be payable at that time accordingly. *Houghton v. Franklin*, 1 S. & S. 390; *Storer v. Prestage*, 3 Madd. 167. Although there may be a direction for payment of the first

year's annuity *within* the year, the second year's annuity will not be due until the end of *that* year. *Irvin v. Ironmonger*, 2 R. & My. 531; see *Stamper v. Pickering*, 9 Sim. 176.

An annuity to be raised out of property, which is reversionary but capable of being sold under a power of sale, commences at the testator's death and may be raised by sale. *Pettinger v. Ambler*, 34 Bea. 542. If two or more properties belonging to different persons are liable to the annuity, they contribute according to the income of the properties respectively *de anno in annum*, although their *capitalized values* may be very different: for instance, one being mining property valued at seven years' purchase, and another agricultural land valued at thirty years' purchase. *Ley v. Ley*, L. R., 6 Eq. 174. And an annuity charged on property in which a life estate is given to one, with remainder to another, is a charge on both interests rateably according to their respective values. *Yates v. Yates*, 28 Bea. 637. As to the statutory bar to suits, &c., for the recovery of annuities, see tit. "STATUTE OF LIMITATIONS." It may not perhaps be out of place to mention that the 16 & 17 Vict. c. 45 (amended by 27 & 28 Vict. c. 43) now regulates the purchase of Government Annuities through the medium of savings banks.

APPORTIONMENT.

<i>In general, irrespective of Statute</i> ... 23 <i>Interest, Dividends, &c.</i> 23 <i>Annuities to Infants—Married Women</i> 23 <i>Rent</i> 24 <i>Lease by Tenant in Fee—for Life</i> 24 <i>Statutory Provisions</i> 24 11 <i>Geo. 2, c. 19</i> 24 <i>Rent payable to Tenant for Life—in Tail</i> 24 <i>Dower</i> 25 <i>Dividends</i> 25 4 § 5 <i>Will. 4, c. 22</i> 25 <i>Rents—Rent Charges—Annuities—Dividends</i> 25 <i>Lease after Act, under Power before</i> 25 <i>Parol Leases</i> 26 <i>Not under a Lease by Owner in Fee</i> 26	4 § 5 <i>Will. 4, c. 22—continued.</i> <i>Interests determining</i> 26 <i>Periodical Payments</i> 26 <i>Dividends</i> 26 33 § 34 <i>Vict. c. 35</i> 27 <i>Rents, &c. deemed to accrue from Day to Day</i> 27 <i>Apportioned part payable when whole due</i> 27 <i>Remedies for recovering</i> 27 <i>Interpretation of Rents, Annuities, Dividends</i> 27, 28 <i>Policies of Assurance</i> 28 <i>Express Stipulations</i> 28 <i>To what Property Act applies</i> . 28 <i>To what Instruments</i> 28 <i>As between what persons</i> 28 <i>Alienation of part of Property subject to entire rent</i> 29 <i>Apportionment by Inclosure Commissioners</i> 29
--	---

In general, irrespective of Statute.] Interest accruing *de die in diem* is apportionable irrespective of the Apportionment Acts presently noticed, although it may be expressly made payable half-yearly or quarterly (*Wilson v. Harman*, 2 Ves. sen. 678; *Banner v. Lowe*, 13 Ves. 135), as under a bond or mortgage (*Edwards v. Ctss. Warwick*, 1 B. P. C. 210), railway debentures or other similar instruments. *Re Rogers' Trusts*, 1 Dr. & Sm. 338; see *Ibbottson v. Elam*, L. R., 1 Eq. 188. But in general, other payments coming due at fixed periods were not apportionable between the representatives of the person entitled for life, who died between two periods of payment, and the person becoming entitled on his death to the future payments. In such cases there was no growing payment *de die in diem*, and nothing was due from the preceding day of payment until the next day of payment, when the whole became due. Thus the dividends of money directed to be laid out in land and temporarily invested were not apportionable. *Sherrard v. Sherrard*, 3 Atk. 502.

Nor was an annuity in general apportionable, unless given for the maintenance of an infant (*Hay v. Palmer*, 2 P. W. 501; see *Ex parte Smyth*, 1 Sw. 349, n.), or granted to a married woman living separate from her husband (*Howell v. Hanforth*, 2 W. B. 1016), but

otherwise if living with and supported by him. *Anderson v. Dwyer*, 1 Sch. & L. 301; 1 Sw. 350, n. In some cases also the income of a *charitable fund* was, and is, irrespective of the Apportionment Acts, liable to be apportioned between a deceased member of the class entitled to such income and his successor. *Att.-Gen. v. Smythies*, 16 Bea. 385.

With reference to rent, there was in general no apportionment. Thus, on the death of a lessor seized in fee, there was no apportionment between his real and personal representatives. It made no difference that the rent was reserved to the lessor, his *executors, administrators and assigns*. In such cases the heir or devisee took the rent accruing subsequently to the lessor's death (Co. Lit. 47a); but the executor was entitled to *arrears* accrued in his testator's lifetime (3 Bac. Ab. 63), but not to rent which accrued due on the *very day* of his death, for rent is not completely due until *midnight* (*Leftley v. Mills*, 4 T. R. 173), though dividends on stock are, and if the tenant for life die on the day they become due his executor will be entitled to them. *Paton v. Sheppard*, 10 Sim. 186; see *Wright v. Tuckett*, 1 J. & H. 266. Where a tenant for life made a lease under a power reserving rent, and died between two quarter days, or other periods of payment of rent, the rent accruing due on the quarter, or other day of payment, after his death was payable to the remainderman (*E. Strafford v. Lady Wentworth*, Pr. Ch. 355, cited 1 P. W. 180); but, in such cases, where the lease was *not* under a power *no rent* was payable, either to the remainderman or to the executors of the tenant for life, from the preceding day of payment up to his death. *Jenner v. Morgan*, 1 P. W. 392.

Various acts of parliament have been passed for remedying the inconveniences occasioned by these principles of law. The statute which henceforth will regulate all questions of apportionment is the 33 & 34 Vict. c. 35 (1st August, 1870), which will be stated hereafter. The previous acts, however (which are not repealed), and the more important decisions upon them, may be found useful. They have accordingly been referred to, although very briefly.

[11 Geo. 2, c. 19.] By this act the right was given to the executors or administrators of a *tenant for life*, in cases where the lease *determined* by his death, to recover the proportionate part of the rent from the last day of payment up to his death, or the whole if he died on the day it became due (s. 15). For a case to fall within this act it was necessary that the lease should *determine* by the death of the tenant for life. *Mills v. Trumper*, L. R., 4 Ch. 320.

A *tenant in tail* granting a lease which is void against the remainderman has been held to be within the act. *Whitfield v. Pindar*, cited 8 Ves. 311; *Paget v. Gee*, cited 3 Sw. 694; *Kevill v. Davies*, 15 Sim. 466. So a tenant for life, having a leasing power, but not properly executing it, as where he demises by parol instead of by deed. *Ex parte Smyth*, 1 Sw. 337. As to a tenant *pur autre vie*, see *Wykham v. Wykham*, 3 Taun. 316; *Mills v. Trumper*, L. R., 1

Eq. 671; 4 Ch. 320. This act applies in the case of lands of an intestate, subject to dower, being purchased under the compulsory powers of an act of parliament, one-third of the purchase-money being invested in the funds to meet the dower; and the representatives of the widow are entitled to an apportionment. *Harrop v. Wilson*, 34 Bea. 166. But this act does not apply to dividends and other periodical payments of the like nature. *Michell v. Michell*, 4 Bea. 549.

4 & 5 Will. 4, c. 22.] By the 4 & 5 Will. 4, c. 22, s. 1 (16 June, 1834), it is in substance enacted that rents reserved on leases of any lands, tenements or hereditaments which have been and shall be made, determining on the death of the person making them (though not strictly tenant for life), or on the death (*sic*) of the life or lives for which such person was entitled to such hereditaments, shall, so far as respects the rents reserved and the recovery of a proportion thereof by the person granting the same, his executors or administrators (as the case may be), be considered as within the provisions of the 11 Geo. 2, c. 19.

By section 2, rents reserved on any lease by a tenant in fee, or for any life interest, or by any lease granted under any power, rent-charges and other rents, annuities, pensions, dividends, moduses, compositions and all other payments of every description in the United Kingdom made payable or coming due *at fixed periods* under any instrument executed, or being a will coming into operation after the passing of the act, are to be apportioned on the death of any person interested in any such rents, &c., or on the determination by any other means whatsoever of his interest, between his executors or assigns, and the person thenceforth entitled to the rent, &c.

A mortgagee who is not in possession is not an assign of the mortgagor within the meaning of section 2. *Paget v. Anglesey*, L. R., 17 Eq. 283.

Under this section a lessor can recover against a lessee or assignee who assigns over during a current quarter, a proportionate part of the quarter's rent up to the time of the assignment over by him. *Swansea Bank v. Thomas*, 4 Ex. D. 94.

The act does not apply where there is an express stipulation that there shall be no apportionment, nor to annual sums made payable in policies of assurance (s. 3). See *Tyrrell v. Clark*, 2 Drew. 86. The act extends to Scotland. *Fordyce v. Bridges*, 1 H. L. C. 1.

The provisions of the act are extended to rent-charges, payable under the Tithe Commutation Act, 6 & 7 Will. 4, c. 71, s. 86, and under the Copyhold Enfranchisement Act, 4 & 5 Vict. c. 35, s. 50.

Rents are apportionable as between successive tenants in tail. *Kevill v. Davies*, 15 Sim. 466.

The act applies to rents reserved by lease granted *after* the passing of the act under a power in a settlement executed *before* the act (*Lock v. De Burgh*, 4 De G. & Sm. 470; *Plummer v. Whiteley*, Johns. 585; *Wardroper v. Cutfield*, 10 Jur., N. S. 194; *Llewellyn v. Rous*, L. R., 2 Eq. 27; see *Fletcher v. Moore*, 3 Jur., N. S. 458, explained in

Wardroper v. Cutfield, *sup.*) and to a tithe rent-charge payable under an award made under the 6 & 7 Will. 4, c. 71, where the life interest and interest in remainder in the tithes had been given by a will made before the 4 & 5 Will. 4, c. 22. *Heasman v. Pearse*, L. R., 8 Eq. 599. This act does not apply to rents payable under *parol* agreements. *Re Markby*, 4 M. & Cr. 484; *Cattley v. Arnold*, 1 J. & H. 651; *Mills v. Trumper*, L. R., 4 Ch. 320; *comp. Kevill v. Davies*, 15 Sim. 466; see now 33 & 34 Vict. c. 35, s. 2, *post*. There is no apportionment under either the act of Geo. 2 or Will. 4 between the *executors or administrators* and *heir* of lessor owner in fee. *Browne v. Amyot*, 3 Ha. 173; *Beer v. Beer*, 12 C. B. 60; *Re Clulow*, 3 K. & J. 689. The words of the act "rents reserved in a lease granted by a *tenant in fee*" apply to a case where the owner in fee, after granting a lease, gives by settlement, will or otherwise a *life estate* in the property subject to the lease, and other similar cases where the interest of the person entitled determines at his death. See *Browne v. Amyot*, 3 Ha. 182; *Re Clulow*, 3 K. & J. 694.

The act applies to an annuity charged on stock (*Carter v. Taggart*, 16 Sim. 447; *Tyrrell v. Clark*, 2 Drew. 86; see *Sheppard v. Wilson*, 4 Ha. 395), but not to an annuity or other payment *absolutely determining* by death or otherwise: for instance, a salary payable to an auditor during the joint lives of himself and his employer. *Lowndes v. E. Stamford*, 18 Q. B. 439; see *Reg. v. Lords of the Treasury*, 16 Q. B. 357; *Leathley v. French*, 8 Ir. Ch. R. 401. But in *Trimmer v. Danby*, 23 L. J., Ch. 979, where an annuity had been granted by will to A., the first payment of which was, by the direction of the court, to be made one year after the testator's death, and A. died just before the end of the year, it was held that the annuity was apportionable, although it absolutely ceased at A.'s death. See now 33 & 34 Vict. c. 35, s. 3, *post*.

Dividends declared by joint stock companies subject to the Companies Clauses Consolidation Acts are not due at fixed periods within the meaning of the act of Will. 4, though dividends directed to be paid at specified periods under a deed of settlement are (*Re Maxwell's Trusts*, 1 H. & M. 610; see *Hartley v. Allen*, 4 Jur., N. S. 500); but not a specific single sum of money by resolution directed to be divided among the shareholders (*Ib.*); nor royalties in the nature of rents payable at *uncertain* periods (*St. Aubyn v. St. Aubyn*, 1 Dr. & S. 611; *Donaldson v. Donaldson*, L. R., 10 Eq. 635); *aliter*, if at *certain* periods. *Llewellyn v. Rous*, L. R., 2 Eq. 27; see now 33 & 34 Vict. c. 35, ss. 2, 5, *post*. Where stock is sold (or even securities carrying interest *de die in diem*) between dividend days, the court will not apportion the proceeds of sale so as to give a tenant for life the value of the current dividend included in the proceeds of sale. *Scholefield v. Redfern*, 2 Dr. & Sm. 173; *Freman v. Whitbread*, L. R., 1 Eq. 266.

In a case where lands subject to a settlement made before the 4 & 5 Will. 4, c. 22, were taken by a railway company under the Lands Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 18, and the dividends

of the funds in which the purchase-money was invested were ordered to be paid to the tenant in possession, it was held that the act did not apply to the dividends, and that the orders of the court were not *instruments* within the meaning of the act. *Re Lawton's Estates*, L. R., 3 Eq. 469; comp. *Harrop v. Wilson*, 34 Bea. 166; *Jodrell v. Jodrell*, L. R., 7 Eq. 461.

33 & 34 Vict. c. 35.] The operation of the preceding acts has been superseded for the future by the 33 & 34 Vict. c. 35 (1st August, 1870), which, after reciting the prior acts (though it does not repeal them), is as follows:—

“1. This act may be cited for all purposes as ‘The Apportionment Act, 1870.’

“2. From and after the passing of this act all rents, annuities, dividends, and other periodical payments in the nature of income (whether reserved or made payable under an instrument in writing or otherwise) shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly.

“3. The apportioned part of any such rent, annuity, dividend, or other payment shall be payable or recoverable in the case of a continuing rent, annuity, or other such payment when the entire portion of which such apportioned part shall form part shall become due and payable, and not before, and in the case of a rent, annuity, or other such payment determined by re-entry, death, or otherwise, when the next entire portion of the same would have been payable if the same had not so determined, and not before.

“4. All persons and their respective heirs, executors, administrators and assigns, and also the executors, administrators and assigns respectively of persons whose interests determine with their own deaths, shall have such or the same remedies at law and in equity for recovering such apportioned parts as aforesaid when payable (allowing proportionate parts of all just allowances) as they respectively would have had for recovering such entire portions as aforesaid if entitled thereto respectively; provided that persons liable to pay rents reserved out of or charged on lands or other hereditaments of any tenure, and the same lands or other hereditaments, shall not be resorted to for any such apportioned part forming part of an entire or continuing rent as aforesaid specifically, but the entire or continuing rent, including such apportioned part, shall be recovered and received by the heir or other person who, if the rent had not been apportionable under this act, or otherwise, would have been entitled to such entire or continuing rent, and such apportioned part shall be recoverable from such heir or other person by the executors or other parties entitled under this act to the same by action at law or suit in equity.

“5. In the construction of this act—

“The word ‘rents’ includes rent service, rent-charge, and rent seek, and also tithes, and all periodical payments or renderings in lieu of or in the nature of rent or tithe.

“The word ‘annuities’ includes salaries and pensions.

“The word ‘dividends’ includes (besides dividends strictly so called) all payments made by the name of dividend, bonus, or otherwise out of the revenue of trading or other public companies, divisible between all or any of the members of such respective companies, whether such payments shall be usually made or declared at any fixed times or otherwise; and all such divisible revenue shall, for the purposes of this act, be deemed to have accrued by equal daily increment during and within the period for or in respect of which the payment of the same revenue shall be declared or expressed to be made; but the said word ‘dividend’ does not include payments in the nature of a return or reimbursement of capital.

“6. Nothing in this act contained shall render apportionable any annual sums made payable in policies of assurance of any description.

“7. The provisions of this act shall not extend to any case in which it is or shall be expressly stipulated that no apportionment shall take place.”

A share of the profits of a private trading company periodically declared and payable is not within the act. *Jones v. Ogle*, L. R., 8 Ch. 192. Nor a share in the profits of a business. *In re Cox's Trusts*, 9 Ch. D. 159; *aliter* the dividends of a canal company. *Pollock v. Pollock*, L. R., 18 Eq. 329. See *Whitehead v. Whitehead*, L. R., 16 Eq. 528. In *In re Griffith*, 12 Ch. D. 655, it was laid down that the word “dividends” in the act includes payments by way of bonus or surplus profits to the shareholders of a public company, even though such payments may be only occasional and not strictly periodical. The words “trading or other public companies” in sect. 5 of the act include any public company, but not a private partnership, *ib.* In *Jones v. Ogle*, *sup.* (on a will), Lord Selborne, L.C., appears to have been strongly of opinion, that the words of a particular gift by will must be construed, generally speaking, according to the meaning of the words at the period the will was made. *Ib.* p. 195. “The reasoning of the Lord Chancellor in this case upon this point appears to us unanswerable.” Per Lindley, L.J., *Mander v. Harris*, 27 Ch. D. 166, 169.

It is settled, however, that the act applies to a will made before the act if confirmed by a codicil executed after, and even to such a will although not so confirmed. *Capron v. Capron*, L. R., 17 Eq. 288; *In re Cline's Estate*, L. R., 18 Eq. 213; *Hasluck v. Pedley*, L. R., 19 Eq. 271; *Constable v. Constable*, 11 Ch. D. 681. In *Lawrence v. Lawrence*, 26 Ch. D. 795, it was decided that although the instrument (a will) was made and came into operation before the act, property which in its nature was apportionable was to be apportioned between the tenant for life under the will and those entitled in remainder. The question of apportionment cannot arise as to interest accrued due and payable in the lifetime of the tenant for life who takes the whole of it. *In re Clarke*, 18 Ch. D. 160. In *Whitehead v. Whitehead*, L. R., 16 Eq. 528, Malins, V.C., held that the income arising from personalty specifically bequeathed is not apportionable as between the

specific legatee and the residuary legatees. But in the later case of *Pollock v. Pollock*, L. R., 18 Eq. 329, his Lordship held that such income would be apportionable. Where a company in liquidation continues in the possession of premises for the purpose of carrying on their business, the landlord is entitled to prove jointly with the other creditors for so much rent as became due up to the date of the presentation of the petition for winding up, and is entitled to distrain for the full rent due after that day. *In re South Kensington Co-operative Stores*, 17 Ch. D. 161. Where there is a direction to accumulate income until the marriage of a person, and then to settle, there is an apportionment up to the time of the marriage. The rule is the same under the acts of W. 4 and Victoria. *Clive v. Clive*, L. R., 7 Ch. 483.

Alienation of Part of Property subject to entire Rent.] If part of property subject to one entire rent be aliened by the lessor, an apportionment of the rent is to be made. Co. Litt. 148 a. If not made with the tenant's consent, the assignee of part, though he may distrain for the apportioned rent (*Walter v. Maunde*, 1 J. & W. 188), or bring an *action* for it, can only recover what upon a just apportionment a jury shall find to be due. Bac. Ab. Rent. M. 3; *Bliss v. Collins*, 5 B. & Al. 876. Where the *tenant* aliens part of the demised property, he and the assignee can make no apportionment binding on the lessor. See *Walter v. Maunde*, *sup.*; *Paterson v. Long*, 6 Bea. 590. This often creates a difficulty in the disposal to several purchasers of property held under one lease. Where property subject with other property to one rent is taken under the Lands Clauses Consolidation Act, 1845, 8 Vict. c. 18, the rent will be apportioned (s. 119). Under this section it is not the duty of the lessee, but of the company, to procure the lessor's consent to the apportionment. *Skipper v. Tottenham, &c. R. Co.*, L. R., 4 Eq. 112.

Under the 17 & 18 Vict. c. 97, the inclosure commissioners have powers in certain cases to apportion fee farm rents, rent seck and of assize or chief rents; and after the order for apportionment the lands will be chargeable only to the extent and in the manner directed in the order (ss. 10—14).

See further with respect to the apportionment of rent and conditions in leases, *post*, tit. "LANDLORD AND TENANT—LEASE," ch. 6.

ASSETS.

CH. 1.—OF ASSETS IN GENERAL, p. 30.

CH. 2.—LEGAL AND EQUITABLE ASSETS, p. 34.

CH. 3.—ORDER OF LIABILITY OF ASSETS TO DEBTS AND OF PRIORITY OF DEBTS, p. 36.

CH. 4.—OF MARSHALLING ASSETS, p. 39.

CHAPTER I.

OF ASSETS IN GENERAL.

<i>General Rules as to Liability of Property to Payment of Debts ...</i>	30	<i>General Rules, &c.—continued.</i>	
<i>Assets</i>	30	<i>General Charge not restricted by specific Charge</i>	32
<i>Liability of Real Estate at Common Law to Debts</i>	30	<i>Or Direction that particular Property shall be applied.....</i>	32
<i>Sir S. Romilly's Act, 47 Geo. 3, c. 74</i>	31	<i>Direction for Payment by Executors</i>	33
<i>3 & 4 Will. 4, c. 104</i>	31	<i>Primâ facie Realty not charged</i>	33
<i>Charge by Testator</i>	31	<i>Unless Real Estate devised to them beneficially.....</i>	33
<i>32 & 33 Vict. c. 46</i>	31	<i>Retainer</i>	33
<i>What amounts to Charge by Testator</i>	32	<i>Operation of 22 & 23 Vict. c. 35</i>	33
<i>Words "In the first place," &c., not necessary</i>	32	<i>Meaning of word Debts.....</i>	33
		<i>Does not extend to Debts barred by Statute</i>	33

General Rules as to the Liability of Property to Payment of Debts.] Assets, from *assez*, the heir under the old law being only bound to pay his ancestor's debts so far as he had lands descended sufficient for that purpose (2 Blac. 244), may now be said to comprise all a testator's or intestate's property, real and personal, and which is now available for payment of his debts of every description. His personal property was always liable, but his real estate has become subject to such liability only, comparatively speaking, of late years, and by degrees. It is true, indeed, that at common law, from an early period, real estate (except copyhold) devolving on the heir was liable to specialty debts where the heir was expressly named, but not to other debts. Afterwards the *devisee* was made liable. By the 3 &

4 W. & M. c. 14, it was enacted, that *devises*, unless for payment of debts, should be fraudulent and void as against *specialty* creditors where the heir was bound, and that the devisee should be liable jointly with the heir on a specialty recoverable by action of *debt*. See *Spackman v. Timbrell*, 8 Sim. 253. The 47 Geo. 3, c. 74 (Sir Samuel Romilly's Act), enacted that if a debtor was at the time of his death *liable to the bankrupt laws*, his *freehold* estates should be subject to his simple contract debts. These acts were repealed by the 1 Will. 4, c. 47, their principal provisions, however, being amended and re-enacted by that act.

The 3 & 4 Will. 4, c. 104, was still more beneficial to creditors. By this it was enacted, that after the 29th of August, 1833, when any person should die seised of or entitled to any estate or interest in lands, tenements or hereditaments, corporeal or incorporeal, or other real estate, whether freehold, customaryhold or copyhold, which *he should not by his last will have charged with or devised subject to the payment of his debts*, the same should be assets to be administered in courts of equity for the payment of the just debts of such person, as well debts due on simple contract as on specialty, and that the heir-at-law, customary heir and devisees of such debtor should be liable in equity, at the suit of any of the creditors, whether by simple contract or by specialty, as the heir-at-law or devisees were therefore liable to in respect of freehold estates at the suit of the creditors by specialty, in which the heirs were bound; provided that, in the administration of assets by courts of equity under the act, all creditors by specialty, in which the heirs were bound, should be paid the full amount of their debts *before* creditors by simple contract or by specialty, in which the heirs were not bound, should be paid any part of their demands. By this act, therefore, copyhold estates were made liable, and the distinction between persons liable and not liable to the bankrupt laws was abolished, but the priority of specialty debts binding the heir was still reserved to them. See *Hamer's Devises Case*, 2 D., M. & G. 366. The rules and doctrines of equity, however, where a testator had subjected his property to the payment of his debts, remained unaffected (*Shaw v. Borrer*, 1 Ke. 559—577); *Ball v. Harris*, 4 M. & C. 268; for these acts did not interfere with testamentary dispositions providing for the payment of debts, and in such case the estate was assets in equity for the payment of *all* a testator's debts, whether simple contract or specialty, *pari passu* without priority on the part of debts of one kind over those of another.

This principle of equity has now been adopted by the legislature. By the 32 & 33 Vict. c. 46, a short act of two sections only, it is enacted that:—"In the *administration* of the estate of every person who shall *die on or after the 1st January, 1870*, no debt or liability of such person shall be entitled to any priority or preference by reason merely that the same is secured by or arises under a bond, deed or other instrument under seal, or is otherwise made or constituted a specialty debt, but *all the creditors* of such person, as well *specialty as simple contract*, shall be treated as standing in *equal degree*, and be

paid accordingly out of the assets of such deceased person, *whether such assets are legal or equitable*, any statute or other law to the contrary notwithstanding : provided always, that this act shall not prejudice or affect any lien, charge or other security which any creditor may hold or be entitled to for the payment of his debt" (s. 1). The act does not extend to Scotland (s. 2). In many cases, however, the administration of assets must still be governed by the rules previously existing. In such cases the distinction between legal and equitable assets is very important. This subject will be considered in the next chapter.

The 3 & 4 Will. 4, c. 104, as already mentioned (*supra*), does not apply where the testator has charged or subjected his property to the payment of his debts. With respect to what words in a will are sufficient to constitute such a charge, the general rule is that whenever a testator directs in terms, however general, that his debts shall be paid, not saying *by his executors* (see *post*, p. 33), and afterwards disposes of his real estate, the real estate is liable in aid of the personalty (*Shallcross v. Finden*, 3 Ves. 738 ; *Graves v. Graves*, 8 Sim. 55 ; *Cook v. Dawson*, 29 Bea. 123 ; consider *Symons v. James*, 2 Y. & C. C. C. 301, and the observations on it in *Harris v. Watkins*, Kay, 447) ; and it is not necessary that the direction to pay should be coupled with such words as "in the first place," "imprimis," or the like (*Graves v. Graves*, *sup.* ; *Harding v. Grady*, 1 Dr. & War. 430 ; *Cook v. Dawson*, *sup.*), though in many early cases much stress was laid upon them, and they were considered important if not essential (see *Ronalds v. Feltham*, T. & R. 418 ; *Douce v. Ld. Torrington*, 2 M. & K. 600 ; as to the last case see *Shaw v. Borrer*, 1 Ke. 567, n. (b) ; and, as a general rule, a general charge will not be restricted or limited merely because it is followed by specific charges of different sums on different estates or property (*Taylor v. Taylor*, 6 Sim. 246 ; *Jones v. Williams*, 1 Coll. 156), or by a direction that particular property shall be applied in payment of the debts (*Coxe v. Bassett*, 3 Ves. 155 ; see *Wrigley v. Sykes*, 21 Bea. 337) ; for the rule is, that the presumption arising from the general charge is not to be repelled by anything short of clear and manifest evidence of a contrary intention. *Price v. North*, 1 Ph. 85 ; *Forster v. Thompson*, 4 Dr. & War. 303. Thus if, after a general direction to pay debts, the testator expressly charges part of his realty with the payment of them, and *excepts the rest*, the implication arising from the general charge will be controlled. *Thomas v. Britnell*, 2 Ves. sen. 313 ; *Palmer v. Graves*, 1 Ke. 545.

A devise of realty, followed by a bequest of personalty, *after payment of debts*, is construed as charging the realty as well as the personalty. *Withers v. Kennedy*, 2 M. & K. 607 : see *Jones v. Price*, 11 Sim. 557 ; *Preston v. Preston*, 2 Jur., N. S. 1040. So a direction to convert the realty, the proceeds to be held upon the trusts of the personalty, followed by a bequest of the personalty after payment of debts, makes such proceeds liable to the debts. *Soames v. Robinson*, 1 M. & K. 500 ; *Shakels v. Richardson*, 2 Coll. 31 ; cons. *Bright v. Larcher*, 3 D. & J. 148.

Direction for Payment by Executors.] As a general rule, when executors are directed to pay the debts, *no realty being devised to them*, the real estate of the testator is not charged, the presumption being that the debts are to be paid out of the personalty coming to them as executors (*Powell v. Robins*, 7 Ves. 209; *Willan v. Lancaster*, 3 Russ. 108; see *Wisden v. Wisden*, 2 Sm. & G. 396); but otherwise where real estate is devised to them beneficially (*Henvell v. Whitaker*, 3 Russ. 343; *Cross v. Kennington*, 9 Bea. 150; *Gallimore v. Gill*, 2 Sm. & G. 158; the case of *Parker v. Fearnley*, 2 S. & S. 592, *contrà*, is overruled; *Preston v. Preston*, 2 Jur., N. S. 1040), or to them as executors with a direction to pay debts. *Dormay v. Borradaile*, 10 Bea. 263; *Hartland v. Murrell*, 27 Bea. 204. But where there is a devise, though of the fee, to one only of two or more executors, his estate will not be charged (*Warren v. Davies*, 2 M. & K. 49), unless the devise be, expressly, *subject* to the payment of debts. *Dowling v. Hudson*, 17 Bea. 248. In *Re Bailey*, 12 Ch. D. 268, Fry, J., observed, p. 273, that "where there is a direction that the executors shall pay the testator's debts, followed by a gift of all his real estate to them, either beneficially or on trust, all the debts will be payable out of all the estate so given to them. The same rule applies whether the executor takes the whole beneficial interest, as in *Henvell v. Whitaker*, 3 Russ. 343, or only a life interest, as in *Finch v. Hattersley*, 3 Russ. 345, n., or no beneficial interest at all, as in *Hartland v. Murrell*, 27 Bea. 204. But in all the cases in which that has been held, the entirety of the liability has been thrown on the entirety of the estate."

As to retainer, an heir-at-law or devisee of real estate sold by the Court under 3 & 4 Will. 4, c. 104, has no right of retainer, either out of the proceeds of sale or any rents in his hands, for a debt due to him either on simple contract or, having regard to this act, on specialty, *Davidson v. Illidge*, 24 Ch. D. 654; see *Ferguson v. Gibson*, L. R., 14 Eq. 379.

As to the operation of a charge of debts in giving a power of sale, see tit. "POWERS," Ch. V., s. 5, and 22 & 23 Vict. c. 35.

Under the word debts are comprised all debts and *liabilities* of the testator, which his personal estate would be liable to discharge in the hands of his executors (see *Lomas v. Wright*, 2 M. & K. 769; *Stone v. Parker*, 1 Dr. & S. 212; *Alsop v. Bell*, 24 Bea. 469), whenever and wherever contracted. *Maxwell v. Maxwell*, L. R., 4 H. L. 506.

A trust or charge for payment of debts will not extend to debts barred by the Statute of Limitations. *Burke v. Jones*, 2 V. & B. 275; *Joel v. Mills*, 7 Jur., N. S., see the Decretal Order, p. 391. Where, however, a person has not by his will charged his property with the payment of his debts, or when he has died intestate, and the 32 & 33 Vict. c. 46 (*ante*, p. 31), does not apply, the case is governed by the 3 & 4 Will. 4, c. 104, which provides for the payment of certain specialty debts before other specialty and simple contract debts. The questions arising in consequence are considered in the following chapters.

CHAPTER II.

LEGAL AND EQUITABLE ASSETS.

<i>Legal Assets</i>	34	<i>Equitable Assets</i>	34, 35
<i>Property vesting in Executor</i>		<i>What are</i>	35
<i>virtute officii</i>	34	<i>Devise of, or Charge on Lands</i>	
<i>Administered according to</i>		<i>for Payment of Debts</i>	35
<i>priority at Law</i>	34	<i>Administered irrespective of</i>	
<i>General Personal Estate</i>	34	<i>Legal Priority</i>	35
<i>Equities of Redemption</i>	34	<i>Equities between Specialty and</i>	
<i>Proceeds of Sale</i>	34	<i>other Creditors</i>	35
<i>Money Paid into Court</i>	34	<i>Law of Foreign Country</i>	35

Legal Assets.] The distinction between legal and equitable assets has already been adverted to, and this distinction must still for some time to come be in many cases very important where the recent act does not apply.

Legal assets comprise everything which an executor takes *virtute officii*, and which would be liable in an action at law against the executor, although he may not be able to recover them without the aid of equity. *Cook v. Gregson*, 3 Drew. 547; *Shee v. French*, ib. 716; *Mutlow v. Mutlow*, 4 D. & J. 539; *Att.-Gen. v. Brunning*, 8 H. L. C. 256, 264.

Such assets must be administered, having regard to the priority of debts at law (*post*, Ch. III.).

Thus the general personal estate of the deceased vesting in the executor or administrator is legal assets (Wms. Exors. 1530). The equity of redemption of a mortgage of a sum of money charged on real estate (*Cook v. Gregson*, *sup.*), and the equity of redemption of a mortgage of freehold or copyhold lands since the 3 & 4 Will. 4, c. 104, are legal assets. *Foster v. Handley*, 1 Sim., N. S. 200; consider *Lovegrove v. Cooper*, 2 Sm. & G. 271; *Burrell v. Smith*, L. R., 9 Eq. 443. So it would seem is the equity of redemption of a *term of years*. *Cook v. Gregson*, *sup.*; but see *Barker v. May*, 9 B. & C. 493.

The surplus proceeds of a sale, by the court, of leaseholds for lives mortgaged by the testator, are legal assets. *Christy v. Courtenay*, 26 Bea. 140. So money paid by executors into court, and the proceeds of realty directed by the court to be sold. *Lovegrove v. Cooper*, *sup.* So a settled fund of personalty paid into court by the trustees of a settlement (*Mutlow v. Mutlow*, 4 D. & J. 539), and the proceeds of a sale of real estate contracted to be sold by the testator himself. *Att.-Gen. v. Brunning*, 8 H. L. C. 243.

Equitable Assets.] Equitable assets are administered in equity

irrespective of the legal priority of one kind of debt over another. Such assets arise in various ways. They will be created by a devise of land for payment of debts. So assets are equitable if they are of such a nature that they can only be reached in a court of equity.

A devise of land though to executors, for payment of debts, or a charge of land with debts, the executors having a power of sale, makes the land equitable assets (*Silk v. Prime*, 1 Dick. 384; 1 B. C. C. 138 n.; *Shiphard v. Lutwidge*, 8 Ves. 26; *Lowe v. Peskett*, 16 C. B. 500); though there are some earlier cases *contrà*. See 1 Ver. 63; 2 Ver. 133, 248.

The rule will be the same notwithstanding a direction that the proceeds of the real estate shall be deemed to be personal estate, and that debts shall be paid out of such proceeds, and the proceeds of other personal estate, for this will not convert the proceeds of the realty into legal assets. *Soames v. Robinson*, 1 M. & K. 500; *Shakells v. Richardson*, 2 Coll. 31. The assets of a deceased married woman, having separate estate, are equitable. *Anon.*, 18 Ves. 258; see *Owens v. Dickenson*, Cr. & Ph. 48.

Specialty creditors, who have been partly paid out of legal assets, have no claim upon equitable assets until the other creditors, who can only be paid out of the latter, have first received a part equal to what the specialty creditors have received. *Sheppard v. Kent*, 2 Ver. 435; *Deg v. Deg*, 2 P. W. 416; *Chapman v. Esgar*, 1 Sm. & G. 575.

A debt contracted by an Englishman living abroad does not entitle the foreigner, by reason of any particular law of his own country, to claim priority in payment of his debt out of a fund which by the law of this country is equitable assets. *Pardo v. Bingham*, L. R., 6 Eq. 485. The 32 & 33 Vict. c. 46, *ante*, p. 31, must now be constantly borne in mind in considering questions as to legal and equitable assets.

CHAPTER III.

ORDER OF LIABILITY OF ASSETS TO DEBTS AND OF PRIORITY OF DEBTS.

<i>Order of Liability of Assets to Debts</i>	36	<i>Order of Liability, &c.—continued.</i>	
1. <i>The general Personal Estate</i>	36	<i>Properties liable in the same degree, contribute equally</i>	37
2. <i>Lands devised for the Payment of Debts</i>	36	<i>Order of Priority of Debts</i>	38
3. <i>Estates descending to Heir</i> ...	36	1. <i>Crown Debts</i>	38
4. <i>Property given, but subject to Debts</i>	36	2. <i>Certain Statutory Debts</i>	38
5. <i>General Pecuniary Legacies</i> .	36	3. <i>Registered Judgments and Decrees</i>	38
6. <i>Realty comprised in a Residuary devise</i>	37	4. <i>Recognizances inrolled</i>	38
7. <i>Specific Legacies and Lands specifically Devised rateably</i>	37	5. <i>Specialty Debts and Rent</i> ...	38
8. <i>Property appointed under a Power</i>	37	6. <i>Simple Contract Debts and Judgments Unregistered</i> ...	38
		7. <i>Claims for Dilapidations</i> ...	38
		8. <i>Voluntary Bonds and Obligations</i>	38
		<i>Administration of Assets</i>	38
		<i>Judicature Act</i>	38

Order of Liability of Assets to Debts.] Subject to the directions of a testator as to the priority of liability to his debts of any particular part of his property, as a general rule it is liable to the payment of them in the following order: 1. The general personal estate not specifically bequeathed, unless exempted by express words or necessary implication (*D. Ancaster v. Mayer*, 1 B. C. C. 454; *Lanoy v. D. Athol*, 2 Atk. 444; see *post*, tit. "WILLS.") 2. Lands expressly devised for the payment of debts (*Harmood v. Oglander*, 8 Ves. 124; *Phillips v. Parry*, 22 Bea. 279). But where there is a devise of all the testator's property for payment of debts, and afterwards a specific devise of land, other land being suffered to descend, the descended land is not liable in exoneration of the specifically-devised land, but both contribute rateably. *Stead v. Hardaker*, L. R., 15 Eq. 175. See *Fisher v. Fisher*, 2 Ke. 610; *Wood v. Ordish*, 3 Sm. & G. 125; *Ryves v. Ryves*, L. R., 11 Eq. 539. 3. Estates descending to the heir (*Harmood v. Oglander*, *sup.*). 4. Real or personal estate devised or bequeathed charged with debts, and subject thereto specifically given over (8 Ves. 124; see *Irvin v. Ironmonger*, 2 R. & My. 531; *Harris v. Watkins*, Kay, 448; *Wood v. Ordish*, 3 Sm. & G. 125; *Davies v. Fowler*, L. R., 16 Eq. 308). 5. General pecuniary legacies.*

* There is perhaps a little ambiguity in terming a general pecuniary legacy an *asset*, being in fact money payable out of assets. The meaning is, that if pecuniary legatees are disappointed by the personal assets being exhausted in payment of debts, they are entitled as against the property mentioned in the second, third and fourth classes to have the assets *marshalled* (*post*), and to be satisfied out of such property.

6. Real estate comprised in a residuary devise (*Collins v. Lewis*, L. R., 8 Eq. 708; *Dugdale v. Dugdale*, L. R., 14 Eq. 234; *Tomkins v. Colthurst*, 1 Ch. D. 626; *Farquharson v. Floyer*, 3 Ch. D. 109). It is true that in *Hensman v. Fryer*, L. R., 3 Ch. 420, Lord Chelmsford, C., decided that pecuniary legacies and real estate comprised in a residuary devise contributed rateably. But this decision is generally considered to be contrary to the settled rule of the court. See the four first-cited cases. *Hensman v. Fryer* also decided that a residuary devise was still specific as it was before the 1 Vict. c. 26, and this decision was followed by the Court of Appeal in *Lancefield v. Iggulden*, L. R., 10 Ch. 136, specific and residuary devisees consequently contribute rateably. See *Giles v. Melsom*, L. R., 6 H. L. pp. 29, 30; (*Mirehouse v. Scaife*, 2 M. & C. 695; *Eddels v. Johnson*, 1 Giff. 22; *Pearmain v. Twiss*, 2 Giff. 130; *Clark v. Clark*, 11 Jur., N. S. 820; *Gibbins v. Eyden*, L. R., 7 Eq. 371; and *contra*, *Dady v. Hartridge*, 1 Dr. & S. 236; *Barnwell v. Iremonger*, *ib.* 242; *Rotheram v. Rotheram*, 26 Bea. 465; *Bethell v. Green*, 34 Bea. 302; *Brownson v. Lawrance*, L. R., 6 Eq. 1). 7. Specific legacies and land specifically devised rateably. *Long v. Short*, 1 P. W. 403; *Tombs v. Roch*, 2 Coll. 490; *Young v. Hassard*, 1 Jo. & Lat. 466; *Gervis v. Gervis*, 14 Sim. 654, overruling *Cornewall v. Cornewall*, 12 Sim. 298. As to land comprised in a residuary devise, see the cases, *supra*. As between legatees of specific pecuniary legacies charged on land which is *specifically devised subject thereto*, the whole amount of contribution must be borne by the *devisees*. *Raikes v. Boulton*, 29 Bea. 41. Lastly, real and personal estate which the testator appoints under a *general power*. See *Thompson v. Towne*, 2 Ver. 319; *Bainton v. Ward*, 2 Atk. 172; *Fleming v. Buchanan*, 3 D., M. & G. 976; *Hawthorn v. Shedden*, 3 Sm. & G. 305. But this rule does not apply when the will is that of a married woman who appoints under a power, unless she has acted fraudulently in contracting debts. *Vaughan v. Vanderstegen*, 2 Drew. 165; *Hobday v. Peters*, 28 Bea. 354; *Shattock v. Shattock*, L. R., 2 Eq. 182; see 12 Jur., N. S., Pt. 2, p. 243.

Where several properties, in the same degree liable to the testator's debts, are given to different persons, such properties contribute rateably according to their value (*Heveningham v. Heveningham*, 2 Ver. 355), whether the properties charged are wholly of one kind or partly of one kind and partly of another (*Ib.*; *Irvin v. Ironmonger*, 2 R. & My. 531; see, as to the contribution of several properties to the payment of an *annuity*, *Ley v. Ley*, L. R., 6 Eq. 174, *ante*, p. 22); and if real and personal estates are directed to be converted and the proceeds applied in payment of debts and legacies (*Roberts v. Walker*, 1 R. & My. 752; *Fourdrin v. Goudey*, 3 M. & K. 388) or legacies (*Stocker v. Harbin*, 3 Bea. 479; *Salt v. Chattaway*, *ib.* 576), both properties contribute rateably according to their values, and the surplus, if any, undisposed of, results in proportion to the values of the respective properties to the parties respectively entitled to them. But this rule does not extend beyond the sums which the testator has

expressly directed to be paid out of the mixed fund. *Elliott v. Dearsley*, 16 Ch. D. 322.

Order of Priority of Debts.] Subject to the payment of funeral and testamentary expenses (Wms. Exors. 906, 924), the order of priority of debts, where the assets are *legal* and the case is not governed by the 32 & 33 Vict. c. 46 (*ante*, p. 31), is as follows: 1. Crown debts (Wms. Exors. 8th ed. 995 *et seq.*). 2. Debts having priority by statute (*Ib.* 995). 3. Judgments in courts of record and decrees in equity against the deceased rateably, but if obtained against the executors according to priority. *Dollond v. Johnson*, 2 Sm. & G. 301. If obtained against executors, they need not be registered (*Jennings v. Rigby*, 33 Bea. 198), and this rule is not affected by the 32 & 33 Vict. c. 46, *ante*, p. 31. *Williams v. Williams*, L. R., 15 Eq. 270, nor by the 10th section of the Judicature Act, *infra*. *Smith v. Morgan*, 5 C. P. D. 337; but if obtained against the deceased they must, or will belong to the sixth class (*infra*). 4. Recognizances when enrolled (*Glynn v. Thorpe*, 1 B. & Al. 153; *Bothomly v. Fairfax*, 1 P. W. 334), and statutes merchant and staple. These, however, have fallen into disuse. See further as to them, Wms. Exors. 1010. 5. Specialty debts for value, and rent, which are equal in degree (see *Clough v. French*, 2 Coll. 277; *Vincent v. Godson*, 4 D., M. & G. 546; *Talbot v. E. Shrewsbury*, L. R., 16 Eq. 26); and it makes no difference that specialty debts are payable *in futuro* if they are certain, but otherwise if they are *contingent*, in which case simple contract debts may be paid before them (Wms. Exors. 8th ed. 1025; *acc. Atkinson v. Grey*, 1 Sm. & G. 577). 6. Simple contract debts and *unregistered* judgments against the deceased debtor (23 & 24 Vict. c. 38, s. 3; *Kemp v. Waddingham*, L. R., 1 Q. B. 355; *Van Gheulve v. Nerinckx*, 21 Ch. D. 189), which are in equal degree. 7. Claims for dilapidations by an incumbent. *Bryan v. Clay*, 1 E. & B. 38; see *Bisset v. Burgess*, 23 Bea. 278. Lastly. Voluntary bonds (*Ramsden v. Jackson*, 1 Atk. 294; see *Watson v. Parker*, 6 Bea. 283; *Dening v. Ware*, 22 Bea. 184), unless assigned for value, when they rank as ordinary bonds. See *Payne v. Mortimer*, 4 D. & J. 447. As to voluntary simple contract debts, see *Dawson v. Kearton*, 3 Sm. & G. 191; Lewin on Trusts, 7th ed. 73, n. (b). With reference to the question whether assets are to be administered according to the law of their *situs*, where the testator dies domiciled in another country, see *Wilson v. Lady Dunsany*, 18 Bea. 293; *Cook v. Gregson*, 2 Drew. 286; Wms. Exors. 8th ed. 994. See now 32 & 33 Vict. c. 46, *ante*, p. 31; and *Shirreff v. Hastings*, 6 Ch. D. 610.

Administration of Assets.] By the Judicature Amendment Act, 1875, 38 & 39 Vict. c. 77, "In the administration by the court of the assets of any person who may die after the commencement of this act, and whose estate may prove to be insufficient for the payment in full of his debts and liabilities, and in the winding up of any company under the Companies Act, 1862, and 1867, whose assets may prove to

be insufficient for the payment of its debts and liabilities and the costs of the winding-up, the same rules shall prevail and be observed as to the respective rights of *secured and unsecured creditors*, and as to *debts and liabilities provable*, and as to the *valuation of annuities and future and contingent liabilities* respectively, as may be in force for the time being under the Law of Bankruptcy with respect to the estates of persons adjudged bankrupt; and all persons who in any such case would be entitled to prove for and receive dividends out of the estate of any such deceased person or out of the assets of any such company, may come in under the decree or order for the administration of such estate, or under the winding-up of such company, and make such claims against the same as they may respectively be entitled to by virtue of the act," s. 10.

CHAPTER IV.

OF MARSHALLING ASSETS.

<i>What Marshalling is</i>	39	<i>Creditors and unpaid Vendor</i>	40
<i>Between Creditors</i>	39	<i>Mortgagees and other Creditors and</i>	
<i>Legatees</i>	40	<i>Legatees</i>	40
<i>Legatees, Heir and Devisee</i>	40	<i>Voluntary Grantees</i>	40

ASSETS are said to be marshalled where there are two claimants, A. and B., and two funds, both of which are available for the claim of A., but only one for that of B. In this case either A. will be compelled to have recourse to the fund not available for B., or if has been paid out of it, B. will be allowed to stand in his place in respect of the other fund, against which originally he had no claim. *Aldrich v. Cooper*, 8 Ves. 382; and see the observations of Lord *Westbury*, *Dolphin v. Aylward*, L. R., 4 H. L. 505.

Thus in cases before the 3 & 4 Will. 4, c. 104, where there were specialty and simple contract creditors, and the former were paid out of the personal estate, equity marshalled the assets by permitting the latter to stand in the place of the former against the real assets. *Galton v. Hancock*, 2 Atk. 436. So where there were mortgagees of real estate, who were paid out of the personalty, simple contract creditors were allowed to stand in their place. *Aldrich v. Cooper*, 8 Ves. 381; *Selby v. Selby*, 4 Russ. 336.

Assets will also be marshalled between legatees: as where some legacies are charged on the real estate and others are not, and the personal estate is not sufficient to pay all. *Bligh v. E. Darnley*, 2 P. W. 619; *Bonner v. Bonner*, 13 Ves. 379; *Mirehouse v. Scaife*, 2 M. & Cr. 700.

The same equity is applied in favour of legatees against the heir taking estates by descent, where specialty creditors have obtained satisfaction out of the personalty (*Bowaman v. Reeve*, Pr. Ch. 578; see *Aldrich v. Cooper*, *sup.*); but not against the heir taking by devise (*Strickland v. Strickland*, 10 Sim. 374), nor against specific devisees. *Clifton v. Burt*, 1 P. W. 678. As to residuary devisees, see *Keeling v. Brown*, 5 Ves. 359; *Mirehouse v. Scaife*, 2 M. & Cr. 695; *Hensman v. Fryer*, L. R., 3 Ch. 420, *ante*, p. 37. If lands are devised for or charged with the payment of debts the assets will be marshalled, and legatees or annuitants will stand in the place of creditors who have been paid out of the personalty. *Foster v. Cook*, 3 B. C. C. 347; *Rickard v. Barrett*, 3 K. & Jo. 289.

And where a person has agreed to buy an estate, but dies before the purchase is completed, and the purchase-money is paid out of his personal estate, the creditors and pecuniary legatees of the purchaser are entitled to stand in the place of the vendor and with the benefit of his lien, whether the estate descends (*Trimmer v. Bayne*, 9 Ves. 209; *Sproule v. Prior*, 8 Sim. 189) or is devised. *Selby v. Selby*, 4 Russ. 336; *Emuss v. Smith*, 2 D. & Sm. 722; *Birds v. Askey*, 24 Bea. 618; *Ld. Lilford v. Keck*, L. R., 1 Eq. 347, overruling on this point *Wythe v. Henniker*, 2 M. & K. 635.

So, if the mortgagee of an estate which descends or is devised be paid out of the mortgagor's personal estate, and thereby exhausts it, the assets will be marshalled against the heir or devisee in favour of creditors or legatees, who will be allowed to stand in place of the mortgagee (*Lutkins v. Leigh*, Ca. t. Tal. 53; *Forrester v. Ld. Leigh*, Amb. 171; *Middleton v. Middleton*, 15 Bea. 450; *Johnson v. Child*, 4 Ha. 87); and this is quite irrespective of the 17 & 18 Vict. c. 113. See tit. "WILLS." As to marshalling assets in cases of charity legacies, see tit. "CHARITY AND MORTMAIN."

Where there is a voluntary settlement of property, and the grantor subsequently mortgages it with other property, the voluntary grantees are entitled to have the two properties marshalled, so as to throw the mortgage debt on that which is not settled. *Hales v. Cox*, 32 Bea. 118.

CHARITY AND MORTMAIN.

CH. 1.—SUPERSTITIOUS AND CHARITABLE USES AND TRUSTS, p. 41.

SEC. 1.—SUPERSTITIOUS USES AND TRUSTS, p. 41.

SEC. 2:—CHARITABLE USES AND TRUSTS, p. 42.

CH. 2.—9 GEO. 2, c. 36, COMMONLY CALLED THE STATUTE OF MORTMAIN, p. 48.

CH. 3.—CHARITABLE TRUSTS ACTS, p. 61.

CHAPTER I.

SUPERSTITIOUS AND CHARITABLE USES AND TRUSTS.

SEC. 1.—*Superstitious Uses and Trusts.*

Dispositions for, are void 41 | *Prayers and Masses for the Soul* ... 41

DISPOSITIONS of real or personal estate for *superstitious* purposes are contrary to the policy of the law and void. By an early statute (1 Edw. 6, c. 14) gifts to superstitious uses then existing were expressly prohibited, such as gifts for prayers and masses for the soul. *Att.-Gen. v. Fishmongers' Co.*, 5 M. & C. 11: and see *West v. Shuttleworth*, 2 M. & K. 684; *Re Blundell*, 30 Bea. 360; *Heath v. Chapman*, 2 Drew. 417. This statute applies to superstitions of a particular description (*Cary v. Abbott*, 7 Ves. 495), and bequests for such purposes are void, and by the act go to the crown. Other bequests, however, which are void as being superstitious, but which are not within the act, go to the next of kin (*West v. Shuttleworth, sup.*), though if the request be in part *charitable*, it either goes to the crown (5 M. & C. 15), or the crown may direct to what charity it shall be applied. *De Themines v. Bonneval*, 5 Russ. 288.

SEC. 2.—Charitable Uses and Trusts.

<i>Charitable Purposes enumerated in</i> 43 Eliz. c. 4.....	42	<i>Certainty of Bequest—continued.</i> <i>Where for Charitable Uses gene-</i> <i>rally</i>	45
<i>Religious Purposes and Doctrines ...</i>	42	<i>Gift for Specific Purpose which</i> <i>fails</i>	46
<i>Dissenters—Roman Catholics—</i> <i>Jews</i>	42, 43	<i>Apportionment of Fund</i>	46
<i>Church Purposes</i>	43	<i>Foreign Charities</i>	46
<i>Purposes of Charity and Benevo-</i> <i>lence</i>	43	<i>Trust Funds to be applied according</i> <i>to Trust</i>	46
<i>Widows—Orphans.....</i>	43	<i>Hospital Funds not for lighting</i> <i>Town.....</i>	46
<i>Poor</i>	43	<i>Funds for Poor of one place not</i> <i>for poor of another.....</i>	46
<i>Hospitals</i>	43	<i>Religious Purposes, usage Evi-</i> <i>dence of Form of Worship ...</i>	46
<i>Improvement of Places</i>	43	<i>Declaration of Trust</i>	47
<i>General Public Benefit.....</i>	44	<i>Minister Tenant at Will to</i> <i>Trustees</i>	47
<i>Releasing Prisoners</i>	44	<i>New Trustees</i>	47
<i>Educational—Public Purposes</i>	44	<i>Visitors of Charities</i>	47
<i>Schools, Lectureships, &c.....</i>	44	<i>Who are</i>	47
<i>Certainty of Bequest.....</i>	44	<i>Powers and Duties</i>	47
<i>Bequest must not be ambiguous .</i>	44		
<i>Doctrine of cy-près.....</i>	45		
<i>Court endeavours to support Gift</i>	45		

Charitable Purposes mentioned in 43 Eliz. c. 4.] Bequests of pure personal estate (as to real estate, chattels real, and property savouring of the realty, see *post*, “MORTMAIN,”) for charitable purposes are valid though in *perpetuity*. Many of these purposes are enumerated in the 43 Eliz. c. 4, viz., gifts for the relief of aged, impotent and poor people; for the maintenance of sick and maimed soldiers and mariners; for ease of poor inhabitants concerning payment of taxes; for aid of young tradesmen, handicraftsmen, and persons decayed; for relief, stock and maintenance of houses of correction; for marriages of poor maids; for education and preferment of orphans; for schools of learning, free schools, and scholars in universities; for relief or redemption of prisoners or captives; for repair of bridges, ports, havens, causeways, churches, sea banks, and highways.

Religious Purposes.] In addition to those mentioned in the act, others of a like nature and not expressly specified in it have been held to be charitable. Thus bequests for the *promotion* of religious doctrines and opinions (not being *superstitious*) are good (*post*); and by several statutes bequests for the promotion of the religious doctrines of various sects holding religious opinions opposed to those of the established church have been rendered valid, as in the case of protestant dissenters, baptists, unitarians, quakers, &c. See 1 W. & M. c. 18; 7 & 8 Vict. c. 45; *Att-Gen. v. Cock*, 2 Ves. sen. 273; *Shrewsbury v. Hornbury*, 5 Ha. 406; *Att-Gen. v. Lawes*, 8 Ha. 32.

So in the case of Roman Catholics. See 2 & 3 Will. 4, c. 115, s. 1;

18 & 19 Vict. c. 86; *Cary v. Abbott*, 7 Ves. 490; *Att.-Gen. v. Todd*, 1 Ke. 803, cases before this act; and *Walsh v. Gladstone*, 1 Ph. 290, since the act. Gifts to Roman Catholic charities are not invalidated by the addition of superstitious or unlawful trusts, but that which is given to superstitious uses may be applied to lawful Roman Catholic charities. 23 & 24 Vict. c. 134, s. 1. This act only applies to England and Wales, s. 10. By the same act deeds conveying property to Roman Catholic charities have been rendered valid if enrolled within twelve months from the passing of the act (s. 3).

Bequests also for the promotion of the religious doctrines of Jews are valid. See 9 & 10 Vict. c. 59; *Michel's Trusts*, 28 Bea. 39. So for the dissemination of the doctrines of Joanna Southcott. *Thornton v. Howe*, 8 Jur., N. S. 663. So gifts of pure personal estate for ministers of religion, *quâ ministers*, are valid. *Att.-Gen. v. Lawes*, 8 Ha. 32. See *Thornber v. Wilson*, 3 Drew. 245; 4 *Ib.* 350; as to the distinction between gifts to ministers, *as such*, and gifts to them as individuals, and consider *Russell v. Kellett*, 3 Sm. & G. 264. So bequests for the distribution of bibles and religious tracts (*Att.-Gen. v. Stepney*, 10 Ves. 22), or for providing things connected with the performance of the church service (*Turner v. Ogden*, 1 Cox, 316; see *Adnam v. Cole*, 6 Bea. 353), or for the repairs or ornaments of a church (*Hoare v. Osborne*, L. R., 1 Eq. 585) are valid. *Primâ facie* a trust for maintaining the worship of God means the *established* form of religion; but where the intention is expressed in favour of any other form of worship not contrary to law, the trust will be enforced. *Att.-Gen. v. Pearson*, 3 Mer. 409.

Purposes of Charity and Benevolence.] Bequests for the following purposes have also been held valid as charitable bequests:—For the widows and orphans or poor of a place (*Powell v. Att.-Gen.*, 3 Mer. 48; *Att.-Gen. v. Comber*, 2 S. & S. 93; *Att.-Gen. v. Clarke*, Amb. 422; *Bp. of Hereford v. Adams*, 7 Ves. 324; *Russell v. Kellett*, 3 Sm. & G. 264; *Thompson v. Corby*, 27 Bea. 649. To constitute a gift to the “poor” or “poorest” of a specified class of persons a charitable gift, it must be construed as a gift to the actually poor, and not to the least wealthy of a wealthy class; *A.-G. v. D. of Northumberland*, 7 Ch. D. 745, disapproving of the dictum of *Wickens*, V.C., in *Gillam v. Taylor* (L. R., 16 Eq. 581). See *Isaac v. Defriez*, Amb. 595. Bequests to poor relations (*White v. White*, 7 Ves. 423; *Isaac v. Defriez*, Amb. 595; *A.-G. v. Price*, 17 Ves. 371); or descendants who may need assistance (*Gillam v. Taylor*, L. R., 16 Eq. 581) are good. The case of *Liley v. Hey*, 1 Ha. 580, is *contra*, but was not followed in *Gillam v. Taylor*, *sup.* Bequest to each of ten poor clergymen of the Church of England, to be selected by A., are not charitable legacies, but are payable out of the testator’s general estate. *Thomas v. Howell*, L. R., 18 Eq. 198. Bequests for building or endowing a hospital (*Pelham v. Anderson*, 2 Ed. 296), where the land is *already in mortmain (post)* are good; so for the improvement or good of a town (*Jones v. Williams*, Amb. 651; *Horse v. Chapman*, 4

Ves. 542; *Att.-Gen. v. Lonsdale*, 1 Sim. 105; *Mitford v. Reynolds*, 1 Ph. 185; *Att.-Gen. v. Bushby*, 24 Bea. 299; for the benefit generally of the country (*Nightingale v. Goulbourn*, 2 Ph. 594; towards payment of the national debt (*Newland v. Att.-Gen.*, 3 Mer. 684); for deserving unsuccessful literary men (*Thompson v. Thompson*, 1 Coll. 395); for the encouragement of good servants (*Loscombe v. Wintringham*, 13 Bea. 87); and for releasing debtors (*Att.-Gen. v. Painters' Co.*, 2 Cox, 51; see *Att.-Gen. v. Ironmongers' Co.*, 2 M. & K. 576, where the bequest was for the redemption of captives). But a bequest to aid in the discharge of persons committed for nonpayment of fines under the game laws is not a good charitable bequest. *Thrupp v. Collett*, 26 Bea. 125.

Educational—Public Purposes.] Gifts also for educational purposes are valid: as for the maintenance of schoolmasters (*Hynshaw v. Corporation of Morpeth*, Duke, 69); for the foundation of fellowships, scholarships or lectureships. *Jesus Coll. Oxf.*, 1b. 78; *Rex v. Newman*, 1 Lev. 284; *Att.-Gen. v. Marg. Prof. Camb.*, 1 Ver. 55; *Att.-Gen. v. Tancred*, 1 Ed. 10; see “Mortmain,” *post*, and the exception in favour of the universities. So gifts for the advancement of education, learning and knowledge generally. *Whicker v. Hume*, 7 H. L. C. 124. Thus bequests for the Royal Society and Royal Geographical Society are good (*Beaumont v. Oliviera*, L. R., 4 Ch. 309); so gifts for a botanical garden or the like; but if of real estate they are within the Statute of Mortmain (*post*) and void. *Townley v. Bedwell*, 6 Ves. 194; *Trustees of Br. Mus. v. White*, 2 S. & S. 594. Bequests to be valid as charitable bequests must be for the benefit or advantage of the public or a section of the public—a parish for instance. *Att.-Gen. v. Aspinall*, 2 M. & C. 622; *Br. Mus. v. White*, 2 S. & S. 596; see *Kendall v. Granger*, 5 Bea. 300. A trust of property in favour of a parish or the parishioners of a parish for ever can only be upheld on the ground of its being a charitable trust. *Att.-Gen. v. Webster*, L. R., 20 Eq. 483.

They will not be so where they are merely for some private object or purpose: thus bequests for the erection or repair of private tombs or monuments (*Re Rickard*, 31 Bea. 244; *Fowler v. Fowler*, 33 Bea. 616; *Hoare v. Osborne*, L. R., 1 Eq. 585; *Hunter v. Bullock*, L. R., 14 Eq. 45; comp. *Gravenor v. Hallum*, Amb. 643), or to found a private museum (*Thompson v. Shakespear*, 1 D., F. & J. 399), or for the benefit of a private company (*Att.-Gen. v. Haberdashers' Co.*, 1 M. & K. 420), or for private charity (*Ommaney v. Butcher*, T. & R. 260), are void if unlimited in point of time, as they are contrary to the rule against perpetuities and invalid as charitable bequests.

Certainty of Bequest.] The bequest must not be of an uncertain nature; for instance, for “charitable or public purposes” (*Vezey v. Jamson*, 1 S. & S. 69; see *Fowler v. Fowler*, 33 Bea. 616), or for such “objects of liberality and benevolence” as a trustee shall approve of. *Morice v. Bp. of Durham*, 9 Ves. 399; *Williams v. Kershaw*, 5

Cl. & F. 111; *Ellis v. Selby*, 1 M. & C. 286; the cases of *Waldo v. Caley*, 16 Ves. 206; *Johnston v. Swann*, cited Amb. 585, n., and *Horde v. E. Suffolk*, 2 M. & K. 59, are *contra*, but see the observations upon them 1 M. & C. 292—3. *Pocock v. Att.-Gen.*, 3 Ch. D. 342. If the gift is indefinite at the testator's death it is inoperative. *Leavers v. Clayton*, 8 Ch. D. 584. A bequest of money "in charitable and deserving objects" is valid. *Stone v. Att.-Gen.*, 28 Ch. D. 464. A bequest to a public body for a purpose, none being expressed, is void. *Corp. of Gloucester v. Osborn*, 1 H. L. C. 272; *S.C.*, nom. *Corp. Gl. v. Wood*, 3 Ha. 131. And a gift to the trustees of a chapel, to be appropriated according to a statement appended, there being no such statement, is too indefinite to have effect given to it. *Aston v. Wood*, L. R., 6 Eq. 419. But a bequest "for such charities and other public purposes as lawfully may be in the parish of A.," is good. *Dolan v. Macdermot*, L. R., 3 Ch. 676. And where the uncertainty arises by reason of several objects answering wholly or in part the terms of the bequest, the court will endeavour to ascertain which, or how many, were intended (see *Wallace v. Att.-Gen.*, 33 Bea. 384); and parol evidence is admissible, as the ambiguity is latent (*post*, "WILLS"); and sometimes where the court finds a difficulty in deciding between two or more objects, it will divide the legacy between them. *Gibson v. Coleman*, 3 W. N. 96; *Re Alchin's Trusts*, L. R., 14 Eq. 230.

Where a general intention to give in charity is apparent, the failure of the particular mode in which the bequest is to be carried out will not prevent the court giving effect to the general intention, if practicable. *Moggridge v. Thackwell*, 7 Ves. 69. The court endeavours to support a charitable bequest, and where there are two possible constructions of a bequest, one of which would render it void and the other effectual, the latter will be supported, and the trust will be executed in equity. *Bruce v. Deer Presbytery*, L. R., 1 Sc. App. 96. As where it is for charitable uses or religious purposes generally (*Att.-Gen. v. Herrick*, Amb. 712; *Wilkinson v. Lindgren*, L. R., 5 Ch. 570); or for the "poor" generally (*Att.-Gen. v. Rance*, cited Amb. 422); or for such charitable uses as the testator (*Mills v. Farmer*, 1 Mer. 55; *Pocock v. Att.-Gen.*, 3 Ch. D. 342) shall appoint, and no appointment is made; or for a charitable purpose which has become impossible (*Hayter v. Trego*, 5 Russ. 113; *Att.-Gen. v. Bp. Llandaff*, cited 2 M. & K. 586; *Att.-Gen. v. Glyn*, 12 Sim. 84; *Att.-Gen. v. Ironmongers' Co.*, Cr. & Ph. 208; 10 Cl. & F. 908; *Marsh v. Att.-Gen.*, 2 J. & H. 61); or for a particular charity and there are several answering the description. *Simon v. Barber*, 5 Russ. 112.

In these and the like cases the court will execute the trust *cy près* and apply the fund to other charitable purposes similar to those (if any) mentioned by the testator. See *Pieschel v. Paris*, 2 S. & S. 384; *Re Campden Charities*, 18 Ch. D. 310. This, however, cannot be done where the object is specific and particular; for if this cannot be carried out, or the charity mentioned ceases to exist in the testator's lifetime, the gift will fail. See *Cherry v. Mott*, 1 M. & C. 123; *Clark v.*

Taylor, 1 Drew. 642; *Russell v. Kellett*, 3 Sm. & G. 264; *Langford v. Gowland*, 3 Giff. 617; *Fisk v. Att.-Gen.*, L. R., 4 Eq. 521; *Clephane v. Prov. of Edinburgh*, L. R., 1 Sc. App. 417; *Re Maguire*, L. R., 9 Eq. 682. So where the trust is of such a nature that the court cannot enforce it. *New v. Bonaker*, L. R., 4 Eq. 655. The jurisdiction of the court to act upon the *cy près* doctrine upon the failure of a specific charitable bequest arises whether the residue be given to charity or not, unless upon the construction of the will a direction can be implied that the bequest, if it fails, should go to the residue. *Mayor of Lyons v. Adv.-Gen. of Bengal*, 1 App. Ca. 91.

Where a fund is left in trust for trustees to apportion between charities and legatees, and the trustees fail to make any apportionment, the court will divide the fund *equally* between the objects of the trust. *Att.-Gen. v. Doyley*, 7 Ves. 58, n.; *Salisbury v. Denton*, 3 K. & J. 529; see *Izod v. Izod*, 32 Bea. 242; *Down v. Worrall*, 1 M. & K. 561. And if one fund be given for several (for instance, three) charitable purposes, some of which (for instance, two) only are good, and from the nature of the fund it is impossible to fix the proportions, the court will make an equal division of the fund, one-third of it, in the case supposed, falling into the residue (if any), and two-thirds being applied equally between the two objects of the valid trusts. *Hoare v. Osborne*, L. R., 1 Eq. 585. A gift over in the event of a charitable bequest not taking effect is good. *De Themines v. De Bonneval*, 5 Russ. 288; *Hall v. Warren*, 9 H. L. C. 420. As to legacies to foreign charities, see *Mitford v. Reynolds*, 1 Ph. 185; *Att.-Gen. v. Sturge*, 19 Bea. 597.

There is a class of cases in which, from the terms in which a bequest is made, there is a doubt whether it is void under the Statute of Mortmain, or whether it is good as a charitable bequest. These cases will be found collected under Chap. II., *post*, p. 48.

Trust Funds to be applied according to the Trust.] Trustees of charities must apply the charity funds in the mode prescribed by the trust. *Att.-Gen. v. Sherborne School*, 18 Bea. 256. Therefore a hospital trust fund cannot be applied towards the lighting, &c. of the town (*Att.-Gen. v. Kell*, 2 Bea. 575); nor a trust for the poor of one place be diverted for the benefit of the poor of another (*Att.-Gen. v. Brandreth*, 1 Y. & C., C. C. 200). See *Att.-Gen. v. Bovill*, 1 Ph. 762. But under a trust for the *relief of the poor*, a fund may be applied for the education of the poor (*Wilkinson v. Malin*, 2 Tyr. 544, 570). So if "in trust for the employment and support of the poor of the parish," it may be applied in aid of the poor rates (*Att.-Gen. v. Blizzard*, 21 Bea. 283), and under a trust for finding and paying a schoolmaster, the fund may be used towards the *repair or rebuilding* of the school-house. *Att.-Gen. v. Mayor of Stamford*, 2 Sw. 592. With regard also to trusts for religious purposes, where the particular trust is doubtful, the usage of a congregation will guide the court in the administration of the trust, and twenty-five years' usage immediately preceding a suit is conclusive evidence. 7 & 8 Vict. c. 45,

s. 2. Upon this statute it has been held, that where *Baptists* have enjoyed for the statutory period a charitable fund originally given to *Presbyterians*, the right of the former cannot be disputed. *Att.-Gen. v. Bunce*, L. R., 6 Eq. 563. But where there is *no doubt* usage cannot alter the trust. *Att.-Gen. v. Pearson*, 3 Mer. 400; *Foley v. Wontner*, 2 J. & W. 247. And a declaration of trust by the trustees at the time of the creation of the trust is *prima facie* evidence of its objects. *Att.-Gen. v. Clapham*, 4 D., M. & G. 626. The question of the original form of worship contemplated by the trust must be raised by information (*Newsome v. Flowers*, 30 Bea. 461). It may be mentioned in connection with this branch of the present title, that a minister in possession of a meeting-house is tenant at will to the trustees, and, as such, may be dispossessed *at law* (*Doe v. Jones*, 10 B. & C. 718), though the *right* of removal may be determinable in equity (*Doe v. Jones*, *sup.*; see *Foley v. Wontner*, 2 J. & W. 247); and a dissenting minister *may* be removable at the discretion of the trustees, &c. *Att.-Gen. v. Pearson*, 3 Mer. 402.

Where the appointment of new trustees or of the minister of any chapel is not provided for by the deed creating the endowment, the court will direct an inquiry as to the proper parties to appoint. *Davis v. Jenkins*, 3 V. & B. 151. And, by the 13 & 14 Vict. c. 28, real estate (see "*Mortmain*," *post*) acquired by congregations or societies for purposes of religious worship or education vests from time to time in their successors in office as new trustees without conveyance (s. 1).

Visitors of Charities.] When a charity has been established by charter the founder and his heirs, or those nominated by the founder, are the visitors (*Att.-Gen. v. Gaunt*, 3 Sw. 148); failing these, the crown. *Att.-Gen. v. Dixie*, 13 Ves. 519, 533.

The visitor's duty is to superintend the *internal government* of the charity according to the rules or statutes of the founder. With this duty the court will not interfere (see *Att.-Gen. v. Found. Hosp.*, 2 Ves. 47; *Att.-Gen. v. Magdalen Coll.*, 10 Bea. 402); but it will in regard to the management of the charity *estate* and revenues. *Ib.*; *Ex parte Berk. School*, 2 V. & B. 138; and see *Att.-Gen. v. Archbp. of York*, 2 R. & My. 461, 468; *Att.-Gen. v. Browne's Hosp.*, 17 Sim. 137; *Att.-Gen. v. St. Cross Hosp.*, 17 Bea. 435. And if property be given to an ancient charity by a new benefactor upon a special trust, the court has jurisdiction with reference to it, though in a matter which, but for the special trust, would be properly cognisable by the visitor. *Green v. Rutherford*, 1 Ves. sen. 468, 473; and see Chap. III., *post*, as to the various Charitable Trusts Acts.

CHAPTER II.

STATUTE OF MORTMAIN.

<i>Provisions of Act</i>	48	<i>Of the Property to which the Statute</i>	
<i>Gifts of Land, &c., to be by Deed</i>	49	<i>applies—continued.</i>	
<i>So of Money, &c., to be laid out</i>		<i>Option to invest in Land or</i>	
<i>in Land, &c.</i>	49	<i>Personal Estate</i>	53, 54
<i>Time of Execution—Enrolment</i> .	49	<i>Establishment or Endowment of</i>	
<i>Purchases or Transfers for Value</i>	49	<i>Charitable Institutions</i>	54
<i>Assurances, &c. contrary to Act</i>		<i>Erections or Buildings</i>	54
<i>Void</i>	49	<i>Land already in Mortmain</i>	55
<i>Exemptions</i>	50	<i>Valid and void Gifts connected.</i>	55
<i>Universities—Eton, Winchester,</i>		<i>Void Legacies paid</i>	56
<i>Westminster</i>	50	<i>Gift valid under Mortmain Act</i>	
<i>Does not extend to Scotland or</i>		<i>may be void as a Perpetuity</i> .	56
<i>Ireland</i>	50	<i>Secret Trust between Devisor</i>	
<i>Nor to London, the Colonies,</i>		<i>and Devisee</i>	56, 57
<i>India</i>	50	<i>Devisee no Party to the Trust</i> ...	57
<i>Where Licence necessary</i>	50	<i>Promise by one Trustee</i>	57
<i>Effect of Licence</i>	50	<i>As to marshalling Assets</i>	57
<i>Charities exempt by Statute</i> ...	50	<i>Court will not marshal Assets...</i>	57
<i>Companies—Societies</i>	51	<i>Where Testator marshals his</i>	
<i>Of the Property to which the Statute</i>		<i>Assets</i>	58
<i>applies</i>	51	<i>Consequences of failure of Chari-</i>	
<i>Copyholds—Leaseholds</i>	51	<i>table Gifts</i>	58
<i>Mortgages</i>	51	<i>Grants, &c., by Deed</i>	59
<i>Money to arise from Proceeds of</i>		<i>Voluntary Deeds</i>	59
<i>Sale—Covenants</i>	51	<i>Death of Grantor within twelve</i>	
<i>Liens for unpaid Purchase</i>		<i>Months</i>	59
<i>Money</i>	52	<i>Two Witnesses</i>	59
<i>Shares in Companies</i>	52	<i>Deeds of Gift reserving Benefit</i>	
<i>Mortgages to Charities</i>	53	<i>to Donor</i>	59
<i>33 & 34 Vict. c. 34</i>	53	<i>Conveyances for Value</i>	59
<i>Legacies in part charged on</i>		<i>Reservation of Rent, &c.</i>	60
<i>Land</i>	53	<i>Demises taking effect within a</i>	
<i>Condition subsequent</i>	53	<i>Year</i>	60
<i>Construction generally of Chari-</i>		<i>Consideration—Enrolment</i>	60
<i>table Bequests</i>	53	<i>Grants for Buildings for Re-</i>	
<i>Recommendations to Purchase</i> ...	53	<i>ligious, &c. Purposes</i>	60

Provisions of the Act.] Even before the 9 Geo. 2, c. 36, commonly known as the Statute of Mortmain (although it should in strictness be termed the act for the prevention of devises of lands to charities except as therein provided; see *Luckraft v. Pridham*, 6 Ch. D. 245, 214), alienations in mortmain were forbidden by several early statutes (see the preamble to the act), yet there was no greater restriction on the disposition of real estate for charitable uses or purposes than on that of personal estate. By this statute, however, after reciting that gifts or alienations of lands, tenements or hereditaments in mortmain

are prohibited or restrained by Magna Charta and divers other wholesome laws, as prejudicial to and against the common utility ; nevertheless, this public mischief had of late greatly increased by many *large and improvident alienations* or dispositions *made by languishing or dying persons or by other persons* to uses called *charitable uses* to take place after their deaths to the disherison of their lawful heirs ; it is enacted, that after 24th June, 1736, no manors, lands, tenements, rents, advowsons, or other hereditaments, corporeal or incorporeal, whatsoever, nor any sums of money, goods, chattels, stocks in the public funds, securities for money, or any other personal estate whatsoever, to be laid out or disposed of in the purchase of any lands, tenements, or hereditaments, shall be given, granted, aliened, limited, released, transferred, assigned or appointed or any ways conveyed or settled to or upon any person or persons, bodies politic or corporate or otherwise for any estate or interest whatsoever, or any ways charged or incumbered by any person or persons whatsoever, in trust or for the benefit of any charitable uses whatsoever, unless such gift, conveyance, appointment or settlement of any such lands, &c., money or personal estate other than stocks in the public funds, be and be made by deed indented, sealed and delivered in the presence of two or more credible witnesses twelve calendar months at least before the death of such donor or grantor, including the days of execution and death, and be *enrolled in chancery* within *six calendar months* next after the execution thereof, and unless such stocks be transferred in the public books usually kept for the transfer of stocks six calendar months at least before the death of such donor or grantor, including the days of the transfer and death, and unless the same be made to take effect in possession for the charitable use intended *immediately from the making thereof*, and be without any power of revocation, reservation, trust, condition, limitation, clause or agreement whatsoever for the benefit of the donor or grantor, or of any person or persons claiming under him (s. 1). A lease to several persons described as trustees of a building used as a dissenting chapel, though not so described, and reserving to the lessors a right of access to their pews therein for ninety-nine years, with a covenant for renewal, at the yearly rent of 1s., and *not enrolled*, is void under the act. *Bunting v. Sargent*, 13 Ch. D. 330.

Provided that nothing thereinbefore mentioned relating to the sealing and delivering of any deed or deeds twelve calendar months at least before the death of the grantor, or to the transfer of any stock six calendar months before the death of the grantor or person making transfer, should extend or be construed to extend to any purchase of any estate or interest in lands, &c., or any transfer of any stock to be made *bonâ fide* for a full and valuable consideration actually paid at or before the making such conveyance or transfer, without fraud or collusion (s. 2).

All gifts, assurances and transfers whatsoever contrary to the act are made absolutely null and void (s. 3).

Exemptions.] The two universities (see *Att.-Gen. v. Tancred*, 1 Ed. 15; *Att.-Gen. v. Andrew*, 3 Ves. 633; *Att.-Gen. v. Trin. Hall, Cam.*, 9 Ves. 525) and the colleges of Eton, Winchester and Westminster are exempt from the operation of the act (s. 4). But no college is to hold more advowsons than are equal in number to a moiety of the fellows, not computing, however, those given for the heads of colleges (s. 5). And see as to Oxford and Cambridge, 40 & 41 Vict. c. 48, s. 60. The act does not extend to *Scotland* (see *Macintosh v. Townsend*, 16 Ves. 330; *Att.-Gen. v. Mill*, 5 Bli., N. S. 593), to *Ireland* (*Campbell v. E. Radnor*, 1 B. C. C. 272), to *London* according to the custom of London (*Middleton v. Cater*, 4 B. C. C. 409), to the *Colonies* (*Whicker v. Hume*, 7 H. L. C. 124), nor to *India* (*Mitford v. Reynolds*, 1 P. H. 185), nor to the *West Indies* (*Att.-Gen. v. Stewart*, 2 Mer. 143); and certain institutions and establishments are exempt from the operation of the act wholly or partially. Of these the principal are the British Museum, 26 Geo. 2, c. 22, s. 14; 5 Geo. 4, c. 39; Queen Anne's Bounty, 43 Geo. 3, c. 107; Greenwich Hospital, 10 Geo. 4, c. 25, s. 37; Foundling, 17 Geo. 2, c. 29; St. George's Hospital, 4 Will. 4, c. 38, loc. & per.; Museums of Art, &c., 13 & 14 Vict. c. 65, s. 3. See *Harrison v. Mayor of Southampton*, 2 Sm. & G. 387; and as to dispositions for ecclesiastical purposes, see 43 Geo. 3, c. 108; *O'Brien v. Tyssen*, 28 Ch. D. 372; 58 Geo. 3, c. 45, s. 33; *Ch. Buil. Soc. v. Coles*, 5 D., M. & G. 324. For other exemptions, see Chronological Table and Index of Statutes, 9th ed., pp. 818—819.

Where a statute merely confers on a charitable, &c., institution a right to purchase, take and hold land, this simply operates as a *licence* (see 7 & 8 Will. 3, c. 37) to that effect, rendering it unnecessary to procure such a licence from the crown (and which, when necessary, is now granted by the Board of Trade), and does not give a right to *acquire* it except in the manner authorized by the Statute of Mortmain. *Mogg v. Hodges*, 2 Ves. sen. 52; *Br. Mus. v. White*, 2 S. & S. 594; see 1 Jarm. Wills., 4th ed., 242, and *Ib. n. (y)*. So that, in effect, in such cases, the charitable institution cannot acquire lands or other property within the Mortmain Act by *devise* at all (*Br. Mus. v. White*, 2 S. & S. 594; consider *Harrison v. Mayor of Southampton*, 2 Sm. & G. 387; *Luckraft v. Pridham*, 6 Ch. D. 205), *unless* the language of a statute be *express*, in effect *wholly* exempting the charity from the operation of the act and giving it power to take under a devise to it, as in Queen Anne's Bounty Act, *sup.*, and some other acts. *Nethersole v. School for the Blind*, L. R., 11 Eq. 1. The language of the exempting act must therefore be carefully looked at to see what the precise privileges of the charity governed by it are. Where a hospital is empowered by an act of Parliament by *will*, gift, purchase, or otherwise, to obtain, acquire, hold, and retain land for the purposes of the charity, and also any kind of personal estate, including money secured on mortgage charged on land, these words imply a power to devise land, &c., for the use of the charity. *Per-ring v. Trail*, L. R., 18 Eq. 88. See *Robinson v. Gov. Lon. Hosp.*,

10 Ha. 19, and comp. *Luckraft v. Pridham*, 6 Ch. D. 205. As to the powers of companies and societies to hold land under the Joint Stock Companies Act, see 25 & 26 Vict. c. 89, ss. 18, 21. Under the former section, which is applicable to ordinary trading companies, there is no restriction as to the quantity of land which may be held by an incorporated company. Under the latter section, however, companies formed for the purpose of promoting art, science, religion, charity, or having other like object, cannot hold more than two acres of land without the sanction of the Board of Trade.

Property to which the statute applies.] It will be convenient to consider, in the first place, what property is within the act. When it is ascertained that property of a particular kind is within it, then, of course, no disposition of it by will can be valid, unless it be within the exemptions in the act, or some subsequent enabling statute applies (*ante*, p. 50), and no disposition of such property by deed can be good unless valid either within sect. 1 or sect. 2. The act expressly mentions lands, tenements or hereditaments, money and personal estate to be laid out in land. It has been held also that the act applies to copyholds (*Doe v. Waterton*, 3 B. & Al. 149; see 24 & 25 Vict. c. 9, s. 1), leaseholds (*Att.-Gen. v. Graves*, Amb. 155), and to principal or interest secured on mortgage of real property or chattels real. *Att.-Gen. v. Caldwell*, Amb. 635; *Currie v. Pye*, 17 Ves. 462. Where a residue of personal estate is bequeathed for charitable purposes, and the personal estate comprises money lent by the testator on the security of a mortgage of *money* which itself is secured on a mortgage of *realty*, if no interest in *land* is given to the testator so that he cannot foreclose, the bequest is good, but otherwise if he can foreclose. *Cornford v. Elliott*, 27 Ch. D. 318; affirmed W.N., 1885, p. 126.

The purchase-money of land directed to be sold is within the act. *Br. Mus. v. White*, 2 S. & S. 594; *Att.-Gen. v. Harley*, 5 Madd. 321. In *Marsh v. Att.-Gen.*, 2 J. & H. 61, a legacy was given by A. to a charity, of money to arise from a sale of land directed by a testator under whom A. claimed. At A.'s death the land had not been sold. The legacy was held good. See also *Shadbolt v. Thornton*, 17 Sim. 49 (more fully reported 13 Jur. 597). The two last cases, however, are at variance with *Att.-Gen. v. Harley*, *sup.*, and were not followed in *Brook v. Badley*, L. R., 3 Ch. 672, where a legacy payable with other legacies out of personalty and the proceeds of the sale of land, was held to be within the act. Nor can there be any apportionment so as to make that part of the legacy which is payable out of the personalty available for the charitable bequest: *ib.* But see *In re Hill's Trusts*, 16 Ch. D. 173. In *Lucas v. Jones*, L. R., 4 Eq. 73, Wood, V.-C., appears to lay down the rule that where *several persons* are interested in the proceeds of land directed to be sold (but still unconverted), and one of them disposes of his share, the act does not apply—*aliter* where *one person* alone is interested in the *whole fund* (*ib.* p. 77); but this seems to be at variance with *Brook v. Badley*, see L. R., 3 Ch. 674. A cove-

nant (which cannot be satisfied without having recourse to the land of the covenantor) to pay money to trustees to be applied in charity, is within the act. *Jeffries v. Alexander*, 8 H. L. C. 594. And a voluntary covenant to secure by will the payment of a sum of money to be applied for charitable purposes cannot be satisfied out of the impure personalty of the covenantor; the debt created by the covenant must, like a legacy, abate in the proportion of the impure to the pure personalty. *Fox v. Lownds*, L. R., 19 Eq. 453. In *Emley v. Davidson*, 19 Ch. D. 156, however, it was held that a covenant for payment of a sum was a mere debt from the covenantor's estate and not void under the act, although it might have to be satisfied out of the proceeds of land. In this case, *Jeffries v. Alexander*, *sup.*, was much commented upon. The distinction between the two cases would seem to be somewhat fine. The act applies also to liens for unpaid purchase-money (*Harrison v. Harrison*, 1 R. & My. 71; *Shepherd v. Beetham*, 6 Ch. D. 597), and to the proceeds of a partnership share in realty (*Ashworth v. Mann*, 15 Ch. D. 363), and to the proceeds of growing crops (*Symonds v. Marine Society*, 2 Giff. 325). But the act does not apply to arrears of rent (*Edwards v. Hall*, *sup.*), nor to apportioned rent (*Thomas v. Howell*, L. R., 18 Eq. 198), nor to shares generally in incorporated or unincorporated joint stock companies having power to hold land (*Thompson v. Thompson*, 1 Coll. 381; *Hilton v. Giraud*, 1 De G. & Sm. 183; *Ashton v. L. Langdale*, 4 De G. & Sm. 402; *Myers v. Perigal*, 2 D., M. & G. 599; *Watson v. Spratley*, 10 Ex. 222; *Hayter v. Tucker*, 4 K. & J. 243; *Edwards v. Hall*, *sup.*; *Taylor v. Linley*, 1 Giff. 67), to railway debentures in the form of promises to pay (*Myers v. Perigal*, *sup.*; see *Langham's Will*, 10 Ha. 446), to improvement bonds (*Bunting v. Marriott*, 19 Bea. 163), to debentures or debenture stock of railway or other commercial companies holding land (*Walker v. Milne*, 11 Bea. 507; *Holdsworth v. Davenport*, 3 Ch. D. 185; *Re Mitchell's Estate*, 6 Ch. D. 655; *Attree v. Howe*, 9 Ch. D. 337, overruling *Ashton v. L. Langdale*, 4 De G. & M. 402, and *Chandler v. Howell*, 4 Ch. D. 651), nor, in general, to the mortgages of tolls, works or rates of municipal or other similarly constituted authorities (*Re Harris Jacson v. Gov. Q. A. Bounty*, 15 Ch. D. 561; *Jervis v. Lawrence*, 22 Ch. D. 202). The cases of *Finch v. Squire*, 10 Ves. 41 (mortgage of poor rates), *Knapp v. Williams*, 4 Ves. 430 (mortgage of tolls), and *Ion v. Ashton*, 28 Bea. 379 (mortgage of railway undertakings), and some early similar cases are *contra*, but would seem to be of doubtful authority. Consider the judgment in *Attree v. Howe*, *sup.* In *In re Harris*, *sup.*, Jessel, M.R., observed (15 Ch. D., p. 564), "It appears to me that *Attree v. Howe* (*sup.*) decides that in order to create an interest in land, the land must be affected directly."

But in a recent case (*Martin v. Lacon*, W. N. 1885, p. 175, following *Knapp v. Williams*, *sup.*), a bond of Harbour Commissioners assigning the duties arising by virtue of their act was held to be an interest in land. Consider, however, the reasoning in *Re Harris* and *Attree v. Howe*, *sup.* Neither does the act apply to shares in mines conducted

on the cost-book principle. *Hayter v. Tucker*, 4 K. & J. 243. It has been held, however, that shares in ordinary joint stock *mines* are within the act. *Morris v. Glynn*, 27 Bea. 218; but see *Attree v. Haue*, *sup.*, and *Entwistle v. Davis*, L. R., 4 Eq. 272, in which it was held that shares in the British Land Company were not within the act. For it is a settled principle, that where land is purchased and held by a public company for the purposes of trade, the interest of a shareholder of the company is not within the act. *Taylor v. Linley*, 2 D., F. & J. 84. And with regard to mortgage securities, it must be observed, that although money secured on mortgage is within the act (*sup.*), it would seem that mortgages to corporations and trustees of charities for money lent by them are not. See *Doe d. Graham v. Hawkins*, 1 G. & D. 551. At all events, a clause of redemption in a mortgage is not a power of revocation or condition within the first section (*Ib.*); and now by the 33 & 34 Vict. c. 34 (1st August, 1870), it is enacted that corporations and trustees holding money in trust for any public or charitable purpose may invest the same in real securities (s. 1). In cases in which the equity of redemption of the premises may be barred or released, the property is to be sold, and decrees shall direct a sale, not foreclosure (s. 2).

"Real security" includes all mortgages or charges, of or upon hereditaments of any tenure, or of or upon any interest therein or charge thereon; "conveyance" includes all grants and assurances whatsoever operating to pass or vest any estate or interest (s. 3).

It will be seen that the act does not refer to or give validity to bequests for charitable uses of money owing on mortgages of real estate or of chattels real. And such bequests would not seem in any way affected by the act, which appears only to apply to money being strictly such held by the trustees at the time of the mortgage. Therefore, such cases as *A.-G. v. Caldwell*, Amb. 635, &c., *ante*, p. 51, would be unaffected by the act. In such cases the interest might on foreclosure become an interest purely in land, which would be clearly contrary to the Mortmain Act. The 33 & 34 Vict. c. 34, s. 2, expressly guards against such a contingency. Prior to this act, however, it was held that a direction to place money given for charitable uses on mortgage rendered the bequest void. *Baker v. Sutton*, 1 Ke. 224.

If a charity legacy be in part money or pure personal estate, and in part charged on land, it will be void *pro tanto* as to the latter part only. *Waite v. Webb*, 6 Madd. 71; see *Calvert v. Armitage*, 1 H. & M. 446.

Where the devise is absolute, as to A. in fee, followed by a condition that he shall convey it to a charity, the condition only is void; the devise is good. *Poor v. Mial*, 6 Madd. 32.

It may be observed that charitable bequests should be construed so as to ascertain the intention from the words of the will without advert- ing to the existence of the statute. *Tatham v. Drummond*, 10 Jur. N. S. 1087.

An option to invest in land or on pure personal estate (Soresby v.

Hollins, Amb. 211; see *Denton v. Manners*, 2 D. & J. 675; *Mayor of Faversham v. Ryder*, 5 D., M. & G. 350; *Graham v. Paternoster*, 31 Bea. 30; *Re Beaumont*, 32 Bea. 191), or in land in Ireland or elsewhere where the Mortmain Act has no operation (*Univ. of London v. Yarrow*, 1 D. & J. 72), has the effect of making the bequest valid, as the trustees can apply the money so as not to contravene the act. But it is otherwise where there is a power to invest on personal estate until the purchase of land is made (*Grieves v. Case*, 4 B. C. C. 67). *Grimmett v. Grimmett*, Amb. 210, is *contra*; cons. the observations of Stuart, V.-C., on *Grimmett v. Grimmett* in *Lewis v. Allenby*, L. R., 10 Eq. 668, 670. Although there may be no express direction in the will to invest in land, yet if from the nature of the charity that result is inevitable the gift is void (*Widmore v. Woodroffe*, Amb. 636; *Middleton v. Clitherow*, 3 Ves. 734, gift to Queen Anne's Bounty, but before the 43 Geo. 3, c. 107; *Denton v. Manners*, 2 D. & J. 675; *Tatham v. Drummond*, 10 Jur., N. S. 1087); *aliter* where from the rules of the charity the money may be applied in some way not contrary to the act. *Church Build. Soc. v. Barlow*, 3 D., M. & G. 120. If the will contain no direction to purchase land the trust will be good, if it can be performed without purchasing land, as where it is "for and towards establishing a school." *Att.-Gen. v. Williams*, 4 B. C. C. 526.

A bequest including impure personalty, to trustees to divide among such charities in England as they in their discretion should think proper, is valid, being equivalent to a gift to charities exempt from the Mortmain Act. *Lewis v. Allenby*, L. R., 10 Eq. 668. And a bequest of pure personalty to an existing charity, the application of the funds of which rests in the absolute discretion of the trustees of the charity, is good, although some of the objects of the charity may involve the acquisition of land. *Wilkinson v. Barber*, L. R., 14 Eq. 96.

Bequests for or towards the *establishment, endowment, or maintenance* of schools, &c., are in themselves ambiguous, and the intention of the testator must be collected from the context. See *Att.-Gen. v. Hall*, 9 Ha. 647; *Dunn v. Bownas*, 1 K. & J. 596; *Edwards v. Hall*, 6 D., M. & G. 74; *Dent v. Allcroft*, 30 Bea. 335; *Hopkins v. Phillips*, 3 Giff. 182; *Tatham v. Drummond*, 10 Jur., N. S. 1087; *Cawood v. Thompson*, 1 Sm. & G. 409. A bequest for "supporting or founding" free or ragged schools is good. *Morley v. Croxon*, 8 Ch. D. 156.

Bequests for or towards the *erection* of churches, schools, or other buildings for charitable purposes are *prima facie* bad (*Foy v. Foy*, 1 Cox, 163), the rule of construction being that a direction to build includes a direction to purchase land for the purpose of building, unless the testator distinctly refers to land already in mortmain. *Pritchard v. Arbouin*, 3 Russ. 458; *Smith v. Oliver*, 11 Bea. 481; *Giblett v. Hobson*, 3 M. & K. 517; *Edwards v. Hall*, *sup.*; *Cox v. Davie*, 7 Ch. D. 204. And where a fund is given for the endowment of such schools, &c., to be erected, such a gift also fails: *Ib.* But where a testator gives money, but forbids a purchase of land with it,

expressing, however, his desire that the land should be found from some other source, the bequest will be good (*Philpott v. St. George's Hosp.*, 6 H. L. C. 338; overruling in effect *Trye v. Corp. of Gloucester*, 14 Bea. 173; see *Cresswell v. Cresswell*, L. R., 6 Eq. 69; comp. *Mather v. Scott*, 2 Ke. 172); so bequests for the erection (*Glubb v. Att.-Gen.*, Amb. 373; *Fisher v. Brierley*, 10 H. L. C. 159) or improvement (*Att.-Gen. v. Bp. of Chester*, 1 B. C. C. 444; *Re Hawkins*, 33 Bea. 570) of buildings on land already in mortmain, are good. *Sewell v. Crewe-Read*, L. R., 3 Eq. 60; *Booth v. Carter*, *Ib.* 757; as to the last case, see *Re Watmough's Trusts*, L. R., 8 Eq. 272. See also *Sinnett v. Herbert*, L. R., 7 Ch. 232. So bequests for the redemption of land tax of hereditaments in mortmain (42 Geo. 3, c. 116); *aliter* bequests to discharge incumbrances on such land. *Corbyn v. French*, 4 Ves. 418; *Waterhouse v. Holmes*, 2 Sim. 162. In *Re Lynall's Trusts*, 12 Ch. D. 211; see *Bunting v. Marriott*, 19 Bea. 163.

It has been held that if gifts of pure personalty valid *per se* are so connected with other gifts void under the Statute of Mortmain that the court cannot disconnect the two and ascertain the quantum of each, both are void; as where a *residue* of personalty is given, the gift being valid *per se*, after a bequest of an uncertain sum which is void under the act by reason of its being impossible to estimate the amount required for the expressed object of the bequest (*Chapman v. Brown*, 6 Ves. 404; *Att.-Gen. v. Davies*, 9 Ves. 535; *Att.-Gen. v. Hinxman*, 2 J. & W. 270; see *Att.-Gen. v. Goulding*, 2 B. C. C. 428; *Fowler v. Fowler*, 33 Bea. 616; *Cramp v. Playfoot*, 4 K. & J. 479).

The decisions in cases of this description have not, however, been uniform. In *Mitford v. Reynolds*, 1 Ph. 185, the testator bequeathed property to buy a mount and erect a monument on it, giving the residue to a charity. Lord Lyndhurst, C., held that whether the directions as to the monument were void or not, as the amount required could be ascertained, the bequest of the residue was good. The mount could not be purchased, and the case coming on again in the court below, Shadwell, V.-C., held that the bequest as to the mount and monument failed, and that the whole went to the charity: 16 Sim. 105.

In *Hoare v. Osborne*, L. R., 1 Eq. 585, a sum was given for (1) a non-charitable and void purpose, and (2) two valid charitable purposes. The fund was directed by Kindersley, V.-C., to be divided into thirds, one third falling into the residue, and the remaining two-thirds being given to the valid charitable purposes. His Honour observed, *Ib.*, p. 588, that where a single fund is given for several objects of this nature, and one of them is bad, if it can be ascertained what are the proper proportions to be attributed to the several objects, it directs an inquiry on the subject; but if, from the nature of the gift, it appears impracticable to fix the proportions, the court divides the fund equally between the different objects. See *In re Rigley's Trusts*, 36 L. J. Ch. 147.

In *Fisk v. Att.-Gen.*, L. R., 4 Eq. 521, a fund was given to apply the dividends to a non-charitable purpose, and the residue to a charitable purpose; it was held that *although* the amount required for the non-charitable purpose *could be ascertained*, the *whole* should be applied for the charitable purpose. Wood, V.-C., said that *Chapman v. Brown, sup.*, could not prevail except in exactly similar circumstances, L. R., 4 Eq. 525. See *Kirkman v. Lewis*, 4 W. N. 174; *Mayor of Dundee v. Morris*, 3 Macq. H. L. 134.

Fisk v. Att.-Gen., sup., was followed in *Hunter v. Bullock*, L. R., 14 Eq. 45; *Dawson v. Small*, L. R., 18 Eq. 114; *In re Williams*, 5 Ch. D. 735, and *In re Birkett*, 9 Ch. D. 576, which were similar cases. In the last, however, Jessel, M.R., while following *Fisk v. Att.-Gen.*, by which and the subsequent cases he considered he was bound, expressed his approval of *Chapman v. Brown, sup.*

In *Champney v. Davy*, 11 Ch. D. 949, there was a bequest of a sum to be applied for charitable purposes, and purposes uncertain whether they were or not charitable, and of the residue of such sum in trust for certain persons. An inquiry was directed whether the uncertain purposes were charitable, and what sum was required for all the purposes which were found to be charitable, the residue being given to the persons named.

If an estate be devised partly upon trusts void under the act and partly upon valid trusts, the devise will be good as to the latter. *Willet v. Sandford*, 1 Ves. sen. 186; see *Doe v. Harris*, 16 M. & W. 517; *Wright v. Wilkin*, 2 B. & S. 232. Where a legacy void under the statute is actually paid and laid out in land, the court will not execute the trust (*Att.-Gen. v. Acland*, 1 R. & My. 248); but after a lapse of many years the validity of the trust will be presumed. *Att.-Gen. v. Moor*, 20 Bea. 119.

It may be mentioned that although a gift or devise may not be void under the Mortmain Act, it will be so if given to trustees for *non-charitable* purposes (*ante*, s. 2) without any restriction as to time, being in that case contrary to the rule against perpetuities. *Thomson v. Shakspear*, 1 D., F. & J. 399; *Carne v. Long*, 2 D., F. & J. 75. *Cocks v. Manners*, L. R., 12 Eq. 574; *In re Clark's Trusts*, 1 Ch. D. 497; *Re Dutton*, 4 Ex. D. 54. But when the gift is valid within the Mortmain Act, and is for charitable purposes, the question of remoteness does not, or can only rarely arise. Thus, a gift in aid of the erecting and endowing a *future* church is good. *Sinnett v. Herbert*, L. R., 7 Ch. 232. So a gift, as soon as land shall be given for almshouses, to erect them. *Chamberlayne v. Brockett*, L. R., 8 Ch. 206.

A *secret trust* will invalidate a gift which is contrary to the statute in the same way as an express trust, and the devisee may be compelled to disclose the trust (*Boson v. Statham*, 1 Ed. 508; see *Sweeting v. Sweeting*, 10 Jur., N. S. 31); and if denied, it may be proved by parol evidence. *Edwards v. Pike*, 1 Ed. 267. Where, however, the devisee is *no party* to the trust, neither expressly promising nor by silence implying that he will carry it out, and the devise vests the

estate in him, he will be entitled to hold it against the heir or residuary devisee. *Wallgrave v. Tebbs*, 2 K. & J. 313; *Lomax v. Ripley*, 3 Sm. & G. 48; *Wheeler v. Smith*, 1 Giff. 300; *Jones v. Badley*, L. R., 3 Ch. 362; *McCormick v. Grogan*, L. R., 4 H. L. 82; *Rowbotham v. Dunnnett*, 8 Ch. D. 430. But if the testator has been induced to make the devise upon an assurance that the devisee will perform the secret trust, the devise fails. *Russell v. Jackson*, 10 Ha. 204.

A gift to A. by will absolute on terms may be proved to be coupled with a valid trust if clearly declared at the time of the will being made, or communicated by testator in his lifetime to the trustee, who accepts it (see *McCormick v. Grogan*, L. R., 4 H. L. 82); but if not so declared or communicated, but a trust is admitted, A. will be a trustee for those who would be entitled, as in the case of a void trust. *In re Boyes*, 26 Ch. D. 531. See *Wallgrave v. Tebbs*, 2 K. & J. 313; *Moss v. Cooper*, 1 J. & H. 352; *Re Way's Trusts*, 2 D. J. & S. 365.

Where there is a devise to joint tenants, a promise by one *before* the will is made avoids the gift to himself and the others (*Moss v. Cooper*, 1 J. & H. 352; see *Russell v. Jackson*, 10 Ha. 204); but not where the promise is made by him *after* the will is executed (*Ib.*), though the party promising will himself take no beneficial interest, and silence by the trustee to whom the communication as to the trust is made is equivalent to a promise. *Tee v. Ferris*, 2 K. & J. 357; *Springett v. Jennings*, L. R., 10 Eq. 488. See *Burney v. Macdonald*, 15 Sim. 6; *Norris v. Frazer*, L. R., 15 Eq. 318.

Where the devise is to tenants in common, although a secret trust may be proved against one, it will not invalidate the bequests to the others. *Rowbotham v. Dunnnett*, 8 Ch. D. 430.

If trustees took the legal estate upon a secret charitable trust, the crown had no claim if the heir could not be found. *Sweeting v. Sweeting*, 10 Jur., N. S. 31. See now tit. Escheat and Forfeiture, *post*.

As to marshalling Assets.] Where debts and legacies of every kind are charged on the estate generally, and the charity legacies are not directed to be paid out of the pure personal estate (see *Beaumont v. Oliveira*, L. R., 4 Ch. 309, 318), the court will not marshal the assets (*ante*, p. 39) in favour of the charity, and throw the debts and non-charitable legacies on the realty, in order to increase the pure personal fund. *Hobson v. Blackburn*, 1 Ke. 273, and several prior cases. On the other hand, the pure personal estate will not be operated exclusively with the debts and non-charitable bequests, the result being that the charitable legacies will be void *pro tanto*, that is to the extent that it would be necessary to have recourse to real estate or chattels real to pay them. See *Philanthropic Soc. v. Kemp*, 4 Bea. 581; *Cherry v. Mott*, 1 M. & C. 123; *Briggs v. Chamberlain*, 18 Jur. 56; *Beaumont v. Oliveira*, *sup.*; 1 Jarm. Wills, 4th Ed. 236. In considering this question regard must be had to the assets at the time of the testator's death. *Calvert v. Armitage*, 1 H. & M. 446. Where property comprising real, impure personal estate, and pure personal estate, is given upon trusts for sale and payment of debts and legacies,

the *residue* being given for charitable purposes, the debts and ordinary legacies are charged upon the funds *rateably* according to their respective values, and the residue of the pure personal fund is then available for the charitable legacies. *Howse v. Chapman*, 4 Ves. 542; see *Currie v. Pye*, 17 Ves. 464; *Robinson v. London Hosp.*, 10 Ha. 29; *Edwards v. Hall*, 11 Ha. 22. And this rule will not be varied, though the testator may direct the charitable legacies to be paid out of such part of his personal estate as by law is applicable for such bequests. *Llewellyn v. Rose*, 4 W. N. 178. See and comp. *Wigg v. Nicholl*, L. R., 14 Eq. 92.

A testator, however, is said to marshal his own assets in favour of a charity when he directs a charity legacy to be paid out of his pure personal estate. In such cases, as between ordinary and charity legacies, the latter have priority. *Robinson v. Geldard*, 3 Mac. & G. 735; *Nickisson v. Cockill*, 9 Jur., N. S. 975; *Llewellyn v. Rose*, *sup.* But although charity legacies are to have priority over ordinary legacies out of the pure personalty, this means after the pure personalty has contributed, rateably with other property liable to contribute, to debts, funeral expenses and costs of suit (if any). *Tempest v. Tempest*, 7 D., M. & G. 470; *Beaumont v. Oliveira*, L. R., 4 Ch. 309.

Under a bequest of residue equally between six hospitals (two of which had power by law to take and hold land notwithstanding 9 Geo. 2, c. 36, while the other four had not), the bequest being coupled with a direction that this estate should be so marshalled and administered as to give the fullest possible effect to bequests in favour of charitable institutions, it was held that the bequests to the six hospitals included impure personalty, and that such impure personalty must be applied as far as possible in payment of the shares of those of the six hospitals which had power to take and hold land. *Wigg v. Nicholl*, L. R., 14 Eq. 92. If a testator directs the proceeds of his real estate to be applied in payment of debts and legacies, and the proceeds of his personal estate to pay so much of debts and legacies as the proceeds of realty will not extend to pay, and gives the residue of his personal estate to charities, declaring that only such parts of his estate should be comprised in the residue as might by law be given to charity, the proceeds of the real and impure personal estate must be applied in payment of debts and legacies before the pure personalty is resorted to. *Wills v. Bourne*, L. R., 16 Eq. 487; *Miles v. Harrison*, L. R., 9 Ch. 316. See *Sturge v. Dimsdale*, 6 Bea. 462. As to this case, in *Wills v. Bourne*, *sup.*, p. 489, Lord Selborne, L.C., observed that some doubt had been thrown upon it.

Charitable gifts which fail as being contrary to the statute enure, where the property is real estate, to the benefit of the testator's heir (*Gibbs v. Rumsey*, 2 V. & B. 294) if the will be made before the 1 Vict. c. 26; if made since that act, of the residuary devisee, if any (see sect. 25; *Carter v. Haswell*, 3 Jur., N. S. 788; *Cogswell v. Armstrong*, 2 K. & J. 227); if none, of the heir. Where the property is personal estate and the gift fails, the failure enures to the benefit of the testator's residuary legatee, if any (*Cooke v. Stationers' Comp.*,

3 M. & K. 262, 264) ; if none, of his next of kin. *Howse v. Chapman*, 5 Ves. 542.

Grants, &c., by Deed.] Voluntary conveyances of lands, &c., to charitable uses are subject to the provisions of sect. 1 of the act (*ante*, p. 49), and the death of the grantor within twelve months from the execution of the deed renders it void. *Price v. Hathaway*, 6 Madd. 304; *Hawkins v. Allen*, L. R., 10 Eq. 246. But in some cases subsequent statutes have made exceptions to the act, as where the conveyance of the land is for the education of the poor. See 4 & 5 Vict. c. 38; 7 & 8 Vict. c. 37, s. 3; 12 & 13 Vict. c. 49, s. 4; 15 & 16 Vict. c. 49. The deed must be attested by two witnesses at least. *Wickham v. Marq. Bath*, L. R., 1 Eq. 17. And this provision is equally applicable to conveyances for value (Mortmain Act, s. 2). No power or revocation, benefit, &c., must be reserved to the grantor. Thus an arrangement, though not amounting to a specific agreement, between the grantor and trustees of the charity that the former shall receive the income of the property, avoids the deed. *Way v. East*, 2 Drew. 44. So a *resulting trust* by operation of law for the donor during his life. *Limbrey v. Gurr*, 6 Madd. 151. And a conveyance to a charity subject to and just after a deed reserving an interest to the donor is void. *Wickham v. Marq. Bath*, *sup.* But the mere retention of the deed, if duly enrolled, by the donor until his death will not avoid it, even though he may have derived some benefit from the land granted. *Fisher v. Brierley*, 10 H. L. C. 159. And the donor may reserve the right of regulating the charity. *Grievcs v. Case*, 2 Cox, 301; and see the statutes cited *infra*, some of which relate to voluntary deeds.

Conveyances for value are not avoided by the death of the grantor within the time limited with reference to voluntary grants (Mortmain Act, s. 2). Some subsequent statutes also (presently noticed) have had the effect of modifying the stringency of some of the provisions of the act, and rendering deeds valid notwithstanding the formalities prescribed by the Statute of Mortmain have not been complied with. Thus, by the 9 Geo. 4, c. 85, s. 1 (which has only a retrospective effect), certain deeds, not strictly complying with the Mortmain Act, are rendered valid.

By the 24 & 25 Vict. c. 9, no deed or assurance for charitable uses shall be void by reason of its not being indented, or of the reservation of a nominal rent, or of mines, minerals or easements, or of covenants or provisions as to the erection, repair, &c., of buildings, formation of roads or similar covenants for the use as well of the hereditaments comprised in such deed, &c., as of other adjacent hereditaments, nor as to the assurance of copyholds for want of a deed, nor, where the conveyance is on a sale, by reason that the consideration is wholly or partly a rent or other annual payment, but the donor or vendor must reserve the same benefits for his representatives as for himself (s. 1). Where there are two deeds, &c., one conveying the property, the other declaring the uses, the former need not be enrolled but the latter must be (s. 2).

By the 25 & 26 Vict. c. 17, s. 5, money *bonâ fide* expended before that act (16th May, 1862) in the substantial and permanent improvement of land held for charitable uses is equivalent to money paid as a consideration for the purchase of the land.

By the 26 & 27 Vict. c. 106, every deed or assurance by which any land shall have been *demised* for any term of years for any charitable use, shall, for all the purposes of the 9 Geo. 2, c. 36, 24 & 25 Vict. c. 9, and 25 & 26 Vict. c. 17, be deemed to have been made to take effect for the charitable use thereby intended immediately from the making thereof, if the term for which such land shall have been thereby demised was thereby made to commence and take effect in possession at any time within one year from the date of such deed or assurance (s. 1).

By the 27 & 28 Vict. c. 13, s. 4, if the consideration is *rent reserved* to the vendor or grantor, such consideration is equivalent to payment at or before the conveyance. In cases falling within sect. 2 of the Mortmain Act, the time for the enrolment of conveyances for value was extended by various statutes (see 24 & 25 Vict. c. 9, ss. 3, 4; 25 & 26 Vict. c. 17; 27 & 28 Vict. c. 13, ss. 1, 2, 3), and now, by the 29 & 30 Vict. c. 57, and 35 & 36 Vict. c. 24, s. 13, the court of chancery has power to authorize the enrolment where the conveyance is *for value*, and the omission to enrol arose from ignorance, inadvertence, or from the destruction of the conveyance by time or accident (s. 2). But the act does not apply when, at the time of the application to the court, any action or suit is pending as to the validity of the deed, or it has been adjudged invalid (s. 4). Lands in mortmain, by virtue of a deed duly enrolled, may be conveyed to similar uses by a deed not enrolled. *Att.-Gen. v. Glyn*, 12 Sim. 84; *Ashton v. Jones*, 28 Bea. 460.

By the 31 & 32 Vict. c. 44 (13 July, 1868), all alienations, grants, &c., or other dispositions, *except by will*, *bonâ fide* made after the passing of the act to trustees on behalf of any society or body associated for religious purposes, or for the promotion of education, arts, literature, science, or other like purposes, of land not exceeding two acres, for the erection thereon of a building for any of such purposes, or whereon a building used or intended for any of such purposes shall have been erected, are exempted from the provisions of the Mortmain Act, and of the 24 & 25 Vict. c. 9, s. 2, *ante*, p. 59; provided that such alienations, &c., shall have been *bonâ fide* made for a valuable consideration actually paid upon or before such alienation, &c., or reserved by way of rent, rent-charge, or other annual payment, or partly paid and partly reserved (s. 1). The trustees may, if they think fit, enrol the deed (s. 2). From and after the passing of this act, it shall not be necessary to acknowledge any deed or instrument in order that the same may be enrolled in chancery (s. 3). The last section seems general.

CHAPTER III.

CHARITABLE TRUSTS ACTS.

Charitable Trusts Acts 61 | *Powers of Commissioners* 61

THE 16 & 17 Vict. c. 137, 18 & 19 Vict. c. 124, and 23 & 24 Vict. c. 136, explained by 25 & 26 Vict. c. 112, contain various important provisions regulating the administration of charities. The first act of the kind was the 43 Eliz. c. 4. The 16 & 17 Vict. c. 137, provides for the appointment of certain commissioners, to be called "The Charity Commissioners of England and Wales," who are empowered to sit as a board to carry out the provisions of the act (ss. 1—6), and to inquire into the condition and management of charities (s. 9). The board, or any commissioner or inspector of the board, may require written accounts and statements (to be verified on oath) as to the property of a charity (s. 10): 18 & 19 Vict. c. 194, s. 6. Officers, &c., having the custody of any charity deeds or documents, are to furnish or allow copies or extracts to be made therefrom (16 & 17 Vict. c. 137, s. 11). Trustees and depositaries of the funds of charities, and the persons beneficially interested therein, and custodians of deeds and documents, are when required to attend and be examined on oath before the board, commissioners or inspectors (18 & 19 Vict. c. 124, s. 7). Persons not complying with the requisitions of the board are to be deemed guilty of a contempt of the court of chancery (*ib.* s. 9). The board may institute proceedings relating to any charity (16 & 17 Vict. c. 137, s. 19), and sanction building leases and building and other works, and authorize the application of charity funds, or raising money on mortgage, for these purposes (*ib.* s. 21), remove schoolmasters and officers of charities, with the sanction of the visitor, if any (*ib.* s. 22; see *Whiston v. Dean of Rochester*, 7 Ha. 532), sanction a compromise of charity claims (*ib.* s. 23; 18 & 19 Vict. c. 124, s. 31), and authorize a sale or exchange of charity lands (*ib.* ss. 24, 25) and purchases under certain restrictions (*ib.* s. 41). See 35 & 36 Vict. c. 24. The acts also contain provisions giving jurisdiction to certain courts and judges, and providing for the efficient working of the board created by the original act. See further as to these acts, Cooke and Harwood's Charitable Trusts Acts. The Allotments Extension Act, 1882, 45 & 46 Vict. c. 80, has not taken away from the charity commissioners the power of authorizing a sale of charity lands vested in them under the Charitable Trusts Act, 1853, and the Charitable Trusts Amendment Act, 1855. *Parish of Sutton to Church*, 26 Ch. D. 173.

COMPROMISES AND FAMILY ARRANGEMENTS.

<i>In general</i>	62	<i>Family Arrangements and Re-settle-</i>	
<i>Supported by the Court</i>	62	<i>ments</i>	64
<i>For Family Honour</i>	62	<i>Father Tenant for Life—Son in</i>	
<i>Consideration for</i>	62	<i>Remainder</i>	64
<i>Compromise of doubtful Rights</i> .	62	<i>Parental Influence</i>	65
<i>Parol agreement as to Real</i>		<i>Father obtaining Benefits</i>	65
<i>Estate</i>	63	<i>Undue Influence</i>	65
<i>Full Disclosure</i>	63	<i>Purchase under Pressure</i>	65
<i>Not binding if Concealment</i>	63	<i>Remote Remainderman</i>	65
<i>Fraud</i>	63	<i>Compromise of Proceedings</i>	65
<i>Parties must understand Ar-</i>		<i>Authority of Counsel and Attor-</i>	
<i>rangement</i>	64	<i>nies</i>	66
<i>Mistake common to all Parties</i> .	64	<i>Infant</i>	66
<i>Compromise limited to Subject-</i>		<i>Principal—Agent</i>	66
<i>matter of it</i>	64	<i>Married Women</i>	66
<i>Non-execution by one Party</i>	64	<i>Laches—Aquiescence</i>	66

In General.] Fair compromises and arrangements, especially between members of a family, are favourably looked upon by courts of equity, their object being to prevent or put an end to litigation, and to preserve the peace and property of families. See, per Turner, L. J., *Williams v. Williams*, L. R., 2 Ch. p. 304; *Head v. Godlee*, Johns. 536; *Wakefield v. Gibbon*, 1 Giff. 401. Thus, a court of equity will if possible decree performance of a reasonable agreement entered into to save the honour of a father and his family, or to reconcile the members of a family, or for the compromise of doubtful rights. *Stapilton v. Stapilton*, 1 Atk. 2; see *Westby v. Westby*, 2 Dr. & War. 502, where the doctrine relating to family arrangements is elaborately examined and explained. In such cases the court will not, as a general rule, enter into the question of the adequacy or inadequacy of the consideration (*Naylor v. Winch*, 1 S. & S. 555); for deeds in the nature of family arrangements are exempt from the rules applicable to other deeds, the consideration for the former being partly value and partly love and affection. Per L. C., *Persse v. Persse*, 7 Cl. & Fin. 318; and see *Williams v. Williams*, L. R., 2 Ch. 294. That the parties have avoided the necessity of legal proceedings is a sufficient consideration. *Partridge v. Smith*, 9 Jur., N. S. 742. And when, upon a doubtful question of right, an arrangement is made either out of court or before the court (much more if before the court) by means of which the doubtful title is given up and a certain interest procured in exchange, it is not consistent with the doctrine of the court to set that arrange-

ment aside on the ground of mistake. *Stone v. Godfrey*, 1 Sm. & Giff. 590, 603; aff. 5 D., M. & G. 76; and see *Naylor v. Winch*, 1 S. & S. 564; *Lucy's Case*, 4 D., M. & G. 356; *Cooke v. Wright*, 1 B. & S. 559.

Upon this principle, an agreement not to dispute a voidable marriage by the person entitled to property in default of issue of the marriage, such person deriving benefits under the agreement, is binding on him and those claiming under him, particularly after the lapse of many years. *Westby v. Westby*, 2 Dr. & War. 502. So where brothers, devisees under their father's will, the validity of which was doubtful, entered into a parol agreement to divide the property, the eldest son and heir taking rather more than the others, and the arrangement was acted upon, it was held that the heir could not afterwards dispute the agreement on the ground that the will did not operate on the property. *Neale v. Neale*, 1 Ke. 672; *Heap v. Tonge*, 9 Ha. 90; consider *Cocking v. Pratt*, 1 Ves. sen. 400. Even a parol agreement as to land made as a family compromise of doubtful rights will be enforced where there has been part performance by possession and improvements and acquiescence for a considerable period. *Stockley v. Stockley*, 1 V. & B. 23; *Clifton v. Cockburn*, 3 M. & K. 76; *Williams v. Williams*, L. R., 2 Ch. 294.

Family compromises without fraud (see *Brooke v. Ld. Mostyn*, *inf.*) will be supported, though to some extent founded on mistake. But a settlement will be set aside where there has been fraud or concealment of material facts. For arrangements in the nature of family arrangements require all material circumstances to be communicated. There must *not only* be good faith and honest intention but *full disclosure*. *Gordon v. Gordon*, 3 Sw. 400; *Groves v. Perkins*, 6 Sim. 576; *Harvey v. Cooke*, 4 Russ. 34; *Smith v. Pincombe*, 3 Mac. & G. 653; *Cook v. Greves*, 30 Bea. 378; *Greenwood v. Greenwood*, 2 D., J. & S. 28; comp. *Bainbridge v. Moss*, 3 Jur., N. S. 58; aff. *ib.*, 62, n. There must be, in such cases, *uberrima fides*. Per Ld. Westbury, *Tennent v. Tennent*, L. R., 2 H. L. Sc. App. 6. "To make a confirmation or compromise of any value in this court the parties must be at arm's length, on equal terms, with equal knowledge and with sufficient advice and protection." Per James, L. J., *Moxon v. Payne*, L. R., 8 Ch. 881, 885.

A compromise on behalf of infants, although sanctioned by the court, will be set aside if important information has been withheld, and there has been misrepresentation. *Brooke v. Ld. Mostyn*, 2 De G., J. & Sm. 373; L. R., 4 H. L. 304. The case as decided in the appeal court was reversed in the House of Lords (*sup.*), not as to the law, but upon the question of fact. But an *infant* in such cases has no greater equity than a person *sui juris*. *Ib.* Even after a considerable lapse of time and settlement of accounts and compromise (though not in the nature of a family arrangement), the compromise will be set aside and the accounts reopened if fraudulent entries have been made in them which have served as the basis of the agreement. *Stainton v. Carron Co.*, 10 Jur., N. S. 783. In *Dunnage v. White* (1 Sw. 137),

a compromise was set aside, even after an acquiescence of some years, where it appeared on the face of the deed that the parties did not understand their rights or the nature of the transaction, and that one of them surrendered an unimpeachable title without consideration; evidence being given besides of his gross ignorance, habitual intoxication, liability to imposition and want of professional advice. See *Cartledge v. Radbourn*, 14 W. R. 603. But in *Manby v. Bewicke*, 3 K. & J. 342, it was held that a suit could not be instituted to set aside the compromise of an action to recover estates made eighty years before the suit, upon the ground that the compromise was a fraud upon the plaintiff in the action, and that he was a man of such dull intellect that though cognizant of all the facts it was necessarily a concealed fraud to him. A mere mistake, common to all parties, particularly as to some question of law, will not invalidate the arrangement. Thus an agreement made upon the supposition that an instrument or some limitation in it will have a particular effect in point of law which it will not have, is nevertheless binding. *Pullen v. Ready*, 2 Atk. 591; see *Cann v. Cann*, 1 P. W. 723; *Clifton v. Cockburn*, 3 M. & K. 76; *Lucy's Case*, 4 D., M. & G. 356; *Partridge v. Smith*, 9 Jur., N. S. 742. And money paid under such an arrangement cannot be recovered back. *Rogers v. Ingham*, 3 Ch. D. 351; comp. *Davis v. Morier*, 2 Coll. 303; *Brisbane v. Dacres*, 5 Taun. 143. The court, however, will set aside a transaction where a party, acting in ignorance of a plain and settled principle of law, is induced to give up a portion of his indisputable rights to another, under the name of compromise (*Lawton v. Champion*, 18 Bea. 87; *Thompson v. Eastwood*, 2 App. C. 215; cons. *Trigge v. Lavallee*, 15 Moo. P. C. 271); and a mistake as to a matter of fact *not included* in the compromise and influencing a party to it, may be sufficient to entitle him to avoid the compromise. *Ib.* The court has no jurisdiction to enforce a compromise against infants contrary to the opinion of their advisers. *Wilson v. Birchall*, 16 Ch. D. 41. So a compromise as to one matter will not conclude the parties to it as to another matter not immediately under their consideration and not necessarily involved in the former. *Bennett v. Merriman*, 6 Bea. 360.

Where it is necessary, or it is the understanding between the parties, that all of them should execute the deed of arrangement, it will not be binding on those who do execute, if one does not (*Peto v. Peto*, 16 Sim. 590), or does execute, but the deed is not binding on such person by reason of incapacity,—for instance, coverture. *Bolitho v. Hillyar*, 34 Bea. 180. For a person entering into a compromise is entitled to have it carried wholly into effect, or to be discharged from it. *Mullins v. Hussey*, 12 Jur., N. S. 636.

Family Arrangements and Re-settlements.] The ordinary family arrangement by which the estate of a son tenant in tail in remainder is reduced to an estate for life, with remainder to his children in tail, upon terms by which he obtains a present interest, will be supported in equity where it has been fully explained, and may fairly be sup-

posed to have been understood. *Jenner v. Jenner*, 2 D., F. & J. 359; see *Wakefield v. Gibbon*, 1 Giff. 401; *Dimsdale v. Dimsdale*, 3 Drew. 556. In judging of the fairness of such an arrangement, when entered into shortly after the son has attained his majority, all the circumstances of the case must be taken into consideration (*Bellamy v. Sabine*, 2 Ph. 425); and it will not be sufficient to invalidate it, merely to show that the father may have exercised his parental authority in inducing his son to enter into it. *Hoghton v. Hoghton*, 15 Bea. 305; *Hartopp v. Hartopp*, 21 Bea. 259; *Davis v. Uphill*, 1 Sw. 129. So where the son agrees to secure a sum of money to each of his sisters, or a jointure to his mother, the settlement or agreement will be enforced if it has been freely entered into and not under any undue exercise of parental influence. *Wycherley v. Wycherley*, 2 Ed. 175; see *Cory v. Cory*, 1 Ves. sen. 19; *Persse v. Persse*, 7 Cl. & F. 318; *Wright v. Vanderplank*, 2 K. & J. 1; 8 D., M. & G. 133. A family settlement will not be supported if founded on a mistake of one party to which the other party is accessory by making a representation, untrue in fact, although innocently made. *Fane v. Fane*, L. R., 20 Eq. 698.

But it is a circumstance always to be considered in such cases, that by the effect of the arrangement the father has obtained important advantages. Where this is the case the father must be prepared to show that no undue influence was exercised. *Hoghton v. Hoghton*, *sup.*; *Potts v. Surr*, 34 Bea. 543; cons. the observations of Hall, V.-C., in *Fane v. Fane*, L. R., 20 Eq. 698, 710; see tit. "FRAUDULENT AND VOLUNTARY CONVEYANCES, &c."

In one case, a purchase by an uncle, who was tenant for life of the presumptive estate tail in remainder of his nephew, under great pressure arising from the circumstances of the nephew, the purchase being effected by barring the entail and a conveyance to the uncle in fee, was set aside, not being supported upon the principles regulating family arrangements. *Talbot v. Staniforth*, 7 Jur., N. S. 961, compromised on the appeal, 8 Jur., N. S. 757. Where the first tenant in tail in remainder enters into a family arrangement with the tenant for life, it is doubtful whether a remote remainderman has any equity to complain of the transaction. *Tweddell v. Tweddell*, T. & R. 1.

[*Compromise of Proceedings.*] Counsel have not, nor have attorneys, authority to compromise legal proceedings if expressly forbidden to do so by their clients (*Swinfen v. Swinfen*, 1 C. B., N. S. 364; *Fray v. Voules*, 1 E. & E. 839; *Swinfen v. Ld. Chelmsford*, 5 H. & N. 890); but otherwise if not so forbidden. *Prestwick v. Poley*, 18 C. B., N. S. 806; see *Mole v. Smith*, 1 Jac. & W. 673; *Chown v. Parrott*, 14 C. B., N. S. 74; *Butler v. Knight*, L. R., 2 Ex. 109. But counsel have no authority to make a compromise out of court. *Green v. Crockett*, 34 L. J., Ch. 606. A consent given by counsel in the presence and with the sanction of his client may be withdrawn before the order is drawn up, if given through inadvertence but not so where the matter was fully understood at the time and the

client shortly afterwards changes his mind. *Holt v. Jesse*, 3 Ch. D. 177. As to a compromise by counsel on the recommendation of the court, see *Elworthy v. Bird*, Tambl. 40. Where one of the parties is an infant, see *Hargrave v. Hargrave*, 12 Bea. 408. It would seem that if parties act by their agents, it is not essential that the former should clearly understand their rights, if the latter do so. *Stewart v. Stewart*, 6 Cl. & F. 911.

In the absence of fraud, a married woman is not bound by a compromise made by her husband affecting her real estate which she has not confirmed by a duly acknowledged deed, even although she may have adopted and acted upon the compromise. *Nicholl v. Jones*, L. R., 3 Eq. 696. But the court has jurisdiction to sanction, on behalf of a married woman, a compromise of a suit; for instance, a suit to make a trustee liable for a breach of trust in relation to a fund in which she has a reversionary interest. *Wall v. Rogers*, *Wall v. Ogle*, L. R., 9 Eq. 58. It would seem that in an action as to the validity of a will when terms of compromise are agreed to by the parties who are *sui juris*, the court of probate will not make an order binding married women or infants to the terms of a compromise. *Norman v. Strains*, 6 P. D. 219.

As to laches and acquiescence where the parties are not *sui juris*, see *Head v. Godlee*, Johns. 536; 6 Jur., N. S. 495.

CONTRACTS.

- CH. 1.—OF CONTRACTS IN GENERAL, p. 67.
 CH. 2.—FOREIGN CONTRACTS—FOREIGN LAW, p. 74.
 CH. 3.—HOW CONTRACTS MAY BE ENTERED INTO, p. 76.
 CH. 4.—HOW CONTRACTS MAY BE DISCHARGED, VARIED AND RELEASED,
 p. 79.
 CH. 5.—ASSIGNMENT AND DEVOLUTION OF CONTRACTS, p. 82.
 CH. 6.—MATTERS AFFECTING THE LEGALITY OF CONTRACTS, p. 86.
 CH. 7.—OF THE REQUISITES OF CONTRACTS IN EQUITY, p. 91.
 CH. 8.—OF SPECIFIC PERFORMANCE, p. 99.
 SEC. 1.—COMPLETE SPECIFIC PERFORMANCE, p. 99.
 SEC. 2.—PARTIAL SPECIFIC PERFORMANCE, p. 103.

CHAPTER I.

OF CONTRACTS IN GENERAL.

<i>Nature of</i>	68	<i>Consideration</i> —continued.	
<i>Definition of</i>	68	<i>Necessary in Simple Contracts</i> .	70
<i>Express or implied</i>	68	<i>Aliter in Contracts under Seal</i> .	70
<i>Parol and under Seal</i>	68	<i>Are: 1, Good; 2, Valuable</i>	71
<i>Simple—Special</i>	68	<i>What are valuable</i>	71
		<i>Adequacy or inadequacy of</i>	71
<i>Who may or may not Contract</i>	68		
<i>Married women—Separate Pro-</i>		<i>Agreements with a penalty</i>	71
<i>perty</i>	68	<i>Enforceable in Equity</i>	71
<i>Lunatics</i>	69	<i>Penalty or liquidated Damages</i> 71. 72	
<i>Infants—Ratification</i>	69		
<i>Corporations</i>	70	<i>Conditions precedent — Concurrent</i>	
<i>Persons not Parties</i>	70	<i>Acts</i>	72
<i>Tenants in Tail</i>	70		
<i>Consideration</i>	70	<i>Independent Contracts—Joint and</i>	
		<i>Several</i>	73

In this title I propose only to treat of contracts generally and of those fundamental principles which, more or less, affect and are

common to all contracts, endeavouring, as much as possible, to exclude matters which would more properly and conveniently come under some other title. To treat of all matters of contract under one head would, though practicable, be inconvenient, having regard to the nature and arrangement of this work. There is, in fact, scarcely a title, some portion of which does not, strictly speaking, come under the general head of contracts used in the largest sense of the term. Some indeed,—for instance, landlord and tenant, mortgage, marriage settlements, vendor and purchaser, &c.,—would almost wholly fall within it. These, however, are far more conveniently treated of separately.

Nature of.] A contract is an agreement, upon sufficient consideration, to do or not to do a particular thing (2 Blac. Com. 442), and may be either express or implied; as where a person buys goods the law implies a promise to pay for them. There are many kinds of implied contracts, the remedy for breach of which is, for the most part, at law, for damages. Express contracts are, technically speaking, of two kinds only,—first, parol or verbal, and, secondly, under seal, or specialty contracts; and although there may be a writing, embodying the contract, it is, strictly speaking, *evidence* only of the verbal contract. *Rann v. Hughes*, 7 T. R. 350, n. Practically, however, and perhaps, more logically, contracts may be considered as—1. Verbal; 2. In writing, not under seal; and 3. Under seal, or by deed. All contracts not under seal are termed *simple contracts*; all contracts under seal are *specialty contracts*. *Rann v. Hughes*, 7 T. R. 351, n.

Who may or may not contract.] *Primâ facie* all persons are capable of contracting. The exceptions or partial exceptions to the rule need only be mentioned. A married woman was incapable of entering into a valid contract at law (*Marshall v. Rutton*, 8 T. R. 545), or in equity unless she had separate estate. The law on the subject of contracts by married women has been altered by recent statutes. See tit. “HUSBAND AND WIFE.”

Though, strictly speaking, a matter coming within the province of law only, it may be observed that while husband and wife are living together the presumption is that she has implied authority to order necessaries. But this may be rebutted by proving that her husband had prohibited her from giving such orders, though the prohibition was not known to the person with whom she dealt. *Jolly v. Rees*, 15 C. B., N. S. 628. The mere fact of cohabitation does not raise a presumption of agency, nor is a proof of notice not to trust the wife necessary. *Debenham v. Mellon*, 6 App. C. 24, questioning *Ruddock v. Marsh*, 1 H. & N. 601. The authority, where it exists, does not extend beyond necessaries. *Montague v. Benedict*, 3 B. & C. 681; *Seaton v. Benedict*, 5 Bing. 28. Where the wife has authority, it is not terminated by her husband's insanity where the party with whom she contracts has no notice of it (*Drew v. Nunn*, 4 Q. B. D. 661). A

wife wrongfully turned away by her husband has the same implied authority in respect of necessities as when she was living with him (*Thompson v. Harvey*, 4 Burr. 2178; see *Bazeley v. Forder*, L. R., 3 Q. B. 559), unless, it would seem, where she has a sufficient fortune or settlement of her own. See *Johnston v. Sumner*, 3 H. & N. 261.

A lunatic cannot contract, but there may be cases in which a person has entered into an agreement with a lunatic, being ignorant of his lunacy, which agreement it would be contrary to equity to set aside. See *Niell v. Morley*, 9 Ves. 478; *Baxter v. E. Portsmouth*, 5 B. & C. 170; *Nelson v. Duncombe*, 9 Bea. 211; *Molton v. Camroux*, 4 Ex. 17; *Beavan v. M'Donnell*, 9 Ex. 309; and tit. "MORTGAGE."

Formerly a contract by an infant (except for necessities, as to which see Chit. Con., 11th ed., 141; *Ryder v. Wombwell*, L. R., 3 Ex. 90) was voidable by the infant (*Lumsden's Case*, L. R., 4 Ch. 31; *Martin v. Gale*, 4 Ch. D. 428), though the other party to the contract was induced to enter into it by means of the fraudulent representation of the infant that he was of age (*Bartlett v. Wells*, 1 B. & S. 836; *De Roo v. Foster*, 12 C. B., N. S. 272). But if there has been fraud relief will be given in equity on that ground (*Nelson v. Stocker*, 4 D. & J. 458); see particularly the judgment of Turner, L.J. (*ib.*). An infant could not maintain a suit for specific performance of a contract, as he himself is not bound by it (*Flight v. Bolland*, 4 Russ. 298; *Hargrave v. Hargrave*, 12 Bea. 408; see "Mutuality," *post*, p. 92); and this would not, it is considered, be altered by the Statute presently stated; but he might have ratified a contract made during infancy on attaining his majority, by some writing signed by him (9 Geo. 4, c. 14, s. 5).

Now by the Infants' Relief Act, 1874, 37 & 38 Vict. c. 62 (7 Aug., 1874), "All contracts, whether by specialty or by simple contract, henceforth entered into by infants for the repayment of money lent or to be lent, or for goods supplied or to be supplied (other than contracts for necessities), and all accounts stated with infants, shall be absolutely void: Provided always that this enactment shall not invalidate any contract into which an infant may, by any existing or future statute, or by the rules of common law or equity, enter, except such as now by law are voidable." Sec. 1.

"No action shall be brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age." Sec. 2.

An infant who has traded cannot be adjudicated a bankrupt on the petition of a person who has supplied him with goods on credit for trade purposes. Whether, if the infant had expressly represented to the petitioning creditor that he was of full age, an adjudication could be made, *quære*. The Act of 1874 applies to the trading contracts of an infant, *Ex parte Jones*, 18 Ch. D. 109; overruling *Ex parte*

Lynch, 2 Ch. D. 227. See *Ex parte Kibble*, L. R., 10 Ch. 373.

The 2nd section of the Act applies to ratifications made after the passing of the Act of contracts made before that time. *Ex parte Kibble*, L. R., 10 Ch. 373.

Where an infant had obtained a lease of a furnished house on an implied representation that he was of full age, it was held that the lease must be declared void, and possession given up, and that the defendant should be restrained by injunction from parting with the furniture; but that he was not liable for use and occupation. *Lemprière v. Lange*, 12 Ch. D. 675. Corporations may contract, but in general only under their common seal, *post*, Ch. 3.

To enable one who is not a party to a contract to enforce it, he must be either named in it or clearly designated as the person for whose benefit it is made. *Peddie v. Brown*, 3 Macq. H. L. C. 65; see *Colyear v. Ctss. Mulgrave*, 2 Ke. 81. In *In re Empress Engineering Co.*, 16 Ch. D. 125, Jessel, M.R., observed, p. 127, "I know of no case where A. simply contracts with B. to pay money to C., C. has been held entitled to sue in equity," unless a case of trustee and *cestui que trust* could be made out (see *Gregory v. Williams*, 3 Mer. 582). "A. being liable to B., C. agrees with A. to pay B. That does not make B. a *cestui que trust*," per Jessel, M.R., 16 Ch. D. 127. Formerly no person could take an immediate estate or benefit under an indenture unless named as a party, but he could under a deed poll (*Com. Dig. Fait (D) 1*), and there was the same distinction with regard to covenants in indentures and deeds poll. *Berkley v. Hardy*, 5 B. & C. 355. Now the 8 & 9 Vict. c. 106, s. 5, enables a person, not named a party to an indenture, to take an immediate estate under it *in*, and the benefit of a covenant in it, *respecting*, any *tenements or hereditaments*. See *Ex parte Cockburn*, 33 L. J., Bkey. 17; *Chesterfield, &c., Co. v. Hawkins*, 3 H. & C. 677.

As to contracts by tenants in tail, see tit. "ESTATES."

Consideration.] At law and in equity it is essential, where the contract is not under seal, that there should be a *consideration moving from one person* for a promise by another, otherwise the promise is a mere *nudum pactum*, for breach of which neither action nor suit can be maintained. See 2 Blac. 445; *Rann v. Hughes*, 7 T. R. 350, n.; *Penn v. Baltimore*, 1 Ves. sen. 444; *Ord v. Johnston*, 1 Jur., N. S. 1063. The court may infer the consideration from the terms of the agreement (*Gravelly v. Barnard*, L. R., 18 Eq. 518). But, as a general rule, a consideration is not necessary at law where the contract is under seal (*Irons v. Smallpiece*, 2 B. & Al. 554), nor always in equity. See *Pratt v. Barker*, 4 Russ. 507; cons. *Wycherley v. Wycherley*, 2 Ed. 177; and tit. "FRAUDULENT AND VOLUNTARY CONVEYANCES AND SETTLEMENTS."

Considerations are—1. *Good or meritorious*, that of blood namely, or the natural love which a person has for his children or relations; such a consideration or any mere *moral* obligation will not support a

promise either at law (*Eastwood v. Kenyon*, 11 A. & E. 447; *Beaumont v. Reeve*, 8 Q. B. 483; *Tweddle v. Atkinson*, 1 B. & S. 398) or in equity. *Jefferys v. Jefferys*, 1 Cr. & Ph. 138; *Moore v. Crofton*, 3 Jo. & Lat. 438, overruling *Ellis v. Nimmo*, Ll. & G. t. Sug. 333. 2. *Valuable*, or such as will support a promise both at law and in equity. Money, money's worth or marriage is a valuable consideration. So any loss, inconvenience or risk sustained or incurred by one party at the request, express or implied, of the other, though the latter may not be benefited. See 2 Blac. Com. 297; *Crosbie v. M'Doual*, 13 Ves. 148—158; *Redington v. Redington*, 3 Ridg. P. C. 106; *Skidmore v. Bradford*, L. R., 8 Eq. 134.

A promise by one person is a sufficient consideration for a promise by another. *M'Neill v. Reid*, 9 Bing. 68. Forbearance by one person to take proceedings against another is a very common consideration, and is valid whether it be for a certain time (*Semple v. Pink*, 1 Ex. 74), or even for a reasonable time. *Oldershaw v. King*, 2 H. & N. 517. So forbearance to sue by bankers will support an agreement to give them security on a loan account. *Alliance Bank v. Broom*, 2 Dr. & S. 289. But there must be a right to sue on the part of a person in his own name at law or in equity, or his forbearance will not be a good consideration. *Graham v. Johnson*, L. R., 8 Eq. 36.

Neither at law (*Moss v. Hall*, 5 Ex. 46, 49) nor in equity (*Townend v. Toker*, L. R., 1 Ch. 458) is the *adequacy* of the consideration in general material to the validity of the contract, for this is a matter which the law cannot ascertain nor decide upon. See 2 Wms. Saun. 138 b.

Agreements with a Penalty.] Where there is an agreement with a penalty for non-performance of it, courts of equity have nevertheless jurisdiction to decree specific performance or to grant an injunction, as the case may be (*Chilliner v. Chilliner*, 2 Ves. sen. 528; *Prebble v. Boghurst*, 1 Sw. 309; see *Logan v. Wienholt*, 1 Cl. & F. 611; *Fox v. Scard*, 33 Bea. 327; *Howard v. Woodward*, 34 L. J., Ch. 47), unless it be clear that the agreement was in the *alternative*, giving the party breaking it an *option* either to pay a fixed sum or to perform the agreement. *Rolfe v. Peterson*, 2 B. P. C. 436. In general an agreement to do something or pay a penalty does not entitle the person so agreeing to pay the penalty and escape performance of the agreement. *Long v. Bowring*, 33 Bea. 585; *Howard v. Woodward*, 34 L. J., Ch. 47.

Where it is stipulated that on breach of covenant or agreement by a person he shall pay a fixed sum even as liquidated or ascertained damages, courts in general endeavour to treat such a stipulation merely as a provision for damages according to the injury sustained, where the same sum is recoverable for every breach of contract whether slight or important. *Kemble v. Farren*, 6 Bing. 141; *Betts v. Burch*, 4 H. & N. 506; *In re Newman*, L. R., 4 Ch. D. 724. But such a provision, when it is express and positive, having reference to one event only (*Sparrow v. Paris*, 7 H. & N. 594, 599), will be

enforced. *Price v. Green*, 16 M. & W. 346; *Mercer v. Irving*, E., B. & E. 563; *Hinton v. Sparkes*, L. R., 3 C. P. 161; *Lea v. Whitaker*, L. R., 8 C. P. 701. The reservation of a right to have full payment of a sum of money actually due on an existing contract, on non-payment of a *smaller sum on a particular day*, is not a penalty against which equity will relieve on failure to pay the smaller sum. *Thompson v. Hudson*, L. R., 4 H. L. C. 1.

The cases and *dicta* upon the point whether a stipulation for payment of a sum is to be considered in the nature of a penalty, or whether that sum is to be treated as liquidated and ascertained damages, are not uniform. In a recent case on the subject (*Wallis v. Smith*, 21 Ch. D. 243), in most elaborate and considered judgments, this was pointed out. See in particular the judgment of Jessel, M.R., p. 254 *et seq.* That of Lindley, L.J., refers to "the decisions on penalty and liquidated damages which are perplexing." *Ib.* p. 277. In this case it was held that where a contract contains a condition for payment of a sum of money as liquidated damages for the breach of stipulations of varied importance, none of which is for payment of an ascertained sum of money, the general rule is that the sum named is not to be treated as a penalty, but as liquidated damages. But whether it would not be treated as a penalty if one of the stipulations was of very trivial importance:—*Quære*. It was held also that where there is a condition for the forfeiture of a deposit for the breach of various stipulations, even though some of them may be very trivial, or for payment of a fixed sum of money, the forfeiture will be enforced and not treated as a penalty, *ib.* See *Astley v. Weldon*, 2 B. & P. 346; *Kemble v. Farren*, 6 Bing. 141; *Atkyns v. Kinnier*, 4 Ex. 776; *Magee v. Lavell*, L. R., 9 C. P. 107; *In re Newman*, 4 Ch. D. 724; and *Betts v. Burch*, 4 H. & N. 506.

In *In re Dagenham Dock Company*, L. R., 8 Ch. 1022, a company agreed with a landowner to purchase land at a price, of which part was to be paid at once, and the balance on a future day, with a provision that if the whole of the balance and interest was not paid off by that day, in which respect time was to be of the essence of the contract, the vendors might re-possess the land as of their former estate, without any obligation to repay any part of the purchase-money. It was held that this stipulation was in the nature of a penalty, from which the company was entitled to be relieved on payment of the balance of the purchase-money, with interest.

Conditions Precedent—Concurrent Acts.] What is or is not a condition precedent depends not on technical words, but on the plain intention of the parties to be deduced from the whole instrument. *Roberts v. Brett*, 11 H. L. C. 337; and see *Hotham v. E. I. Co.*, 1 T. R. 638. "Parties may think some matter, apparently of very trivial importance, essential; and if they sufficiently express an intention to make the literal fulfilment of such a thing a condition precedent, it will be one." *Per Blackburn, J., Bettini v. Gye*, 1 Q. B. D. p. 187; cons. *London Guarantee Comp. v. Fearnley*, 5 App. C. 911. The

plaintiff in an action or suit is bound to perform whatever is a condition precedent on his part to performance by the defendant, unless prevented by the latter. *Ib.*; see *Jones v. Barkley*, 2 Doug. 684; *Wallis v. Warren*, 4 Ex. 361.

The leading principles with respect to concurrent acts and conditions precedent are thus stated by Serjeant Williams in the notes to *Pordage v. Cole*, 1 Wms. Saun. 320, and are as important in equity as at law in the construction of agreements. They are in substance these:—1. If a day be appointed for the doing of any act (by A.), and the day must or *may* happen before the act which is the consideration for it is to be performed (by B.), an action may be brought against A. for non-performance before performance by B. See *Mattock v. Kinglake*, 10 A. & E. 50, and other cases cited 2 Sm. L. C., 8th ed. 15. 2. But not where the day is to happen after performance by B. See *Glaholm v. Hays*, 2 M. & Gr. 257; 2 Sm. L. C. 16, 17. 3. "Where a covenant or promise goes only to *part* of the consideration and a breach thereof may be paid for in damages, it is an independent covenant or promise." Thus, on an agreement by A. to repay a loan and by B. to *return securities* upon repayment, the return of the securities is neither a concurrent act nor a condition precedent. *Scott v. Parker*, 1 Q. B. 809. 4. "Where the mutual promises or covenants go to the whole consideration on both sides, they are mutual conditions, and performance must be averred." See *Atkinson v. Smith*, 14 M. & W. 695; *Bankart v. Bowers*, L. R., 1 C. P. 484. 5. "When two acts are to be done *at the same time*, as when A. covenants to convey an estate to B. on such a day, and in consideration thereof B. covenants to pay A. a sum of money *on the same day*, neither can maintain an action without averring a performance, or an offer to perform his own part," that is, that he was ready and willing to do so. 2 Sm. L. C. 17.

Independent Contracts—Joint and several.] Where there are two distinct contracts relating to one subject-matter, though the plaintiff may have made default as to one contract, this will not necessarily prejudice his right to have the other performed. *Phipps v. Child*, 3 Drew. 709; *Green v. Low*, 22 Bea. 625. And if the plaintiff covenant to indemnify the defendant, and the defendant covenant for further assurance, a breach of the former covenant is no answer to an action for performance of the latter. *Gibson v. Goldsmid*, 5 D., M. & G. 757. An agreement between a builder and landowner by which the former is to build a certain number of houses on each of several plots, separate leases to be granted of the plots on certain of the houses mentioned being covered in, is separable, and if the conditions affecting one plot are performed, the builder is entitled to have the lease of the plot granted. *Wilkinson v. Clements*, L. R., 8 Ch. 96. An agreement which from its terms may be joint or several will be construed to be several, if the interest be several; or joint, if the interest be joint. *Bradburne v. Botfield*, 14 M. & W. 559; *Keightley v. Watson*, 3 Ex. 716, 721; see *Sorsbie v. Park*, 12 M. & W. 146; *Haddon v. Ayers*,

1 E. & E. 118. Though if the words *expressly* import a joint or several contract only, the agreement must, as a general rule, be construed accordingly. *Id.*; and see *Thompson v. Hakewill*, 19 C. B., N. S. 713.

CHAPTER II.

FOREIGN CONTRACTS—FOREIGN LAW.

<i>Construction of, concerning Real Estate</i>	74	<i>Legality or Illegality of Foreign Law</i>	75
<i>Personal estate</i>	74	<i>Evidence of Foreign Law</i>	75
<i>Scotland</i>	74	<i>Custom of Merchants</i>	75
<i>Contracts concerning Real Estate Abroad</i>	74, 75	<i>What necessary for construction of Foreign Contract</i>	75
<i>Not valid where made, not valid here</i>	75	22 & 23 Vict. c. 63	76
		24 & 25 Vict. c. 11	76

CONTRACTS concerning real property, wheresoever made, are, as a general rule, construed according to the law of the country where the property is situate, to which law the property is subject. Story, Conf. Laws, 8th ed., 510—513. Contracts concerning personalty and moveables are construed either according to the law of the country where they are made, if no other place of performance be expressly or by implication specified (*Melan v. Fitzjames*, 1 B. & P. 142; see *Gibbs v. Fremont*, 9 Exch. 25; *Fergusson v. Fryffe*, 8 Cl. & Fin. 121; *Lloyd v. Guibert*, L. R., 1 Q. B. 115), or according to the place of performance where it is so specified. *Rothschild v. Currie*, 1 Q. B. 43; *Don v. Lippman*, 5 Cl. & Fin. 1; see *The Halley*, L. R., 2 P. C. 193. Scotland is considered a foreign country with reference to the questions now under consideration. *Cookney v. Anderson*, 1 D., J. & S. 365; see *Drummond v. Drummond*, L. R., 2 Ch. 32; *Phospho Guano Co. v. Guild*, L. R., 17 Eq. 432; cons. *Re Orr Ewing*, 22 Ch. D. 456, a case of administration. As to Scotland being termed a foreign country, see the judgment of Jessel, M.R., *ib.*, p. 464. Various questions may arise where contracts, whether made here or abroad, relating to realty abroad, or contracts made out of England and not to be performed here, or contracts made here to be performed abroad, are sought to be enforced before our tribunals. A contract concerning realty abroad, if made between persons resident out of this country, cannot be enforced here (*Cookney v. Anderson*, *sup.*; *Matthaei v. Galitzin*, L. R., 18 Eq. 340), except to the extent of process out of the courts here being permitted to be served on parties abroad (see *Drummond v. Drummond*, *sup.*; see *Société Générale de Paris v. Dreyfus*, 29 Ch. D. 239). In *Graham v. Massey*, 23 Ch. D.

743, the title to immoveable property in Saxony was in dispute between A. and B. A. sold the property in Saxony, received part of the purchase-money, and took a mortgage for the balance. Both A. and B. being in England, an action by B. to make A. account for the purchase-money, was dismissed for want of jurisdiction. Nor will the court enforce a lien upon real estate abroad, though the plaintiff and defendant are both English and resident here, if there is no privity between them, and foreigners are interested in the property (*Norris v. Chambres*, 29 Bea. 246; aff. 7 Jur., N. S. 689), though a contract between Englishmen in England relating to the real estate of one of them abroad may, in some cases, give a lien upon it which equity will enforce. *Penn v. Ld. Baltimore*, 1 Ves. sen. 444; see *Norris v. Chambres*, *sup.* A foreclosure decree being a decree *in personam* depriving the mortgagor of his personal right to redeem, the court has jurisdiction to make such a decree in respect of a mortgage, between an English mortgagor and mortgagee, of land in one of the colonies. *Paget v. Ede*, L. R., 18 Eq. 118. When the contract is not binding in the country where it is made, as a general rule it cannot be enforced here (*Alves v. Hodgson*, 7 T. R. 241; *Trimbey v. Vignier*, 1 Bing., N. C. 160), unless, perhaps, in those cases in which it would be valid here, and was entered into expressly with the view to performance here. A contract valid in the country where it is made is generally valid here (*Branley v. S. E. R. Co.*, 12 C. B., N. S. 63; *P. & O. Co. v. Shand*, 3 Moo. P. C., N. S. 272; *Smith v. Weguelin*, 4 W. N. 139), unless of a kind expressly forbidden by our laws; for in such cases the remedy, time and mode of enforcing it, depend upon the law of this country. *De la Vega v. Vianna*, 1 B. & Ad. 284; *Huber v. Steiner*, 2 Bing., N. C. 202, 210; *Cooper v. Waldegrave*, 2 Bea. 282; *Hope v. Hope*, 8 D., M. & G. 731; *Brook v. Brook*, 9 H. L. C. 193; *Grell v. Levy*, 16 C. B., N. S. 73. If an agreement contrary to the policy of the English law is entered into in a country by the law of which it is valid, an English Court will not enforce it. *Rousillon v. Rousillon*, 14 Ch. D. 351. See *Schibsby v. Westenholz*, L. R., 6 Q. B. 155. The penal (*Wolff v. Oxholm*, 6 M. & S. 99) and revenue, *e.g.*, stamp, laws (*James v. Catherwood*, 3 D. & R. 190) of foreign states, are not recognised in this country, so far as regards the admissibility of documents in evidence. But if a contract without a stamp be void by the foreign law, such contract, if unstamped, cannot be enforced here. *Alves v. Hodgson*, 7 T. R. 241; *Bristow v. Sequeville*, 5 Ex. 275. What the law of a foreign country is upon any particular point is a question of fact to be proved by advocates or other skilled witnesses. *De Bode's Ca.*, 8 Q. B. 208; *Sussex Peerage Ca.*, 11 Cl. & Fin. 85; *Bristow v. Sequeville*, 5 Ex. 275; *Trimbey v. Vignier*, 1 B., N. C. 151. And the custom of merchants may be proved by a merchant. *Van der Donckt v. Thellusson*, 8 C. B. 812. The law of a foreign country is sufficiently proved by the certificate of the ambassador of that country. *In the Goods of Prince Oldenburg*, 9 P. D. 234.

When a contract is made in a foreign country and in a foreign

language, an English court having to construe it must first obtain a translation of the instrument; secondly, an explanation of the terms of art, if any; thirdly, evidence of the foreign law applicable to it; and fourthly, evidence of any peculiar rules of construction which may exist in that law, and must then itself interpret the instrument on ordinary principles of construction. *Di Sora v. Phillips*, 10 H. L. C. 624.

By the 22 & 23 Vict. c. 63, courts in one part of her Majesty's dominions may remit a case for the opinion in law of a court in any other part thereof (s. 1). Copies of the opinion are to be certified by an officer of the court giving it and handed to the parties (s. 2). The court is to apply the opinion to the case in which it was requested, or, if necessary, submit the opinion to a jury (s. 3). The Queen in council, or the House of Lords on appeal, may adopt or reject the opinion (s. 4). This act applies to all the Queen's dominions (s. 1). By a subsequent act (the 24 & 25 Vict. c. 11), superior courts within the Queen's dominions may remit a case, with queries or questions of law, for the opinion of a superior court of any foreign state with which a convention has been made for that purpose (s. 1), the remitting court to apply the opinion of the foreign court to the facts set forth in the case, or submit such opinion to a jury, as conclusive evidence of the foreign law therein stated (s. 2). A case may be again remitted, with or without amendments, to the same or any other superior court in such foreign state (*ib.*). And courts in the Queen's dominions may pronounce an opinion on cases remitted by foreign courts (s. 3).

CHAPTER III.

HOW CONTRACTS MAY BE ENTERED INTO.

<i>Contracts, Verbal — in Writing —</i>		<i>Contracts, &c.—continued.</i>	
<i>under Seal</i>	76	<i>Contracts not to be performed</i>	
<i>Prima facie verbal Agreements</i>		<i>within a Year</i>	77
<i>sufficient</i>	76	<i>Capable of Performance</i>	77
<i>Statute of Frauds</i>	76, 77	<i>Signature</i>	77
<i>4th Section</i>	77	<i>Contracts under Seal</i>	77
<i>17th Section</i>	77	<i>Non-trading Corporations</i>	78
<i>Consideration</i>	77	<i>Trading Corporations</i>	78

Contracts, Verbal—in Writing—under Seal.] *Prima facie* it may be taken that a verbal contract is valid unless by some statute it is necessary to be in writing or under seal. The Statute of Frauds (29 Car. 2, c. 3) is the most important statute of this kind. Those sections of it which have reference to *agreements* are the fourth and

seventeenth. By the fourth it is enacted, that no action shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate (see tit. "EXECUTORS"), or whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person, or to charge any person upon any agreement made upon consideration of marriage (see tit. "MARRIAGE SETTLEMENT"), or upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them (see tit. "VENDORS AND PURCHASERS"), or upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized.

By the 17th section it is enacted that no contract for the sale of any goods, wares or merchandises for the *price* of 10*l.* sterling (or of that *value*, 9 Geo. 4, c. 14, s. 7) or upwards, shall be allowed to be good except the buyer shall accept part of the goods so sold and actually receive the same, or shall give something in earnest to bind the bargain or in part of payment, or that some memorandum or note in writing of the said bargain be made and signed by the parties to be charged by such contract or their agents thereunto lawfully authorized. A *consideration* is as necessary to support a promise now as before the statute. 1 Wms. Saun. 211, n. (2). It was held, also, upon the construction of section 4, that it was necessary that the *consideration* should appear in writing (*Wain v. Warlters*, 5 Ea. 10); but this has been altered by the 19 & 20 Vict. c. 97, s. 3, *to this extent*, that the consideration for a special promise to answer *for the debt, &c., of another* need not appear in writing, or, by a necessary inference, from a written document.

With reference to contracts not to be performed within a year from the making of them, it has been held that this means a contract which *cannot* be performed within the year; therefore, a contract by a person that after his death his executor shall pay a sum of money is not within the statute, for he may die within the year. *Wells v. Horton*, 4 Bing. 40; *Ridley v. Ridley*, 34 Bea. 478. And if the agreement be capable of being performed by *one* party (though not by the other) within the year, it is not within the statute. Thus, where a landlord agreed to expend a sum in improvement, and the tenant agreed to pay additional rent for the remainder of his term (some years), it was held that the agreement need not be in writing, as the landlord's part of it was capable of being performed within the year. *Donellan v. Read*, 3 B. & Ad. 899; see *Smith v. Neale*, 2 C. B., N. S. 67. But a contract for service for more than a year, but subject to determination within the year, must be in writing. *Dobson v. Collis*, 1 H. & N. 81. So a contract for a partnership for more than a year. *Williams v. Jones*, 5 B. & C. 108. So where the contract is for the supply of goods for more than a year, but determinable within it. *Re Pentreguinea, &c. Co.*, 8 Jur., N. S. 706. With re-

spect to the signature of the party to be charged, see tit. "VENDORS AND PURCHASERS."

In most cases the law leaves the parties to make their *contracts* under seal or not as they think fit. But where a non-trading corporation is a party to a contract, it must, as a general rule, to bind the corporation be under the common seal. See *Mayor of Ludlow v. Charlton*, 6 M. & W. 815; *Australian, &c. Co. v. Marzetti*, 11 Ex. 228; *Frend v. Dennett*, 4 C. B., N. S. 576. But as to a trading corporation the rule appears settled that it can contract without seal for any object or purpose for which it was established, but not for other purposes. *South of Ireland, &c. Co. v. Waddle*, L. R., 3 C. P. 463. See *Nicholson v. Bradfield Union*, L. R., 1 Q. B. 620, in which the previous authorities are considered. See *London Dock Co. v. Sinnott*, 8 E. & B. 347. When the contract of a corporation ought to be, but is not under seal, neither the corporation nor the other contracting party will be bound, as there is no mutuality (*post*, p. 92). *Mayor of Kidderminster v. Hardwick*, L. R., 9 Ex. 13. There may, however, be such a part performance of the contract as may render it binding, although not under seal. See *Ecclesiastical Commissioners v. Merral*, L. R., 4 Ex. 162. In *Hunt v. Wimbledon Board*, 3 C. P. D. 208, Lindley, L.J., observed, p. 212: "Where the unsealed contract is of such a nature as to be the subject of an action for specific performance, and such contract has been in part performed, under circumstances which render the equitable doctrines of part performance applicable, the contract will, I apprehend, bind such a corporation (*Crook v. Seaford*, L. R., 6 Ch. 551); but, in other cases, it is extremely doubtful whether the mere fact that a contract, not otherwise binding on the corporation, has been wholly or partly performed, renders the corporation liable to be used either on the contract or on a *quantum meruit*. *Nicholson v. Bradfield*, L. R., 1 Q. B. 620; *Clarke v. Cuckfield Union*, 21 L. J., Q. B. 349; and *Haigh v. North Brierly Union*, E. B. & E. 873, are the leading authorities in favour of the corporation being liable. On the other hand, *Mayor of Ludlow v. Charlton*, 6 M. & W. 815; *Lamprell v. Billericay Union*, 3 Ex. 283; *Smart v. West Ham Union*, 10 Ex. 867, at law, and *Kirk v. Bromley Union*, 2 Ph. 640, and *Crampton v. Varna R. Co.*, L. R., 7 Ch. 562, in equity, are leading authorities to the contrary." In *Hunt v. Wimbledon Board*, *sup.*, it was held that where an Act of parliament directed that the contracts of a local board of a certain amount should be under seal, a contract for work exceeding that amount was not binding on the board. In *Scott v. Great Clifton School Board*, 14 Q. B. D. 500, it was held on the construction of the 33 & 34 Vict. c. 75, s. 30, that an official of the board (an architect) was entitled to recover payment for his services, although his appointment and the orders under which he acted were not under seal. As to what contracts are *ultra vires*, see tit. "JOINT STOCK COMPANIES."

See as to the acceptance and withdrawal of offers before acceptance, *post*, tit. "JOINT STOCK COMPANIES," "VENDORS AND PURCHASERS," Ch. 3.

CHAPTER IV.

WHEN CONTRACTS MAY BE EXPLAINED, VARIED, RELEASED AND RECTIFIED.

<i>Of Parol Evidence to contradict or vary written Contracts.....</i>	79	<i>Of Parol Evidence—continued.</i>	
<i>In general inadmissible</i>	79	<i>Plain Terms cannot in general be contradicted</i>	81
<i>Mistake may be corrected.....</i>	80	<i>Distinct Agreements</i>	81
<i>Fraud, Mistake or Surprise.....</i>	80	<i>Ambiguity</i>	81
<i>Parol variation</i>	80	<i>Particular Character—Principal or Agent</i>	81
<i>Alleged by Plaintiff—by Defendant</i>	80	<i>Waiver and Discharge of Contracts</i>	81
<i>Of Parol Evidence to explain Terms</i>	80	<i>Before Breach—After Breach .</i>	82
<i>Mercantile or Technical Terms .</i>	80	<i>By one of several—To one of several</i>	82
<i>Custom or usage of Trade or Agriculture</i>	80, 81	<i>Of the Rectification of Contracts ...</i>	82

Of Parol Evidence to contradict or vary written Contracts.] As a general rule the parties to the contract must abide by it as it is, and a written agreement between them could not in general be varied by parol at law (*Goss v. Ld. Nugent*, 5 B. & Ad. 58; *Brown v. Hotson*, 7 Jur., N. S. 633), though sometimes it might have been, and may be, in effect in equity, *Noble v. Ward*, L. R. 2 Ex. 135. See *Ogle v. E. Vane*, L. R. 3 Q. B. 272. Where there is a parol contract and subsequent written agreement not embracing all the terms of the parol contract, it is a question of fact whether there was to be a distinct parol contract collateral to the written one, and evidence of the terms of the parol agreement is admissible. *Lindley v. Lacey*, 17 C. B., N. S. 578; *Salaman v. Glover*, L. R., 20 Eq. 444; *Morgan v. Griffith*, L. R., 6 Ex. 70.

So parol evidence is admissible to show what was the condition of the document when it became a contract between the parties. *Stewart v. Eddowes*; *Hudson v. Stewart*, L. R., 9 C. P. 311.

Where a written agreement exists, and one of the parties sets up an arrangement of a different nature, alleging conduct on the other side amounting to a substitution of this arrangement for the written agreement, he must clearly show not merely his own understanding as to the new terms of arrangement, but that the other party had the same understanding. *E. Darnley v. Lon. Ch. & Dov. R. Co.*, L. R., 2 H. L. 43.

Where there is an assignment of a lease by A. to B., and a parol agreement that B. shall hold part of the premises for A., this will be

enforced, notwithstanding the Statute of Frauds. *Booth v. Turle*, L. R., 16 Eq. 182; see *Davies v. Otty*, 35 Bea. 208.

A mistake may be corrected if common to *both* parties (*Sells v. Sells*, 1 Dr. & S. 42); and surprise, and of course fraud, are sufficient to prevent the court specifically enforcing an agreement. But when there is no fraud, mistake or surprise, parol evidence to contradict the written agreement is inadmissible, even in equity. See *Croome v. Lediard*, 2 M. & K. 251. Where, therefore, A. agrees to sell Whiteacre to B., and B. agrees to sell Blackacre to A., these agreements are distinct and independent, and parol evidence that an exchange was meant is inadmissible. *Ib.* So an agreement to make a marketable title cannot be contradicted by proof that the purchaser had notice that there were restrictive covenants affecting the property which could not be released. *Cato v. Thompson*, L. R., 9 Q. B. D. 616. So held by Lopes, J., on the trial, and by Lindley, L.J., on appeal. *Ib.* p. 620.

A parol variation from the contract will not be allowed to be shown by the *plaintiff* in a suit for specific performance of the contract *with such variation*, though he allege mistake or surprise (*Ld. Townshend v. Stangroom*, 6 Ves. 328; see *Barnard v. Cave*, 26 Bea. 253; *E. Darnley v. Lon. Ch. & Dor. R. Co.*, L. R., 2 H. L. 43); *Snelling v. Thomas*, L. R., 17 Eq. 303; but mistake or surprise, and of course fraud, may be relied upon by the defendant *as a defence*. *Ib.*; *Clowes v. Higginson*, 1 V. & B. 527; *Wood v. Scarth*, 2 K. & Jo. 33; *Swaishland v. Dearsley*, 29 Bea. 430. And if the written agreement by mistake incorrectly state the contract, it must be executed with the variation or the bill will be dismissed. *Ramsbottom v. Gosden*, 1 V. & B. 165. So the *defendant* may set up a parol declaration by an auctioneer which is at variance with the written agreement (*Winch v. Winchester*, 1 V. & B. 375); though, as a rule, the auctioneer cannot contradict the particulars or conditions. See *Anson v. Tourgood*, 1 J. & W. 639. Even where there is *no* fraud, mistake or surprise, an *additional* parol provision, agreed upon between the parties and set up and proved by the defendant, must be incorporated with the written contract or the bill will be dismissed (*Martin v. Pycroft*, 2 D., M. & G. 785); but this principle will not be applied where the contract has been to a great extent performed, and the parties cannot be restored to their original position. *Vouillon v. States*, 2 Jur., N. S. 845. But if the plaintiff state the contract *with* the parol variation, submitting to perform it *with or without* the variation, the defendant must elect or the court will decree performance of the contract *without* the variation. *Robinson v. Page*, 3 Russ. 114.

Parol Evidence to explain Terms or Expressions.] Parol evidence is admissible to explain the meaning of mercantile and technical terms (*Robertson v. Jackson*, 2 C. B. 412); thus variances in bought and sold notes may be explained by brokers. *Bold v. Rayner*, 1 M. & W. 343; see *Syers v. Jonas*, 2 Ex. 111. *Thousand*, in an agricultural lease, may be explained to mean a different number (*Smith v. Wilson*, 3 B. & Ad. 728); and the word *years*, in a theatrical con-

tract, has been held to mean seasons. *Grant v. Maddox*, 15 M. & W. 737. So evidence of the custom of a place, or the usage of trade, is admissible to explain or add to written instruments. *Johnston v. Usborne*, 11 A. & E. 549. Thus a lessee may be entitled to an away-going crop, though not mentioned in the lease (*Wigglesworth v. Dullison*, 1 Doug. 201), unless his right be expressly restricted by covenant. *Clarke v. Royston*, 13 M. & W. 752. But this principle goes no further than to permit the explanation of words used in a sense different from that in which they are usually understood, or the addition of known terms not inconsistent with the written contract. *Trueman v. Loder*, 11 A. & E. 589—599; see *Humfrey v. Dale*, 7 E. & B. 266; *E., B. & E.* 1004. The plain terms or words of an instrument, therefore, not used in a technical sense or having some special meaning attached by local usage, cannot be contradicted. Thus evidence that *cargo* or *freight* means passengers is inadmissible. *Lewis v. Marshall*, 7 M. & Gr. 729; see *Yates v. Pym*, 6 Taun. 446; *Smith v. Jeffries*, 15 M. & W. 561; *Sotilichos v. Kemp*, 3 Exch. 105.

But of course there may be separate and distinct agreements, though wholly or in part relating to the same subject-matter, and one may be by parol and valid (unless required to be in writing by some statute), though the other is in writing. Thus, if parties have entered into a charter-party for a ship, a parol agreement between them for the use of the ship *before the charter-party begins* is good and quite independent of the charter-party. *White v. Parkin*, 12 Ea. 578. So a consideration, not expressed but not inconsistent with that which is expressed, may be proved, see *Llanelly R. Co. v. L. & N. W. R. Co.*, L. R., 8 Ch. 942; as if a pecuniary consideration be expressed, marriage also may be proved. *Mildmay's case*, 1 Rep. 176; *Leifchild's case*, L. R., 1 Eq. 231. So the consideration of marriage may be shown under "esteem and other good considerations." *Tull v. Parlett*, M. & M. 472. It has been held even, that where one sum is stated as paid, a greater sum may be proved to have been paid (*Clifford v. Turrell*, 1 Y. & C., C. C. 138), but not that a greater rent was to be paid than is expressed. *Preston v. Merceau*, 2 W. Blac. 1249. The particular business which a person carries on may be shown by parol evidence, and this may be used to explain the memorandum or contract. *Newell v. Radford*, L. R., 3 C. P. 52 (on s. 17 of the Statute of Frauds); and consider the observations in this case on *Vandenbergh v. Spooner*, L. R., 1 Ex. 316, in which it was held, that an agreement by A. to buy goods purchased by B. was insufficient within this section, B. not being named as seller.

A person who signs as principal cannot be admitted to show by parol evidence that he was not such principal. *Jones v. Littledale*, 6 A. & E. 486. But if the principal sign as agent, he may be sued as principal. *Jenkins v. Hutchinson*, 13 Q. B. 744.

Of the Waiver and Discharge of Contracts.] A verbal and ordinary written contract not required to be in writing under the
W.—VOL. I. G

Statute of Frauds may before breach be discharged by parol (*Gibbons v. Caunt*, 4 Ves. 848; *Price v. Dyer*, 17 Ves. 356; *Goss v. Ld. Nugent*, 5 B. & Ad. 58, 65); and so it would seem may a contract in writing under this statute. *Ib.*; *Goman v. Salisbury*, 1 Ver. 240; see, however, *Harvey v. Grabham*, 5 A. & E. 61. A contract under seal cannot, even before breach, be discharged except by release under seal. See *Doe d. Muston v. Gladwin*, 6 Q. B. 962; *Thames, &c., R. Co. v. Brymer*, 5 Ex. 696. See as to agreements in substitution for others, *Taylor v. Hilary*, 1 C., M. & R. 741.

A contract after breach, whether in writing or under seal, can only be discharged by deed, or something accepted in accord and satisfaction. See *Willoughby v. Backhouse*, 2 B. & C. 824; *Foster v. Dawber*, 6 Ex. 851. As to bills and notes, see *ib.* 839. A release by one of several jointly interested is at law a release by all. See *Jacomb v. Harwood*, 2 Ves. sen. 265. So a release to one of several jointly liable is a release to all, unless the operation of the release be expressly restricted to one. *North v. Wakefield*, 13 Q. B. 536; see *Owen v. Homan*, 4 H. L. C. 1037.

Rectifying Contracts.] In general when a contract is sought to be rectified it is on the ground of mistake. In cases of this description the mistake must in general be mutual. *Sells v. Sells*, 1 Dr. & S. 42; see *Fowler v. Fowler*, 4 D. & J. 250; *Thompson v. Whitmore*, 1 J. & H. 268; *Metrop., &c. Society v. Brown*, 26 Bea. 454; comp. *Broughton v. Hutt*, 3 D. & J. 501; and see tit. "MARRIAGE SETTLEMENTS" and "VENDOR AND PURCHASER," where most of the cases on the subject of the rectification and rescission of contracts are collected.

CHAPTER V.

ASSIGNMENT AND DEVOLUTION OF CONTRACTS.

<i>May in general be assigned</i>	82	<i>Effect of Bankruptcy</i>	84
<i>Unless Contract of a Personal Nature</i>	83	<i>Judicature Act</i>	84
<i>Or Stipulation contrà</i>	83	<i>Disclaimer</i>	84
<i>Personal Motives for Contract</i>	83	<i>Death of contracting Party</i>	84, 85
<i>Assignee of chose in action</i>	83	<i>Executor of Person having Appren-</i>	
<i>Policies of Assurance Act</i>	83	<i>tices or Clerks</i>	85

ALTHOUGH a mere *proposal*, or the benefit of it cannot be assigned so as to confer on the assignee the right to accept the proposal (*Meynell v. Surtees*, 3 Sm. & G. 101), yet, as a general rule, a *contract* may, so as to give the assignee a right in equity to enforce it in his own name. But there are some exceptions to the rule. Thus, where the agreement is of a purely personal nature, depending for its execution upon the peculiar skill and knowledge of one of the contracting parties,

he cannot assign it so as to deprive the other of such skill and knowledge. *Stevens v. Benning*, 6 D., M. & G. 223; *Hole v. Bradbury*, 12 Ch. D. 886. So there may be an express stipulation against assignment, and if the agreement be for a lease or other instrument which is to contain a covenant against assignment, the agreement itself cannot, it seems, be assigned. *Weatherall v. Geering*, 12 Ves. 511. And it would seem that although an agreement for a lease may in ordinary cases be assigned, it will not be specifically executed at the instance of an assignee of the intended lessee, unless the latter enters into the covenants of the lease or guarantees the performance of them. *Dowell v. Dew*, 1 Y. & C., C. C. 345; comp. *Morgan v. Rhodes*, 1 M. & K. 435; *O'Herlihy v. Hedges*, 1 Sch. & Lef. 123.

There may be cases in which one party enters into a contract wholly or in part out of motives of kindness to the other party, or motives of so personal a nature in respect of such other party that an assignment by him of the contract will confer no rights as against the other contracting party. See *Phillips v. D. Buckingham*, 1 Ver. 227. The report in *Vernon*, however, is incorrect, for the court decreed the contract to be specifically executed. See ed. Raith, 230, n. (1). But it was said by Lord Eldon, commenting on this case, in *Bonnett v. Sadler* (14 Ves. 528), that although Lord Thurlow, in *Irnham v. Child* (1 B. C. C. 95), intimated a doubt whether a man, treating with a third person in trust for a second, whom he had refused to deal with, could therefore set it aside; he (Lord Eldon) could not possibly admit that it might not, under some circumstances, be a decisive answer to a bill for the specific performance of an agreement.

The assignee of a *chose in action* could not formerly, before the Judicature Act presently noticed, sue at law in his own name, although he could in equity. There were a few statutory exceptions. Thus, by the 30 & 31 Vict. c. 144, "The Policies of Assurance Act, 1867," an assignment of a policy of assurance to a person entitled in equity to receive and give a discharge for the moneys assured, gives him a right to sue in his own name on the policy, where he has given due notice of the assignment to the office (ss. 1, 3). This act does not apply to policies granted nor to contracts for payment of sums of money, either under the 16 & 17 Vict. c. 45, passed for consolidating the laws relating to the purchase of government annuities through the savings' banks (see ss. 10, 11, 12), or under the 27 & 28 Vict. c. 43 (amending act). See s. 8. The act applies to policies assigned previously to the act. In *Re Haycock's Policy*, 1 Ch. D. 611. Where a policy of assurance is given, but no assignment executed to the donee, and he has possession of it at the time of the donor's death, the right to the document itself passes by the gift, although the right to the money may belong to the representatives of the donor. *Rummens v. Hare*, 1 Ex. D. 169. Where there is no equitable assignment of the policies by the person entitled to them within the act, the company are justified in refusing to pay in the absence of the legal personal representative of the assured. *Crossley v. City of Glasgow Life Assurance Co.*, 4 Ch. D. 421, disapproving of *Wolfe v. Findlay* (6 Hare, 66).

Under the Bankruptcy Act (32 & 33 Vict. c. 71, 1869), the assignee of a bankrupt's *choses in action* might sue in his own name (s. 111). And by the 46 & 47 Vict. c. 52 (Bankruptcy Act, 1883), *choses in action* are to be deemed to have been duly assigned to the trustee (s. 50 (5)).

And generally now, by the Judicature Act, 36 & 37 Vict. c. 66, any absolute assignment, by writing under the hand of the assignor (not purporting to be by way of charge only), of any debt or other legal *choses in action*, of which *express notice* in writing shall have been given to the debtor, trustee, or other person liable, shall be effectual (subject to all prior equities) to transfer the legal right from the date of such notice, and all remedies for, and the power to give a good discharge for the same, without the concurrence of the assignor. Provided, that if the person liable shall have had notice that such assignment is disputed, or of any other opposing or conflicting claims, he may call upon the several claimants to interplead, or may pay the same into the court (s. 25 (6)).

The effect of bankruptcy was to vest in the bankrupt's trustee under the Bankruptcy Act, 1869 [formerly assignees], the benefit of all contracts made with him *before* his bankruptcy (*ib.* s. 15 (3); s. 4, and see s. 23; see also 12 & 13 Vict. c. 106, s. 141; *Beckham v. Drake*, 2 H. L. C. 579; *Whitmore v. Gilmour*, 12 M. & W. 808); or it would seem *afterwards*, but before he has obtained his certificate of discharge. See Bankruptcy Act, 1869, s. 15 (3); or before the bankruptcy closed. *Re Pettit's Estate*, 1 Ch. D. 478. If the trustee disclaims the contract, it is to be considered as determined from the date of the order of adjudication (*ib.* s. 23). See *In Re Sneezum*, 3 Ch. D. 463, p. 85.

By the Bankruptcy Act, 1883 (in operation 1st January, 1884), s. 55, where any part of the property of the bankrupt consists of *land* of any tenure *burdened with onerous covenants*, of *shares or stocks in companies*, of *unprofitable contracts*, or of *any other property* that is *unsaleable* or not readily saleable, by reason of its binding the possessor thereof to the performance of *any onerous act*, or to the *payment of any sum of money*, the trustee, notwithstanding acts of ownership, may, by *writing signed by him*, at any time *within three months* after the first appointment of a trustee *disclaim* the property, or if not then aware of it, within two months after he first became aware of it (1).

The disclaimer determines as from the date of it, the rights and liabilities of the bankrupt, and discharges the trustee from all personal liability as from the date when the property vested in him, but shall not, except so far as is necessary for the purpose of releasing the bankrupt and trustee, affect the rights or liabilities of any other person (2).

Sub-s. (3) relates to leases, *post*, tit. "LANDLORD AND TENANT," Ch. 7.

The right of disclaimer is subject to the right of any person interested in the property to require in writing the trustee to decide whether he will disclaim or not, which he must do within twenty-eight days after, or such extended period as the court may allow (4).

The court may, on the application of such person as aforesaid, rescind the contract on equitable terms as to payment by or to either party of damages for the non-performance of the contract, or otherwise, and any damages payable under the order to any such person may be proved by him as a debt under the bankruptcy (5).

The court may make an order for the vesting of the property in or delivery thereof to any person entitled thereto, or to whom it may seem just that the same should be delivered, and on any such vesting order being made, the property comprised therein shall vest accordingly in the person therein named, without any conveyance.

Sub-s. (6) relates to leases, *post*, tit. "LANDLORD AND TENANT," Ch. 7.

Any person injured by the operation of a disclaimer shall be deemed to be a creditor of the bankrupt to the extent of the injury, and may accordingly prove the same as a debt under the bankruptcy (7).

Under sect. 31 of the Bankruptcy Act, 1869, if the trustee of a bankrupt, when called upon to decide whether he will disclaim a continuing contract of the bankrupt, does not disclaim it, but carries it on for the benefit of the estate, he is still at liberty, when he finds it unprofitable, to cease to perform it, and in that case the other party to the contract is entitled to prove against the bankrupt's estate for the damages occasioned by the breach of the contract, and this is his only remedy. The trustee does not by not disclaiming adopt the contract, either personally or on behalf of the estate. *In re Sneezum*, 3 Ch. D. 463. As to disclaimer under the Act of 1883, s. 55, sub. 4, see *ante*, p. 84.

As a general rule the benefit or burthen, as the case may be, of the contracts of a person pass to his executors or administrators, who may enforce or are liable to perform them, although they are not named in the contract, and the heir is (*Williams v. Burrell*, 1 C. B. 402. The principal exception to this rule is where the contract is of such a *personal* nature that only the contracting party can perform it,—for instance, a contract to write a book or the like. *Marshall v. Broadhurst*, 1 Tyrw. 349; see *Wentworth v. Cock*, 10 A. & E. 42; *Stubbs v. Holywell R. Co.*, L. R., 2 Ex. 311. So upon this principle no liability attaches to the executors of a person having apprentices, to provide for their further instruction, though they will be bound to perform their testator's covenant to *maintain* the apprentices. Wms. Exors. 8th ed., p. 1772. If a premium has been paid to an attorney with an articulated clerk, and the former dies during the continuance of the articles, the court will direct a proportionate part of the premium to be refunded. *Hirst v. Tolson*, 2 Mac. & G. 134.

CHAPTER VI.

OF MATTERS AFFECTING THE LEGALITY OF CONTRACTS.

<i>Illegality generally</i>	86	<i>Champerty and Maintenance, &c....</i>	88
<i>Effect of</i>	86	<i>Champerty—Maintenance</i>	88
<i>Any Party to Contract may set</i>		<i>Sale of Right to Litigate.....</i>	88
<i>up</i>	86	<i>Right to be enforced by Action</i>	89
<i>Sale of certain Offices</i>	86	<i>Purchase of Shares to institute</i>	
<i>To compromise Felonies</i>	86, 87	<i>Action</i>	89
<i>Gaming—Stock Jobbing</i>	87	<i>Agreement to give part of Pro-</i>	
<i>Restraint of Trade.....</i>	87	<i>perty arising from Suit</i>	89
<i>Immorality</i>	88	<i>Contract valid Abroad but im-</i>	
<i>Past or Future Cohabitation</i> ...	88	<i>peachable here.....</i>	90
<i>Immoral Publications</i>	88	<i>Pretended Rights</i>	90
<i>Libellous Publications</i>	88	<i>Expectancies—To leave by Will</i>	90

Illegality.] Whenever the contract which a party seeks to enforce is, expressly or by implication, forbidden by the common or statute law, no court will lend its assistance to give it effect (see *Cope v. Rowlands*, 2 M. & W. 157; *Ritchie v. Smith*, 6 C. B. 462); and parol evidence is admissible to show the nature of the transaction, although arising out of or connected with an instrument in writing or under seal. *Collins v. Blantern*, 2 Wils. 347; *Shakell v. Rozier*, 3 Sc. 59. Any party to an illegal contract may set up its illegality. This is allowed, not on his account, but out of consideration for the public benefit. See *Holman v. Johnson*, Cowp. 343; *Thomson v. Thomson*, 7 Ves. 470; *Reynell v. Sprye*, 1 D., M. & G. 660.

The 5 & 6 Edw. 6, c. 16, ss. 2, 3, avoids agreements for the sale or deputation of certain offices concerning the administration of justice and the revenue, except such offices in which persons have estates of inheritance (s. 4). The provisions of this act are extended by the 49 Geo. 3, c. 126, s. 1, to Scotland and Ireland, and to all offices in the gift of the crown, and all commissions, civil, naval or military, and to all places and employments under government here or in any part of the dominions of the crown or the East Indies. Commissions in the army at regulation prices and offices legally saleable at the time of the passing of the act are excepted (ss. 8, 9). *Hartwell v. Hartwell*, 4 Ves. 815. A contract to assign the fees of a gaoler is void. *Methwold v. Walbank*, 2 Ves. sen. 238. So a contract by a public officer to pay over the excess of his fees beyond a certain sum to the body appointing him. *Corp. Liverpool v. Wright*, Johns. 359.

Agreements to compromise felonies and misdemeanors of a public nature are also void, upon grounds of public policy (*Keir v. Leeman*,

9 Q. B. 371, 398; see *Johnson v. Ogilvy*, 3 P. W. 279; *Clubb v. Hutson*, 18 C. B., N. S. 414; and any agreement having for its object the stifling of a criminal prosecution will be set aside in equity. *Williams v. Bayley*, L. R., 1 H. L. 200.

By the 8 & 9 Vict. c. 109, s. 18, contracts by parol or in writing by way of gaming or wagering are null and void, and no suit is maintainable for recovering money, or any valuable thing alleged to be won upon or deposited to abide the event of any wager. The act does not apply to subscriptions or agreements to subscribe towards any prize or money to be awarded to the winner of any lawful game. A bond for a racing debt, given to prevent steps being taken by the obligee which would have involved the obligor in considerable pecuniary loss, is valid. *Bubb v. Yelverton*, L. R., 9 Eq. 471. But whether a bond given for a racing debt, *simpliciter*, would be good, is doubtful. The Stock Jobbing Acts, 7 Geo. 2, c. 8, and 10 Geo. 2, c. 8, were repealed by the 23 & 24 Vict. c. 28. But the last act was repealed by the 38 & 39 Vict. c. 66., s. 1. See *Bridger v. Savage*, 15 Q. B. D. 363.

It has been held that contracts *wholly* in restraint of trade, for instance, that a man shall not carry on business *anywhere*, though only for a limited time, are void. *Mitchel v. Reynolds*, 1 P. W. 181; *Ward v. Byrne*, 5 M. & W. 548. The case of *Whittaker v. Howe*, 2 Bea. 383, where the agreement was, not to practise as a solicitor in Great Britain, is *contrà*; and see *Nicholls v. Stretton*, 10 Q. B. 353; *Proctor v. Sargent*, 2 M. & Gr. 33. There is no absolute rule that a covenant in restraint of trade is void if it is unlimited in regard to space.

The question in each case is whether the restraint extends further than is necessary for the reasonable protection of the covenantee. If it does not do that, the performance of the covenant will be enforced, even though the restriction be unlimited as to space. *Rousillon v. Rousillon*, 14 Ch. D. 351; *Allsopp v. Wheatecroft*, L. R., 15 Eq. 59, is *contrà*, but disapproved.

Contracts not to carry on business, though unlimited as to time, are valid if reasonable. *Hitchcock v. Coker*, 6 A. & E. 438; *Harms v. Parsons*, 32 Bea. 328; *Leather Cloth Co. v. Lhorsont*, L. R., 9 Eq. 345: see *Avery v. Langford*, 1 Kay, 663—667,—in the note to this case there is a very carefully compiled and useful summary of the decisions on the question from 1711 to the date of the report, 1854: and see *Benwell v. Inns*, 24 Bea. 307; *Tallis v. Tallis*, 1 E. & B. 391. A covenant not to carry on, or be concerned in carrying on, either directly or indirectly, a business, or to sell any goods in any way connected with that trade within a certain distance, is broken by selling goods as a journeyman in the employment of a person carrying on the particular trade within the distance, and the breach will be restrained by injunction. *Jones v. Heavens*, 4 Ch. D. 636.

The covenant is divisible, and, although part may be unreasonable, the rest, if reasonable, may be enforced. *Mallan v. May*, 11 M. & W. 653. The covenantor is not released from his covenant by the death of the covenantee (*Hastings v. Whitley*, 2 Ex. 611), or his retirement from the business on the sale of which the covenant was entered into.

Elves v. Crofts, 10 C. B. 241; and see *Collins v. Locke*, 4 App. C. 674.

There is nothing illegal in the owners of commodities agreeing that they will sell as between themselves at a certain price, leaving one of them to make any other profit that he can. And if A. agrees to purchase from B. in order to supply C., B. agreeing that he will not supply C. for a specified period, that is not illegal. *Jones v. North*, L. R., 19 Eq. 426, 428.

An agreement by the vendor of a patent to assign to the purchaser all future patent rights which the vendor may hereafter acquire of a like nature to the patent sold, is not contrary to public policy. *Printing, &c., Co. v. Sampson*, L. R., 19 Eq. 462.

Agreements founded upon an immoral consideration cannot, as a general rule, be enforced. Thus a lessee of a house used as a brothel, who assigns it for value, knowing it is intended to be used for the same purpose, cannot recover against his assignee on a covenant contained in the assignment. *Smith v. White*, L. R., 1 Eq. 626; *Pearce v. Brooks*, L. R., 1 Ex. 213; *Cowan v. Milbourn*, L. R., 2 Ex. 230; see *Brown v. Brine*, 1 Ex. D. 5.

Bonds or agreements to induce future cohabitation are invalid (*Gray v. Mathias*, 5 Ves. 286); but otherwise, if given in respect of the injury sustained by reason of past cohabitation. *Ib.*; *Knye v. Moore*, 2 S. & S. 260; *Hall v. Palmer*, 3 Ha. 532; see *Keenan v. Handley*, 2 D., J. & S. 283. The mere continuance of cohabitation is not enough to raise the presumption that a bond is given in consideration of future cohabitation, and accordingly such a bond is good. *Vallance v. Blagden*, 26 Ch. D. 353.

Contracts relating to the sale or publication of libellous or immoral books or prints cannot be enforced. *Stockdale v. Onwhyn*, 5 B. & C. 173; *Lawrence v. Smith*, Jac. 471.

Maintenance and Champerty—Pretended Titles.] Contracts involving maintenance or champerty are illegal. Maintenance is where a man gives or delivers to another that is plaintiff or defendant in any action any sum of money or other thing to maintain his plea, or takes great pains for him when he hath nothing therewith to do. See *Bradlaugh v. Newdegate*, 11 Q. B. D. 1. Champerty is a species of maintenance, being [originally] “a bargain with a plaintiff or defendant to divide the land, *campum partiri*, or other matters sued for, between them, if they prevail at law, whereupon the champertor is to carry on the party’s suit at his own expense.” *Radcliffe v. Anderson*, E., B. & E. 825. It is not necessary, however, to constitute champerty, that the agreement should be for an actual division, nor that it should relate to land. If the bargain be, that one party is to have part of the thing in dispute, or some profit out of it, it is sufficient. *Stanley v. Jones*, 7 Bing. 369. The assignment of a mere naked right to litigate, for instance, to set aside a conveyance for fraud, cannot be enforced on this ground (*Prosser v. Edmunds*, 1 Y. & C., Ex. 481; see *Stevens v. Bagwell*, 15 Ves. 139; *Wood v. Downes*, 18

Ves. 120; *Cholmondeley v. Clinton*, 4 Bli. 1; *Reynell v. Sprye*, 1 D., M. & G. 660; *Sprye v. Porter*, 7 E. & B. 58; *Hutley v. Hutley*, L. R., 8 Q. B. 112), for the right to complain of a fraud is not a marketable commodity. *De Hoghton v. Money*, L. R., 2 Ch. 164, 169. It is not, however, in every case that the sale and purchase of a right enforceable only by suit, or of the subject-matter of a suit, amounts to champerty or maintenance: thus a contract to purchase an interest in land which is the subject of a suit, is not void on the ground of maintenance (see *Harrington v. Long*, 2 M. & K. 590); and a mere provision by the purchaser to indemnify the vendor against costs and expenses does not render such a contract invalid. *Hunter v. Daniel*, 4 Ha. 420; see *Knight v. Bowyer*, 2 D. & J. 421, and consider *Harrington v. Long*, *sup.* In *In re Attorneys and Solicitors Act*, 1870, 1 Ch. D. 573, by an agreement between clients and solicitors, it was agreed that in the event of the solicitors succeeding in recovering certain property for the clients, they should receive 10 per cent. on the value of the property—it was held, that the opinion of the court on the validity or fairness of the agreement could not be required under s. 4 of the Attorneys and Solicitors Act, 1870, before any money was payable under the agreement. Jessel, M.R., was, however, of opinion that the agreement in question was champerty, and invalid under s. 11 of the act. A creditor may assign his interest in a debt, even after he has instituted a suit to recover it (*Myers v. United Guarantee Co.*, 7 D., M. & G. 112); and a party claiming a fund in court may mortgage it *pendente lite* to enable him to prosecute his claim. *Cockell v. Taylor*, *Collett v. Preston*, 15 Bea. 103. Nor is it champerty where the right purchased was originally clear, but the litigation is the result of circumstances subsequently arising or subsequently becoming known. *Wilson v. Short*, 6 Ha. 366. If a legatee, who is too poor to sue, assign his legacy for less than it is worth to a person who buys it for the purpose of enforcing payment by suit, this does not constitute champerty nor maintenance. *Tyson v. Jackson*, 30 Bea. 384. Nor does a purchase of shares in a company to enable a person to institute a suit against the company to restrain the carrying out of an agreement alleged to be illegal. *Hare v. L. & N. W. R. Co.*, Johns. 722. Consider the cases on this subject, tit. "JOINT STOCK COMPANIES."

A conveyance, whether voluntary or for valuable consideration, of property which the grantor has previously conveyed by a deed voidable in equity, is not void on the ground of champerty, and the right to impeach the first conveyance follows and is consequent upon the execution of the second. *Dickinson v. Burrell*, *Stourton v. Burrell*, L. R., 1 Eq. 337. But if a person entitled to property agrees with a solicitor to give him a portion of the profits arising from the successful prosecution of a suit, to establish his right upon being indemnified against the costs of the proceedings, it is champerty and maintenance, but the client is not disqualified from suing, since his title is independent of, and not arising from, the illegal contract. The case would have been different if the solicitor had been the party suing. *Hilton*

v. *Woods*, L. R., 4 Eq. 432; see *Earle v. Hopwood*, 9 C. B., N. S. 566. An agreement made abroad, but to be carried into effect in this country, which would be void on the ground of champerty if made here, is not the less void because made in a foreign country, though such a contract may be legal there. *Grell v. Levy*, 16 C. B., N. S. 73.

Agreements for the sale of *pretenced* or pretended rights or titles to lands are prohibited, except in certain cases, by the 32 Hen. 8, c. 9. See *Cholmondeley v. Clinton*, 4 Bli., N. S. 4; *Hitchins v. Lander*, G. Coop. 34; *Wall v. Stubbs*, 2 V. & B. 354. Although 32 Hen. 8, c. 9, s. 2, cannot be said to have been repealed by 8 & 9 Vict. c. 106, s. 6, nevertheless since the passing of the latter statute a grant of lands to which the grantor has a title existing in fact, but of which he has never been in possession, and on which he is entitled only to a right of entry, will be valid, even although at the time of the grant a litigation is pending as to the title to the lands. *Jenkins v. Jones*, 9 Q. B. D. 128. The sale of a *mere expectancy* is not within the statute. *Cook v. Field*, 15 Q. B. 460. Agreements to divide property which may be left or descend to one or other of the contracting parties are valid. *Beckley v. Newland*, 2 P. W. 182; *Wethered v. Wethered*, 2 Sim. 183; *Harwood v. Tooke*, *Ib.* 192; *Lyde v. Mynn*, 1 M. & K. 683; *Houghton v. Lees*, 1 Jur., N. S. 862; *Cook v. Field*, 15 Q. B. 460. In connection with this subject it may be observed that contracts for valuable consideration to devise or bequeath property will be enforced against persons claiming the property under the will or by reason of the intestacy of the party so contracting. *Goilmere v. Battison*, 1 Ver. 48; see *Needham v. Smith*, 4 Russ. 318; *Eyre v. Munro*, 3 Jur., N. S. 584. But a contract of this description must be in writing, where so required by the Statute of Frauds; for instance, if relating to interests in land. Such a contract, however, is capable of being performed within a year, and is not, therefore, within that branch of the 4th section which relates to contracts not to be performed within a year. *Ridley v. Ridley*, 34 Bea. 478. Contracts to leave property by will are not uncommon in marriage settlements. See that title. As to mutual contracts to leave property by will, see *Ryan v. Daniel*, 1 Y. & C., C. C. 60.

CHAPTER VII.

OF THE REQUISITES OF CONTRACTS IN EQUITY.

<i>General Doctrine of Equity</i>	91	<i>Unfairness, &c.—continued.</i>	
<i>Plaintiff must submit his Legal Rights to Equity</i>	91	<i>Delusion—Intoxication</i>	94
<i>Specific Performance is in the nature of Indulgence</i>	91	<i>Undue Pressure—Under Value.</i>	94
<i>General Requisites of Contract must be Complete, Certain, and Mutual</i>	92	<i>Imprisonment</i>	94
<i>Further Contract intended—All Terms to be stated</i>	92	<i>Hardship—Inequality</i>	94
<i>Infant cannot sue</i>	92	<i>Must exist when Contract entered into</i>	94
<i>Person selling Estate not his own As to Services</i>	93	<i>Where execution of Contract a forfeiture</i>	94
<i>Exception as to Mutuality—Statute of Frauds</i>	93	<i>Representations—Misrepresentations</i>	95
<i>Unfairness—Fraud—Undue Pressure or Advantage</i>	93	<i>Effect of</i>	95
<i>Mental Incapacity</i>	93	<i>Evidence of</i>	95, 96
<i>Want of proper Advice</i>	93	<i>Knowledge of Untruth</i>	96
<i>Breach of Trust</i>	93	<i>Reliance on Misrepresentation</i> .	96
<i>Fraud—Contract is voidable</i> ...	93	<i>Concealment</i>	96
		<i>Mistake—Surprise</i>	97
		<i>Mistake of Facts of Law</i>	97
		<i>Misconception of Effect</i>	98
		<i>Surprise</i>	98

General Doctrine of the Court.] A contract may be free from illegality, and may yet be of such a nature or attended by such circumstances that equity will not specifically execute it but leave the aggrieved party to his remedy (if any) at law. And if resort be had to equity by a suit for specific performance, whatever may be the legal rights of the plaintiff, he must put those legal rights under the control of the court, and cannot proceed on them at law without its leave. *Phelps v. Prothero*, 7 D., M. & G. 722. Specific performance is not of course because there is a contract, but is a relief in the nature of indulgence peculiar to the jurisdiction of equity. *Cox v. Middleton*, 2 Drew. 209; see *Martin v. Mitchell*, 2 J. & W. 420; *Clowes v. Higginson*, 1 V. & B. 524; *Haywood v. Cope*, 25 Bea. 140. Before a contract will be specifically executed, it is as a very general rule necessary that it should be presented to the court in a complete form, certain, free from illegality and fraud, and the conduct of the party seeking to enforce it must not be such as to preclude the court from aiding him; for contracts must be certain, fair and proved as by law required. See *Ld. Walpole v. Ld. Oxford*, 3 Ves. 420. Therefore, where a contract is required to be in writing, as in some cases it is, by the Statute of Frauds (*ante*, p. 76) and some other statutes, a verbal agreement is insufficient, unless in some exceptional cases.

See tit. "VENDOR AND PURCHASER." The contract between the parties must be complete; the cases on this head will be found collected under "VENDOR AND PURCHASER," as nearly all have arisen upon questions properly belonging to that title, and on the point whether letters or other documents taken together form a complete agreement or not within the statute. It only remains to observe, that if there be a complete contract, its validity and efficacy as such will be in no way affected merely by reason of a further and more formal contract being contemplated by the parties. *Thomas v. Dering*, 1 Ke. 729—741; *Heyworth v. Knight*, 17 C. B., N. S. 298; *Chinnock v. Mss. Ely*, 11 Jur., N. S. 329; see *Lindsey v. Lynch*, 2 Sch. & L. 1; *Ridgway v. Wharton*, 6 H. L. C. 238; *Nesham v. Selby*, L. R., 13 Eq. 191. Equity cannot decree the performance of an agreement any of the terms of which are uncertain, or where the whole of the agreement is not before the court. *Post v. Marsh*, 16 Ch. D. 395. Thus it will not specifically execute an agreement for the sale of property, material terms of the sale not being stated (*Rummen v. Robins*, 3 D., J. & S. 88), or the amount of purchase-money being uncertain (*Gourlay v. D. Somerset*, 19 Ves. 431), or where, the agreement being for the sale of leasehold property, the term is uncertain (*Fitzmaurice v. Bayley*, 9 H. L. C. 78; *Southern v. Harriman*, 14 W. R. 487; and see *Taylor v. Portington*, 7 D., M. & G. 328; *Gardner v. Fooks*, 15 W. R. 388), or it is uncertain to whom ground-rent is payable. *Pegler v. White*, 33 Bea. 403. In a suit for specific performance of a vague agreement relating to property, the court, having regard to its terms, will consider the surrounding circumstances and conduct of the parties in dealing with the property between the making of the agreement and the commencement of the suit. *Oxford v. Provand*, L. R., 2 P. C. 135. Although where an agreement is clear the court must act upon its own view of the construction without regard to the view entertained by the parties, yet where a party has throughout insisted on one construction of an obscure agreement, he cannot get specific performance on the footing of the opposite construction. *Marshall v. Berridge*, 19 Ch. D., 233.

Where there was a contract for sale of an estate, the vendor reserving "the necessary land for making a railway" through the estate the reservation was held void for uncertainty. *Pearce v. Watts*, L. R., 20 Eq. 492. Evidence of a plaintiff on his own behalf as to a bargain with a man since dead ought, in the absence of corroboration, to be disregarded, *per James, L.J. Hill v. Wilson*, L. R., 8 Ch. 888. As a general rule also, the court will not specifically execute contracts that are not mutually binding on the parties at the time they are entered into. As to the rule at law, see *Arnold v. Mayor of Poole*, 4 M. & Gr. 860, 896. Thus, a party contracting with an infant cannot be sued, for he could not sue (*Flight v. Bolland*, 4 Russ. 298); and a vendor of an estate, without title at the time he sells it, cannot sue the purchaser, if the latter retires from the contract as soon as he discovers the want of title (*Hoggart v. Scott*, 1 R. & My. 293; see *Sneesby v. Thorne*, 7 D., M. & G. 399; *Forrer v. Nash*, 11 Jur.,

N. S. 789, 35 Bea. 167; *Brewer v. Broadwood*, 22 Ch. D. 105; neither can a tenant in tail enforce a contract entered into by the tenant for life. *Ricketts v. Bell*, 1 De G. & Sm. 335. So where part of a contract relating to the sale of a patent and formation of a company to work it, was, that the vendor, the plaintiff, should *give his services* for two years and use his *best endeavours* to improve the invention, as the contract could not have been enforced *against* him, the court would not specifically execute it in his favour. *Stocker v. Wedderburn*, 3 K. & J. 393. As to contracts by railway contractors to keep a railway in repair and work it upon certain terms, see *Johnson v. Shrews. & Bir. R. Co.*, 3 D., M. & G. 914.

As an exception to this rule as to mutuality; where the contract is required to be in writing under the Statute of Frauds, and *one* party alone has signed it, he is bound, though the other party is not, until, by some subsequent signature or some other act, he adopts it. See tit. "VENDOR AND PURCHASER."

Unfairness—Fraud—Undue Pressure or Advantage.] A contract must be fair at the time it is entered into, or the court will not specifically execute it. See *Vivers v. Tuck*, 1 Moo. P. C., N. S. 516. The circumstances under which a contract was made, as well as the terms of the contract itself, will be considered, to enable the court to judge of the fairness of the transaction. Thus, mental incapacity, though not amounting to insanity (*Clarkson v. Hanway*, 2 P. W. 203) or want of proper advice, where necessary to a due understanding of the contract (*Stanley v. Robinson*, 1 R. & My. 527), will be sufficient to induce a court of equity to refuse specific execution of the contract. In *Heffer v. Martyn* (36 L. J., Ch. 372), where A. paid B. not to bid at an auction at which A. bid and became the purchaser, it was held by the Master of the Rolls, though apparently with reluctance, that this circumstance did not affect A.'s right to specific performance against the vendor, the price bid being the reserved price. And see *Galton v. Emuss*, 1 Coll. 243; *Re Carew's Estate*, 26 Bea. 187.

Execution of contracts, the performance of which would be a breach of trust on the part of trustees, will not be decreed (*Ord v. Noel*, 5 Madd. 438; *Mortlock v. Buller*, 10 Ves. 292; *Bridger v. Rice*, 1 J. & W. 74; *Evans v. Jackson*, 8 Sim. 217), nor where the execution of the contract would be an injury to the *cestuis que trust*. *Sneesby v. Thorne*, 7 D., M. & G. 399. Thus, if a trustee agree to grant a lease which he has no power to do under the instrument creating the trust (*Harnett v. Yeilding*, 2 Sch. & Lef. 549; *Bellringer v. Blaggrave*, 1 De G. & Sm. 63), or to allow a purchaser of the trust estate part of the purchase-money in discharge of the trustee's private debt (*Thompson v. Blackstone*, 6 Bea. 470), execution of the contract will not be enforced. A contract induced by fraud is not void but voidable. *Oakes v. Turquand*, L. R., 2 H. L. 325. Contracts which may be impeached on the ground of fraud are not void, but voidable only at the option of the party who is or may be injured by the fraud, subject

to the condition that the other party if the contract be disaffirmed, can be remitted to his former state. *Clarke v. Dickson*, E., B. & E. 148; *Urquhart v. Macpherson*, 3 App. C. 831. To constitute fraud there must be an assertion of something false within the knowledge of the party asserting it, or the suppression of that which it was his duty to communicate. *Horsfall v. Thomas*, 1 H. & C. 100. See *Misrepresentation*, *post*, p. 95. A contract between A. and B., fair as regards them, may be enforced by either, though brought about by the fraud of a third person and in order to benefit himself. *Bellamy v. Sabine*, 2 Ph. 425. An agreement which involves a fraud on the public will not be enforced. *Post v. Marsh*, 16 Ch. D. 395. The mere existence of a delusion in the mind of a person making a disposition or contract is not sufficient to avoid it, even though the delusion is connected with the subject-matter of such disposition or contract: it is a question for the jury whether the delusion affected the disposition or contract. *Jenkins v. Morris*, 14 Ch. D. 674.

An answer is sometimes set up that the *defendant was intoxicated* at the time of his entering into the contract; but the court will not assist a party to a contract merely on the ground that he was intoxicated: he must show that the other contracting party drew him into that state in order to take advantage of him in the transaction, and this obviously is a species of fraud. *Cooke v. Clayworth*, 18 Ves. 12; *Shaw v. Thackray*, 1 Sm. & G. 537; *Butler v. Mullvihill*, 1 Bligh, 137; *Wiltshire v. Marshall*, 14 W. R. 602. A contract of sale which a vendor is induced to enter into under undue pressure and at an undervalue will be set aside. *Ford v. Olden*, L. R., 3 Eq. 461; *Summers v. Griffiths*, 35 Bea. 27; see for other cases of this class, *post*, tit. "VENDOR AND PURCHASER." So an advantage or security obtained by working on the fears of any one, though without any *direct threat*, is void, where, for instance, it is obtained from a parent from the fear of disclosure of a forgery committed by his son. *Williams v. Bayley*, L. R., 1 H. L. 200; see *Scott v. Scott*, 11 Ir. Eq. R. 74. Imprisonment is no bar to dealings or contracts with reference to property; but the transaction must be fair, and will be carefully examined into by the court. *Brinkley v. Hann*, 1 Dru. 175.

Hardship—Inequality.] Sometimes the hardship or inequality of the contract will induce the court to refuse specific performance of it. *Kimberley v. Jennings*, 6 Sim. 340; *Shrewsbury, &c., Co. v. L. & N. W. R. Co.*, 6 H. L. C. 113. In general it is necessary that the hardship should have existed at the time when the contract was made; if fair then, subsequent events will not in general influence the court, though the bargain may in consequence have become a hard one for either party. *Lawder v. Blachford*, Beat. 522. If however such subsequent events have been occasioned by one party, this may induce the court to refuse specific performance at his instance. *D. Bedford v. Trustees of Br. Mus.*, 2 M. & K. 552; *Sayers v. Collyer*, 24 Ch. D. 180. If the execution of the contract would entail a forfeiture of some interest on one of the parties, the court will not in general

decree specific performance, as if part of the purchase-money of property agreed to be sold would be forfeited by the vendor if he sold. *Faine v. Brown*, cited 2 Ves. sen. 307; see *Peacock v. Penson*, 11 Bea. 355. So where a mortgagee with power of sale, who afterwards became owner under a foreclosure decree, sold inadvertently as mortgagee, he was not compelled to convey as such under the power of sale, as that would have involved the risk of opening the foreclosure decree. *Watson v. Marston*, 4 D., M. & G. 230. And where trustees had, in a contract for sale, agreed to exonerate an estate from incumbrances, the court refused specifically to execute it against them, as it was uncertain whether the purchase-money would be sufficient to discharge the incumbrances. *Wedgwood v. Adams*, 6 Bea. 600.

Representations or Misrepresentations.] A representation by one party to the contract will as a general rule be a ground for compelling him to make good the representation (*Pulsford v. Richards*, 17 Bea. 87), or where it is untrue for refusing specific performance (*Cadman v. Horner*, 18 Ves. 10), or for rescinding the contract. *Pulsford v. Richards*, *sup.*; *Wilde v. Gibson*, 1 H. L. C. 605; 12 Jur. 527; *Rawlins v. Wickham*, 3 D. & J. 304; *Piggott v. Stratton*, 1 D., F. & J. 33; *Behn v. Burness*, 3 B. & S. 751; *Smith v. Kay*, 7 H. L. C. 750; *Moore v. De la Torres' Case*, L. R., 18 Eq. 661. The representation must be of a nature calculated to induce the other party to enter into the contract. See *Reynell v. Sprye*, 1 D., M. & G. 660; *Natl. Exch. Co. v. Drew*, 2 Macq. H. L. 103. And when it relates to property, the evidence of the representation and of the property to which it relates must be clear. *Turner v. Ince*, 5 Jur., N. S. 1072. Where there is a misrepresentation of a material fact, it would seem not to be necessary, that the party making the misrepresentation should know that it is untrue; it is enough that he does not know it to be true. *Ainslie v. Medlycott*, 9 Ves. 21; *Burrowes v. Lock*, 10 Ves. 476; *Price v. Macaulay*, 2 D., M. & G. 339; *Higgins v. Samels*, 2 J. & H. 460; *Reese River, &c., Co. v. Smith*, L. R., 4 H. L. 79, per Ld. Cairns. "The rule laid down in the important case of *Pickard v. Sears*, 6 A. & E. 469, on this subject is, that where one by his words or conduct wilfully causes another to believe in the existence of a certain state of things and induces him to act on that belief or to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time. By the term wilfully, however, in that rule we must understand if not that the party represents that to be true which he knows to be untrue, at least that he means his representation to be acted upon, and that it is acted upon accordingly." *Per Parke, B.*, in *Freeman v. Cooke*, 2 Ex. 654. See *Jorden v. Money*, 5 H. L. C. 185; *Citizens' Bank of Louisiana v. First Nat. Bank of New Orleans*, L. R., 6 H. L. 352. If a statement, although untrue to the knowledge of the defendants, is so trivial that it could not in the opinion of the court have influenced the conduct of the plaintiff, it will not support an action for deceit. *Smith v. Chadwick*, 20 Ch. D. 27.

And a statement honestly made and believed to be true as to some matter of law, for instance, a decision, although it turns out to be erroneous, will not, it is considered, amount to misrepresentation within the meaning of the rule. *Legge v. Croker*, 1 Ba. & Be. 506. This case was cited with approbation by Lord Selborne, L.C., in *Brownlie v. Campbell*, 5 App. C. 925, 937. In the last cited case, one between vendor and purchaser of land in Scotland, the latter by the contract of purchase was to take *with the risk of errors* in the particulars, which stated that "the lands hold of the crown," a statement which was erroneous but made *bond fide*, and the purchaser was held not entitled to relief. If a statement, by which a person says he has been deceived, is ambiguous, he is bound to state the meaning which he attaches to it, and cannot leave the court to put a meaning upon it. If it is capable of two meanings, he must prove that he had interpreted the words in the sense in which they were false, and had in fact been deceived by them. *Smith v. Chadwick*, 9 App. C. 187. See also *Evans v. Edmonds*, 13 C. B. 777, 786; *Cornfoot v. Fowke*, 6 M. & W. 358; and comp. *Vigers v. Pike*, 8 Cl. & F. 562; *Evans v. Collins*, 5 Q. B. 804; *Murray v. Mann*, 2 Ex. 538; *Freeman v. Cooke*, *ib.* 654; *Att.-Gen. v. Stephens*, 1 K. & J. 748, 749; *Barry v. Croskey*, 2 J. & H. 1; *Gerhard v. Bates*, 2 E. & B. 476; *Barwick v. Eng. Jt. St. Bank*, L. R., 2 Ex. 259; *Rawlins v. Wickham*, 3 D. & J. 316; *Hart v. Swaine*, 7 Ch. D. 42; *Miles v. McIlwraith*, 8 App. C. 120. A representation is binding on the party making it, and he is generally estopped from disputing it, and he must, so far as the case will admit of it, make it good. Thus, a representation by a solicitor to a client that money belonging to the latter has been invested in a particular way, is binding on the former and those claiming under him, if in fact there are investments, though in his name, which could have been effected with the client's money. *M. of Middleton v. Pollock*, 4 Ch. D. 49.

In such cases, however, to induce the court to refuse specific performance on the ground of misrepresentation, it must be shown that the contract was entered into upon the faith of the misrepresentation. Thus, if the person to whom it is made does not rely upon it but himself inquires into the truth of the matter misrepresented, he is not misled, and cannot afterwards set up the misrepresentation. *Attwood v. Small*, 6 Cl. & Fin. 232; *Clapham v. Shillito*, 7 Bea. 146; *Jennings v. Broughton*, 5 D., M. & G. 126; *Smith v. Chadwick*, 20 Ch. D. 27; comp. *Higgins v. Samels*, 2 J. & H. 460; *Redgrave v. Hurd*, 20 Ch. D. 1.

Concealment of facts by one contracting party material to be known to the other will, in certain cases, be a bar to specific performance. *Shirley v. Stratton*, 1 B. C. C. 440; *Attwood v. Small*, 6 Cl. & F. 232; consider the judgment in *Fuller v. Wilson*, 3 Q. B. 58; and see *post*, tit. "VENDOR AND PURCHASER." Giving imperfect information may be equivalent to concealment. *Walker v. Symonds*, 3 Sw. 73. In *McKewan v. Sanderson*, L. R., 20 Eq. 65, arrangements which would have the effect of giving one creditor a secret advantage over

the others, cannot be sustained. Laches in taking proceedings for relief upon the ground of misrepresentation will in general be as fatal to the plaintiff's case as in actions to enforce performance of contracts. See the cases, *post*, p. 102. In *Eaglesfield v. M. Londonderry*, 4 Ch. D. 693, although the case was decided on another ground, all the Lords Justices commented strongly upon the delay on the plaintiff's part in instituting proceedings which alone would have seemed a sufficient answer to his claim. See *Ib.*, pp. 713, 715, 717.

Mistake—Surprise.] A contract entered into under a mutual mistake of facts will be set aside. *Cochrane v. Willis*, L. R., 1 Ch. 58; *Cooper v. Phibbs*, L. R., 2 H. L. 149; *Jones v. Clifford*, 3 Ch. D. 779; see *Higginson v. Clowes*, 1 V. & B. 524; *Leuty v. Hillas*, 2 D. & J. 110. The mistake must be as to some matter of fact, not of law. *Midland, &c., Co. v. Johnson*, 6 H. L. C. 798. Mistake of fact is not the less a ground for relief because the person who has made the mistake had the means of knowledge. *Willmott v. Barber*, 15 Ch. D. 96. What is the nature of a mistake and what has been the cause of it will be considered in determining whether relief ought to be granted. The rule *ignorantia juris neminem excusat* applies where the alleged ignorance is that of a well-known rule of law, but not where it is that of a matter of law arising upon the doubtful construction of some legal instrument. In the latter case it is not decisively a ground for refusing relief. A court of equity will not, if a ground for relief from the mistake of persons as to their rights is clearly established, decline to grant it merely because, on account of the circumstances which have intervened since the agreement was made, it may be difficult to restore the parties exactly to their original condition. *Earl Beauchamp v. Winn*, L. R., 6 H. L. 223. See as to the distinction between law and fact, *Cooper v. Phibbs*, *sup.* In equity the line between mistakes in fact and in law is not so sharply drawn as at law. See *Daniel v. Sinclair*, L. R., 6 App. C. 180; *E. Beauchamp v. Winn*, L. R., 6 H. L. C. 223, 234. An agreement relating to the distribution of the personal estate of an intestate, founded on a mistake by one party as to the value of his share, will be set aside. *Cocking v. Pratt*, 1 Ves. sen. 400. So where a person buys his own estate by mistake. *Bingham v. Bingham*, *ib.* 126; and see *tit. "VENDOR AND PURCHASER."* Sometimes, where the mistake is on *one side* only, the person making it may correct it, and will not be bound by it. Thus, if a purchaser buy under a mistake, which is not attributable to his own negligence, but in part to the statements of the vendor, the contract will not be enforced (*Moxey v. Bigwood*, 12 W. R. 811); so if by mistake he has bid for the wrong lot. *Malins v. Freeman*, 2 Ke. 25. So a vendor is not bound by a mistake in the amount at which property is offered for sale where the mistake is immediately corrected, though after acceptance of the offer. *Webster v. Cecil*, 30 Bea. 62; see *Day v. Wells*, 30 Bea. 220; *Garrard v. Frankel*, *ib.* 445. In *Tamplin v. James*, 15 Ch. D. 215, there was no mistake or misrepresentation by the vendor, but the

purchaser thought he was purchasing more than in fact he did, and it was held that he could not repudiate the contract. Baggallay, L.J., observed, p. 218, that the law was correctly stated by Lord Romilly in *Swaishland v. Dearsley*, 29 Bea. 430, 433. "That the principle on which the court proceeds in cases of mistakes is this: If it appears upon the evidence that there was in the description of the property a matter on which a person might *bonâ fide* make a mistake, and he swears positively that he did make such mistake, and his evidence is not disproved, this court cannot enforce the specific performance against him. If there appears on the particulars no ground for the mistake, it is not sufficient for the purchaser to swear that he made a mistake, or that he did not understand what he was about."

It is no ground for refusing specific performance, that the object which one of the parties had in view when entering into the contract will not be effectuated on the completion of it. Thus, if a person agree to purchase land in order to erect a mill upon it, for which purpose the consent of some third person is necessary, who refuses to give it, this will not relieve the purchaser from the performance of the contract. *Adams v. Weare*, 1 B. C. C. 567. And it is no answer to a suit for specific performance for defendant to say that though he understood what the words of the agreement were he was under a mistake as to their legal effect. *Hart v. Hart*, 18 Ch. D. 670. And where A. agrees to take a lease of land upon the chance of there being something on it, *e.g.*, a coal mine, he must take the lease although there is no mine. *Jeffreys v. Fairs*, 4 Ch. D. 448. So an agreement for a lease for seven or fourteen years, which gives the option to the lessee only will be specifically executed against the lessor, although the latter understood that it was to be at his own option only. *Powell v. Smith*, L. R., 14 Eq. 85.

The court will in some cases refuse to enforce a contract, or will order it to be delivered up on the ground of surprise, where the parties have not understood the effect of it. *Willan v. Willan*, 16 Ves. 72; and see tit. "VENDOR AND PURCHASER."

Acquiescence in what has been done will not be a bar to relief where the party alleged to have acquiesced has acted, or abstained from acting, through being ignorant that he possessed rights which would be available against that which he permitted to be enjoyed. *Earl Beauchamp v. Winn*, L. R., 6 H. L. 223.

CHAPTER VIII.

OF SPECIFIC PERFORMANCE.

SECT. 1.—*Complete Specific Performance.*

<i>Complete execution of Contract—</i>		<i>Partnership Contracts</i>	101
<i>Damages</i>	99	<i>To refer to Arbitration</i>	101
<i>Doctrine of Court as to particular</i>		<i>As to Awards</i>	101
<i>Contracts</i>	100	<i>To write a Book</i>	101
<i>Covenant to do future Acts</i>	100	<i>To perform at a Theatre</i>	101
<i>Principal and accessory Agreements</i>	100	<i>Not to apply for Act of Parliament</i> ..	101
<i>To make Railways</i>	100	<i>For Sale of Goodwill</i>	102
<i>To Build</i>	100	<i>Business of Attorney</i>	102
<i>To work Mines</i>	101	<i>Negative Contracts</i>	102
<i>Hiring and Service</i>	101	<i>Injunction</i>	102
<i>Agency Contracts</i>	101	<i>Laches—Acquiescence</i>	102

IN Chapters VI. and VII. I have endeavoured to show in what cases equity will not interfere by reason of the illegality of the contract or from its being affected by some other matter fatal to the exercise of the jurisdiction of the court. There are besides some particular agreements which, with some exceptions, will not be specifically executed in equity upon the ground chiefly that it cannot *wholly* execute them. To a certain extent the jurisdiction of courts of equity was enlarged by the 21 & 22 Vict. c. 27 (Ld. Cairns' Act) enabling them to give damages in certain cases. This act was repealed by the 46 & 47 Vict. c. 49. In *Sayers v. Collyer*, 28 Ch. D. 103, Baggallay, L.J., observed, p. 107, that the repealing act "preserved the jurisdiction of the court notwithstanding the repeal. By sect. 5 it is enacted that any jurisdiction, or principle, or rule of law or equity, established or confirmed, or right or privilege acquired, by or under any enactment repealed by the act shall not be affected by the repeal. It is not, however, necessary to have recourse to Lord Cairns' Act, for it is clear that the court now has power to give damages as alternative relief. Before Lord Cairns' Act was passed a plaintiff who wished to enforce a restrictive covenant had two remedies; he might come into a court of equity for an injunction to restrain an infringement of his right, or he might have recourse to a court of common law to obtain damages, and Lord Cairns' Act gives the court of equity the power of giving a plaintiff damages by way of alternative relief. But since the Judicature Acts each division of the court has full power, apart from Lord Cairns' Act, to give either an injunction or damages." The general rule with respect to specific performance is, that the court must be able specifically to execute *every part* of the

agreement and at the time that its interposition is called for. Upon this principle, if under the agreement one party to it is to do something *at a future time*, which the court cannot enforce, it will not interfere. *Gervais v. Edwards*, 2 Dr. & War. 80; see *Waring v. Man. Sheff. & Lin. R. Co.*, 7 Ha. 492; *Hills v. Croll*, 2 Ph. 60; *Blackett v. Bates*, L. R., 1 Ch. 117. But an agreement for purchase, the purchase-money to be paid by *instalments*, will be enforced. *Gervais v. Edwards*, 2 Dr. & War. 83. And as the court cannot specifically execute a contract to do certain *future acts*, it will not decree, as an equivalent, a *covenant* to do them (*Stocker v. Wedderburn*, 3 K. & J. 393, 405; see *Blackett v. Bates*, *sup.*), unless it is part of the agreement that a covenant shall be entered into (*Wilson v. West Hartlepool &c. Co.*, 2 D., J. & S. 475); and a contract to do certain things and execute a deed, the deed being of the essence of the contract, will be enforced. *Granville v. Betts*, 18 L. J., N. S., Ch. 32. The court will not specifically execute an accessory agreement, unless it can also execute the principal one. *Scottish N. E. R. Co. v. Stewart*, 3 Macq. H. L. C. 382. And where one part of an award was capable of specific performance and another part not, the court refused to enforce performance of the former part. *Nickels v. Hancock*, 7 D., M. & G. 300; *Blackett v. Bates*, L. R., 1 Ch. 117. Upon this principle also the court will not enforce an agreement to make a railway, for it would be unable to carry out the works. *S. W. R. Co. v. Wythes*, 5 D., M. & G. 880. But if the interest of the party contracting with the company cannot be measured by damages, and the subject-matter of the contract is clear and definite; for instance, a contract by a railway company to make and keep in repair an archway under their railway to connect the different parts of the land divided by it; specific performance will be decreed. *Storer v. G. W. R. Co.*, 2 Y. & C., C. C. 48; see *Lane v. Newdigate*, 10 Ves. 192; *Franklyn v. Tuton*, 5 Mad. 469; *Lytton v. G. N. R. Co.*, 2 K. & J. 394; *Raphael v. Thames Val. R. Co.*, L. R., 2 Ch. 147.

Equity will not, in general, enforce an agreement to build or repair a house. *Paxton v. Newton*, 2 Sm. & G. 437; *Bruce v. Wehnert*, 25 Bea. 348; *Norris v. Jackson*, 1 J. & H. 319; comp. *Mosely v. Virgin*, 3 Ves. 184; *Cubitt v. Smith*, 10 Jur., N. S. 1123. But if a contract has been in part performed in specie by one party, the court will enforce performance in specie, though of an agreement to build, by the other party. *Price v. Corp. of Penzance*, 4 Ha. 506. And in a case where A. contracted for the erection of a house on his land and died intestate, it was held that his heir had an equity to have the house built and paid for out of A.'s personal estate. *Holt v. Holt*, 2 Ver. 322; *Lechmere v. Carlisle*, 3 P. W. 222; *Cooper v. Jarman*, L. R., 3 Eq. 98. Also where a contract to build or repair, &c., forms part of some other contract, for instance to grant a lease, of which the court ordinarily grants specific performance, it will specifically execute the latter and give damages for non-performance of the former. *Middleton v. Greenwood*, 2 D., J. & S. 142; *Soames v. Edge*, Johns. 669; see *Kay v. Johnson*, 2 H. & M. 118; *Mayor & Corp. of Lon.*

v. Southgate, 3 W. N. 297. Comp. the cases *Lewers v. E. Shaftesbury, &c.*, *post*, p. 103, in which there was no contract of which equity could decree specific performance.

Contracts to work mines (*Pollard v. Clayton*, 1 K. & J. 462) or quarries (*Booth v. Pollard*, 4 Y. & C., Ex. 61) will not be specifically executed. And, as a general rule, equity will not decree the specific performance of contracts the provisions of which cannot be enforced at once, but the performance of which would extend over a number of years (*Blackett v. Bates*, L. R., 1 Ch. 117); nor will equity decree specific performance of contracts for hiring and service (*Stocker v. Brocklebank*, 3 Mac. & G. 250; *Johnson v. Shrewsbury R. Co.*, 3 D., M. & G. 914; *Brett v. East India &c. Co.*, 2 H. & M. 404; *Mair v. Himalaya Tea Co.*, L. R., 1 Eq. 411 (see an earlier case *contrà*, *Ball v. Coggs*, 1 B. P. C. 140); nor agency contracts (*Chinnock v. Sainsbury*, 30 L. J., Ch. 409; *Ogden v. Fossick*, 9 Jur., N. S. 288); and it makes no difference in such cases that the agreement has for some time been acted upon (*ib.*) Nor will the court enforce performance of contracts for a partnership (see that tit., *post*); or agreements to refer to arbitration. *Wilks v. Davis*, 3 Mer. 507; *Street v. Rigby*, 6 Ves. 818. But in equity an *award* is considered as an agreement, and will be enforced in those cases in which, if the terms of it were embodied in the form of an *agreement*, it would be enforced. *Wood v. Griffith*, 1 Sw. 43; *Blackett v. Bates*, L. R., 1 Ch. 117. An award to convey an estate, or the like, will therefore be enforced (*Norton v. Mascall*, 2 Ver. 24); but not, it would seem, an award to pay money (*Hall v. Hardy*, 3 P. W. 189, n.); nor an award that a lease shall be granted by A. to B., and that B. shall perform certain duties during the continuance of the lease, as the court cannot enforce performance of the latter part. *Blackett v. Bates*, *sup.*

A contract to write a book cannot be specifically executed (*Clarke v. Price*, 2 Wils. Ch. 157); but a contract *not* to write except for a particular person is good and will be enforced in equity. *Morris v. Colman*, 18 Ves. 437. A contract *to perform* at a particular theatre, though it cannot be specifically executed, will be negatively enforced by an injunction restraining performance elsewhere, whether there is (*Lumley v. Wagner*, 1 D., M. & G. 604; cons. *Wolverhampton, &c. Co. v. L. & N. W. R. Co.*, L. R. 16 Eq. 433) or is not (*Webster v. Dillon*, 3 Jur., N. S. 432) the further agreement *not to perform elsewhere*. *Kemble v. Kean*, 6 Sim. 333, is *contrà* but overruled. But the performer must have an opportunity of performing, and although his salary may be paid, yet if he is not allowed to act, the contract will not be enforced against him. *Fechter v. Montgomery*, 33 Bea. 22.

The court will not interfere by injunction to restrain the breach of a contract for the sale and delivery of chattels which it cannot specifically perform. *Fothergill v. Rowland*, L. R., 17 Eq. 132.

The court will restrain persons from applying to Parliament, in breach of their agreement, for an act where the matter relates to *private interests* only, but not where the application, if successful,

would be so upon *public grounds*. *Lancaster, &c. R. Co. v. N. W. R. Co.*, 2 K. & J. 293; see *Ware v. Gr. Junc. Co.*, 2 R. & My. 470; *Steele v. N. Met. R. Co.*, L. R., 2 Ch. 237.

A contract *solely* for the sale of the goodwill of a business will not be enforced, by reason of the uncertainty of the subject-matter of the contract. *Baxter v. Connolly*, 1 J. & W. 580. But otherwise where it is for the sale of premises *and* goodwill attached to the premises. *Darbey v. Whitaker*, 4 Dr. 134; see *Cruttwell v. Lye*, 17 Ves. p. 346; *Chissum v. Dewes*, 5 Russ. 29; and see as to the nature of goodwill in general, *Allison v. Monkwearmouth*, 4 E. & B. 13; also tit. "PARTNERSHIP," Ch. V., sec. 2. The court will also decree specific performance of a contract between attorneys (partners), that one should have and carry on the business on certain terms, the other retiring from it. *Aubin v. Holt*, 2 K. & J. 66; see *Whittaker v. Howe*, 3 Bea. 383; *Candler v. Candler*, Jac. 225, 231; *Thornbury v. Bevil*, 1 Y. & C., C. C. 554. Whether the court can enforce specific performance of a contract to sell a medical practice *quære*. *May v. Thomson*, 20 Ch. D. 705.

Where the contract is of a negative character, for instance, not to carry on a particular business (*Chesman v. Nainby*, 1 B. P. C. 234; *Barret v. Blagrove*, 5 Ves. 555; *Williams v. Williams*, 2 Sw. 253; *Whittaker v. Howe*, 3 Bea. 383; *Clarkson v. Edge*, 12 W. R. 518; *Clements v. Welles*, L. R., 1 Eq. 200), not to build (*Rankin v. Huskisson*, 4 Sim. 13), or the like, the remedy is by injunction restraining the party from doing the act which he has contracted not to do. See *Lumley v. Wagner*, 1 D., M. & G. 616. Where a contract for the sale of chattels to the plaintiff contained an express negative stipulation not to sell to any other manufacturer, *Fry, J.* granted an injunction to restrain the breach of the negative stipulation although the contract was one of which specific performance would not have been granted. *Donnell v. Bennett*, 22 Ch. D. 835. As a general rule delay in seeking the assistance of the court is a bar to relief; for a bill for specific performance of an agreement is an application to the extraordinary jurisdiction of the court, which cannot be exercised in favour of persons who have slept on their rights or acquiesced for a long time in a title and possession adverse to their claim. *Moore v. Blake*, 1 Ba. & Be. 69. What lapse of time is sufficient to bar the right to relief must depend upon the circumstances of each particular case. See *Heaphy v. Hill*, 2 S. & S. 29; *Jennings v. Broughton*, 5 D., M. & G. 126; *Alloway v. Braine*, 26 Bea. 575; *Clegg v. Edmonson*, 8 D., M. & G. 787; *Colby v. Gadsden*, 34 Bea. 416; *Maythorne v. Palmer*, 11 Jur., N. S. 230; *Lehmann v. M'Arthur*, L. R., 3 Ch. 496. But there is no laches so long as a correspondence is going on between the parties with reference to the subject-matter of the contract. *Southcomb v. Bp. of Exeter*, 6 Ha. 213; *M'Murray v. Spicer*, L. R., 5 Eq. 527. Nor is there where possession has been taken under the contract. *Shepherd v. Walker*, L. R., 20 Eq. 659. In cases seeking a specific performance, laches is equally as strong against a plaintiff in not proceeding in, as in not

commencing, a suit. *Moore v. Blake*, 1 Ba. & Be. 69; see, however, *Foster v. M'Muhon*, 11 Ir. Eq. R. 287.

Where one party to an agreement has broken it, the court will not, or not in general, grant an injunction to restrain the other party to the agreement from breaking his part of it. *Telegraph, &c. Co. v. M'Lean*, L. R., 8 Ch. 658.

SECT. 2.—*Partial Specific Performance.*

<i>In what cases</i>	103	<i>Plaintiff's Delay</i>	104
<i>Damages in Equity</i>	103	<i>Jurisdiction of Equity to decide</i>	
<i>Contract must be capable of Specific</i>		<i>Questions of Law</i>	104
<i>Performance</i>	103	<i>Equitable defences at law</i>	104

Where the performance of future acts is not in question, although the court cannot specifically execute the whole agreement, if the defendant is in a position partially to perform it, the plaintiff may, in general, have what the defendant can give, with compensation (*G. W. R. Co. v. Bir. & Oxf. R. Co.*, 2 Ph. 605), or, in some cases, damages. See *Middleton v. Greenwood*, 2 D., J. & S. 142; *Samuda v. Lawford*, 4 Giff. 42, and *ante*, p. 99. This, of course, assumes that the contract is of such a nature that compensation in money by reason of the nonperformance of the whole of it in its integrity can properly be given, as in the familiar instance, in a case between vendor and purchaser, where the former has not exactly the interest which he contracts to sell. See tit. "VENDOR AND PURCHASER."

When justice can be better done by an inquiry as to damages rather than by a decree for specific performance, the court will direct such inquiry accordingly. Thus, where a railway company agreed for valuable consideration with a landowner to erect a station on certain lands which they had bought from him, but the agreement contained no further description of the station, nor any stipulations as to the use of it, and the company refused to erect a station in the specified place, but substituted one at a distance of two miles, the court directed an inquiry as to damages. *Wilson v. Northampton & Banbury Junc. R. Co.*, L. R., 9 Ch. 279.

If the plaintiff fail to establish any contract of which specific performance can be decreed, damages cannot be given. *Lewers v. E. Shaftesbury*, L. R., 2 Eq. 270; see *Durell v. Pritchard*, L. R., 1 Ch. 244; *Ferguson v. Wilson*, L. R. 2 Ch. 77; *Middleton v. Greenwood*, 2 D., J. & S. 142. The rule is the same if the failure is by reason of an agreement to grant a lease, but the term for which it was to be granted expires before the cause can be heard. *De Brassac v. Martyn*, 11 W. R. 1020. Where there is an action for specific performance with a claim for damages in the alternative as a substitute for specific performance, and the plaintiff has by his own act rendered specific

performance impossible, he is not in such action entitled to damages. *Hipgrave v. Case*, 28 Ch. D. 356. But in *Howe v. Hunt* (31 Bea. 420), though the court could not specifically execute the mortgagor's agreement to grant a lease, the mortgagee dissenting, it assessed the damages sustained.

By the 25 & 26 Vict. c. 42 (Sir John Rolt's Act), courts of Equity were required to decide questions of law. This Act was repealed by the 46 & 47 Vict. c. 49 being no longer necessary by reason of the provisions contained in the Judicature Acts, *ante*, p. 2). Its application to inferior courts was in certain cases retained (s. 7).

By the 17 & 18 Vict. c. 125 equitable defences were formerly admitted to be available at law in cases in which, if judgment were obtained, relief might be obtained on equitable grounds (s. 83). This section being no longer necessary by reason of the operation of the Judicature Acts, *ante*, p. 2, was repealed by the 46 & 47 Vict. c. 49, subject to s. 7. See *supra*.

OF CONVERSION.

CH. 1.—CONVERSION OF MONEY INTO LAND AND LAND INTO MONEY, p. 105.

CH. 2.—CONVERSION BECOMING UNNECESSARY, OR DIRECTED FOR OBJECTS CONTRARY TO LAW, p. 115.

CH. 3.—CONVERSION AS BETWEEN TENANT FOR LIFE AND REMAINDERMAN, p. 118.

CHAPTER I.

CONVERSION OF MONEY INTO LAND AND LAND INTO MONEY.

<i>General Doctrine</i>	105	<i>Option, Consent or Request of Third Persons</i>	111
<i>Conversion agreed upon or directed considered as effected.</i> ..	105	<i>Option—Power</i>	111
<i>Double Conversion</i>	106	<i>Direction to convert must be absolute</i>	111
<i>Land agreed or directed to be sold</i> .	106	<i>Implication from Limitations relating to Land</i>	111
<i>Does not pass under Devise</i> ...	106	<i>Consent—Request</i>	111
<i>Under Bequest</i>	106	<i>Property at Home—Election</i>	112
<i>Contract of Sale must be valid.</i> ..	106	<i>Absolute Owner</i>	112
<i>Verbal Agreement</i>	106	<i>Tenant in Tail</i>	112
<i>Option to purchase</i>	106, 107	<i>Remainderman</i>	112
<i>Notice under Railway Acts</i> ...	107	<i>Infants—Lunatics</i>	113
<i>Money paid into Court</i>	107	<i>Married Women</i>	113
<i>Sale by Order of Court</i>	107	<i>Where several entitled</i>	113
<i>Infancy — Lunacy — Bankruptcy</i>	108	<i>Acts of Election</i>	113
<i>Aliens</i>	108, 109	<i>Treating as Money in Accounts</i> ..	113
<i>Cases under Legacy Duty Acts</i> ..	109	<i>Taking Principal, not Interest</i> ..	113
<i>Power of Sale</i>	110	<i>Letting Land</i>	114
<i>Money agreed or directed to be laid out in Land</i>	110	<i>Taking Deeds</i>	114
<i>Money passes as Land</i>	110	<i>Continuing in Possession</i>	114
<i>Exceptions to Rule</i>	110	<i>Election as to Property in Remainder</i>	114

General Doctrine.] Where money or land is agreed or directed to be converted, the former into land, the latter into money, the conversion is considered, in equity, as having actually taken place, upon the principle that equity considers that as done which ought to be done. See *Fletcher v. Ashburner*, 1 B. C. C. 497; *Wheldale v.*

Partridge, 5 Ves. 396; *S. C.*, 8 Ves. 227; *Harcourt v. Seymour*, 2 Sim., N. S. 12; *Re Pedder*, 5 D., M. & G. 890. This principle is established by numerous cases (*post*), and is, as a very general rule, carried out to its fullest extent, even in favour of volunteers (*Lechmere v. E. of Carlisle*, 3 P. W. 223), and in all its consequences.

Conversion takes place under a deed from its delivery (*Griffith v. Ricketts*, 7 Ha. 299, 311; *Clarke v. Franklin*, 4 K. & J. 257; see *Hewitt v. Wright*, 1 B. C. C. 86); under a will, in general and in the absence of a direction to the contrary, from the death of the testator. *Beauclerk v. Mead*, 2 Atk. 167.

Sometimes a double conversion, as land into money and the money again into land, is directed. In this case the property is to be considered, in general, as in that state in which it is ultimately to be converted; in the case supposed, as land. See *Re Pedder's Settlement*, 5 D., M. & G. 890. Where property is directed to be sold and the proceeds invested in the purchase of other lands, the persons who would be interested in the latter, if purchased, take, as a rule, the same interests in the former until they are sold. *Pearson v. Lane*, 17 Ves. 101.

Land agreed or directed to be sold—Contract of Sale.] Realty, by marriage articles or settlement, agreed, or by will directed, to be sold, will, though unconverted, be considered as money, not passing under a devise of land (*Elliott v. Fisher*, 12 Sim. 505), but as money under a general gift or residuary bequest of all personalty (*Stead v. Newdigate*, 2 Mer. 521; *Farrar v. E. Winterton*, 5 Bea. 1); and where there is no will it will go to the personal representatives. *Ashby v. Palmer*, 1 Mer. 296; *Elliott v. Fisher*, *sup.*; *Griffith v. Ricketts*, 7 Ha. 299; see *Hoddel v. Pugh*, 33 Bea. 489. As to the effect of election, see cases, *post*, p. 112, and *Chandler v. Pocock*, 16 Ch. D. 648.

A contract of sale, where all the terms are agreed upon, will also operate as a conversion of the property, the vendor being a trustee of the estate for the purchaser, and the purchaser a trustee of the purchase-money for the vendor. *Atcherley v. Vernon*, 10 Mod. 518; *Green v. Smith*, 1 Atk. 572; *Pollexfen v. Moore*, 3 Atk. 272.

For a conversion to be effected under a contract of sale, it must be free from objection in respect of the fiduciary character of the vendor or purchaser; for instance, that the vendor is a trustee for sale selling to himself (*Ingle v. Richards*, 28 Bea. 361), and the contract must be such as a court of equity will enforce against an unwilling purchaser. *Garnett v. Acton*, *ib.* 333; see as to the requisites of such a contract, *post*, tit. "VENDOR AND PURCHASER." A verbal agreement, however, by an owner in fee who dies intestate before it is carried out, will, if adopted by his heir voluntarily and not under a mistake, effect a conversion *retrospectively*, and the money will belong to the next of kin. *Frayne v. Taylor*, 10 Jur., N. S. 119.

Where a lessee, with an option of purchase, duly declares his option after the death of the lessor, the owner in fee, the realty is thereby converted *retrospectively* as between those claiming under the lessor or under his will, the proceeds going to his personal representatives,

though the heir or devisee will be entitled to the rents up to the time of the option being declared. *Lawes v. Bennett*, 1 Cox, 167; *Townley v. Bedwell*, 14 Ves. 591; *Collingwood v. Row*, 3 Jur., N. S. 785; *Goold v. Teague*, 5 Jur. N. S. 116; *Weeding v. Weeding*, 1 J. & H. 424; *Woods v. Hyde*, 31 L. J., Ch. 295; see *Ex parte Hardy*, 30 Bea. 206; the cases of *Drant v. Fause*, 1 Y. C. C. C. 580, and *Emuss v. Smith*, 2 De G. & S. 722, are, to a certain extent, *contra*, but are exceptional cases; see 1 J. & H. 431, where they are explained. If, before the option is declared, the property is taken by a company having compulsory powers of purchase, the person having the option will be entitled to the difference, if any, between the price fixed to be paid by him and that paid by the company. *Re Cant*, 4 D. & J. 503. Where property, *e.g.*, an advowson, is converted into a right of money compensation in the lifetime of a testator, it is as between his real and personal representatives converted into money, *Frewen v. Frewen*, L. R. 10 Ch. 610.

A notice given to an owner in fee under the railway acts, or by persons having compulsory purchasing powers, will not effect a conversion in equity (*Haynes v. Haynes*, 1 Dr. & Sm. 426; *Re Battersea Park Acts*, 9 Jur., N. S. 883; *Righton v. Righton*, 36 L. J., Ch. 61), though it may operate so as to restrain the owner from selling the land. *Met. R. Co. v. Woodhouse*, 11 Jur., N. S. 296. But a conversion takes place when the amount of the purchase-money is *agreed upon* (*Re Hawkins*, 13 Sim. 569; see *Re Manchester, &c. R. Co.*, 19 Bea. 365; *Regent's Canal Co. v. Ware*, 23 Bea. 575; comp. *Re Skeggs*, 2 D., J. & S. 533); but not under a mere agreement that, if land be taken, the price shall be a fixed sum per acre, and not be referred to a jury to assess. *Re Walker*, 1 Drew. 508.

When property is taken under the compulsory powers of an act of parliament and the money is paid into court, it continues real estate until taken by some person having a right to elect (see *post*, p. 112; *Re Stewart*, 1 Sm. & G. 32, 39; *Re Bagot*, 31 L. J., Ch. 772; *Dixie v. Wright*, 32 Bea. 662), and will not pass under a bequest of personal estate. *Re Skeggs*, 2 D., J. & S. 533. But the accumulations of such a fund will be personal estate. *Dixie v. Wright*, *sup.* Money paid into court under the 69th section of the Lands Clauses Consolidation Act (8 Vict. c. 18) is realty (see *Kelland v. Fulford*, 6 Ch. D. 491); but if paid in under the 76th section it is personalty. *Re Harrop*, 3 Drew. 726. It has been held that if property be sold by order of the court, and there is a surplus after satisfying the purpose for which the sale is directed, it will be considered as realty. *Jermyn v. Preston*, 13 Sm. 356; *Cooke v. Dealey*, 22 Bea. 196. But it has since been held that where, in an administration suit or administration suit asking also for partition of real estate, the court directed a sale, but before it was effected one of the parties interested in the real estate, an infant, died; the estate was sufficiently converted, and the estate having been sold, the share of the deceased beneficiary passed to his legal personal representative (*Steed v. Preece*,

L. R. 18 Eq. 192; *Arnold v. Dixon*, L. R. 19 Eq. 113. As to conversion under a power of sale in a mortgage, see tit. "MORTGAGE."

In the case of infants the court would not in general direct a conversion of one kind of property into another, particularly personal into real estate; as, prior to the 1 Vict. c. 26, a female infant could, after the age of twelve, a male after fourteen (2 Blac. Com. 497), dispose of personal estate, but neither could dispose of real estate before the age of twenty-one years. See *Re Phillips*, 19 Ves. 122. It was, therefore, more beneficial for the infant that it should continue personal estate. Since the act however this reason has ceased to have any weight. The proceeds of the sale of timber cut by order of the court on the estate of an infant tenant in fee, with an executory devise over on his dying under the age of twenty-one, is personal estate (*Dyer v. Dyer*, 34 Bea. 504); though if cut in the lifetime of the tenant for life, and the proceeds invested, such proceeds are, as between the heir and executor of the person ultimately entitled, real estate. *Field v. Brown*, 27 Bea. 90. When timber is cut by order of the court on the estate of a lunatic, the proceeds are personal estate. *Oxenden v. Ld. Compton*, 2 Ves. jun. 72. But the court will not, without a sufficient cause, change the nature of property belonging to a lunatic. *Ib.* See *Re Badcock*, 4 M. & Cr. 440. And if a sale of a lunatic's lands be ordered by the court, the proceeds, after satisfying the purpose for which the sale was directed, will be considered as land. 16 & 17 Vict. c. 70, s. 119. See *Re Wharton*, 5 D. M. & G. 33, decided on the corresponding provision of a prior act, the 9 Geo. 4, c. 78, s. 2. See also *In re Barker*, 17 Ch. D. 241, on the Partition Act, 1868. So the purchase-money of the land of a lunatic taken by a railway company. *Re Sloper*, 22 Bea. 198, cited. Where a bankrupt's estate is sold, or contracted to be sold, before his death, a conversion is effected; *aliter* if sold after his death, except to the extent necessary to satisfy his creditors. *Banks v. Scott*, 5 Madd. 493; see *Bromley v. Goodere*, 1 Atk. 75. And this rule does not depend upon any special provision of any of the bankruptcy acts.

With respect to aliens, although an alien could not formerly hold land, he was entitled to take the proceeds of land agreed or directed to be sold. *Du Hourmelin v. Sheldon*, 1 Bea. 79; 4 M. & C. 525. Now, by the 33 & 34 Vict. c. 14, 12 May, 1870, an important alteration has been made in the law affecting aliens. The second section is that which relates to property, and is as follows:—

"Real and personal property of every description may be taken, acquired, held and disposed of by an alien in the same manner in all respects as by a natural-born British subject, and a title to real and personal property of every description may be derived through, from or in succession to an alien, in the same manner in all respects as through, from or in succession to a natural born British subject: Provided—

"(1) That this section shall not confer any right on an alien to hold real property situate out of the United Kingdom, and

shall not qualify an alien for any office or for any municipal, parliamentary or other franchise ;

“(2) That this section shall not entitle any alien to any right or privilege as a British subject, except such rights and privileges in respect of property as are hereby expressly given to him ;

“(3) That this section shall not affect any estate or interest in real and personal property to which any person has or may become entitled, either mediately or immediately, in possession or expectancy, in pursuance of any disposition made before the passing of this act, or in pursuance of any devolution by law on the death of any person dying before the passing of this act ” (s. 2).

The act is not retrospective, and the court will enforce in favour of the crown a trust of land for an alien created prior to the act. *Sharp v. St. Sauveur*, L. R., 7 Ch. 343. The *status* of natural born British subjects, which, by the acts 7 Anne, c. 5, 4 Geo. 2, c. 21, and 13 Geo. 3, c. 21, is conferred on children and grandchildren born abroad of natural born British subjects, is a merely personal *status*, and is not by those acts made transmissible to the descendants of the persons to whom that *status* is thereby given. The rule that the children born abroad of ambassadors in the service of the Crown of *England* abroad, are treated as natural born British subjects, does not apply to the children born abroad of officers in the military service of the Crown in foreign parts. *De Geer v. Stone*, 22 Ch. D. 243.

As to the wills of aliens, see *post*, tit. “ WILLS,” Ch. 1.

The question whether there is an equitable conversion has sometimes arisen under the 55 Geo. 4, c. 184, Sch. part 3, by which legacy duty is payable on money arising from the sale, mortgage or other disposition of realty directed by will to be sold, mortgaged or otherwise disposed of. Under this act it has been held that where trustees have an *option* and do not sell, legacy duty does not attach (*Att.-Gen. v. Mangles*, 5 M. & W. 120 ; see *Matson v. Swift*, 8 Bea. 368) ; but of course succession duty would be payable. See also *Re De Lancey*, L. R., 5 Ex. 102. Legacy duty is payable only when the sale is under some imperative trust or direction. *Adv.-Gen. v. Smith*, 1 Macq. H. L. C. 760 ; *Att.-Gen. v. Simcox*, 1 Ex. 749. Under a sale by the court, legacy duty is not payable. *Hobson v. Neale*, 17 Bea. 178. A direction that realty is to be considered as personalty will not make it liable to legacy duty. *Att.-Gen. v. Mangles, sup.* When a conversion out and out (see *Grieverson v. Kirsopp*, 2 Ke. 653 ; *Singleton v. Tomlinson*, L. R., 3 App. C. 404) is directed, legacy duty attaches though the property be not sold, the parties entitled electing to take it as realty (*Att.-Gen. v. Holford*, 1 Pri. 426 ; *Williamson v. Adv.-Gen.*, 10 Cl. & F. 1 ; see *Att.-Gen. v. Brunning*, 8 H. L. C. 243 ; *Re De Lancey, sup.* ; *Att.-Gen. v. Lomas*, L. R., 9 Ex. 29) ; but otherwise where there is a trust for sale (which is effected) and for *re-investment* (which is not carried out), and the parties entitled elect to take the money.

Mules v. Jennings, 8 Ex. 830 ; see *Rich v. Whitfield*, L. R., 2 Eq. 583.

Although there may be a mere *power* of sale, if the intention of the testator will be best effectuated by a conversion, it will in general be directed by the court accordingly. *Greenway v. Greenway*, 1 Giff. 131. And it is an important circumstance to be considered in such cases, that a conversion will facilitate a division of the property where many persons are interested. See *Mower v. Orr*, 7 Ha. 473 ; *Burrell v. Baskerfield*, 11 Bea. 525. But the court will not interfere where there is a discretionary power or mere authority on the part of trustees, which they do not exercise (*Shipperdson v. Tower*, 1 Y. C. C. 441 ; *Lucas v. Brandreth*, 28 Bea. 273), or only partially exercise. *Walter v. Maunde*, 19 Ves. 424. See also *Yates v. Yates*, 28 Bea. 637 ; *Re Beaumont's Trusts*, 32 Bea. 191. In a partition action, an order for sale of a married woman's share of real estate when made with her consent or at her request under sect. 6 of the Partition Act, 1876 (see tit. "JOINT TENANTS," Ch. 4), operates as a conversion of such share into personal estate. *Wallace v. Greenwood*, 16 Ch. D. 362.

Money directed or agreed to be laid out in Land.] Money agreed or directed to be laid out in the purchase of land will in equity pass under a general devise of lands or descend to the heir, but cannot be bequeathed as money (*Biddulph v. Biddulph*, 12 Ves. 161 ; *Green v. Stephens*, 17 Ves. 64, 77), unless there has been an election on the part of the absolute owner to treat it as money (*Chandler v. Pocock*, 16 Ch. D. 648) ; and if the heir die intestate before the purchase has been made, the fund will descend to *his heir*. *Scudamore v. Scudamore*, Pr. Ch. 543 ; see *Edwards v. Css. of Warwick*, 2 P. W. 171 ; *Lechmere v. E. of Carlisle*, 3 P. W. 222 ; *Gillies v. Longlands*, 4 De G. & Sm. 372. And money will be considered as converted notwithstanding a direction for investment *until* a purchase can be found (*Edwards v. Css. of Warwick*, 2 P. W. 171), and would have been bound by a judgment to the same extent that the land if purchased would have been. *Frederick v. Aynscombe*, 1 Atk. 392. Consider now the various judgment acts, tit. "JUDGMENTS."

As an exception, and one of the very few exceptions, to this general rule, it may be observed that although *the heir* takes the income of *realty*, under an executory devise to a person not *in esse*, until such person comes into existence (*Hopkins v. Hopkins*, Ca. t. Tal. 44), yet the heir is not entitled to the income of money directed to be laid out in land which is to be settled in the same way as the devised realty. *E. Bective v. Hodgson*, 10 H. L. C. 656. See the case in the court below (1 H. & M. 376), and minutes of decree. See also *Richards v. Richards*, Johns. 754 ; *Goodale v. Gawthorne*, 2 Sm. & G. 375 ; *Wade-Gery v. Handley*, 3 Ch. D. 374, cited *post*, tit. "ESTATES," Ch. 1, sect. 1. As another exception to the rule, money directed to be laid out in real estate or leaseholds will not escheat to the crown as land ; and this would seem to be the case, although there may be no option

as to the kind of property to be purchased, but the direction is to lay out the money in land. *Walker v. Denne*, 2 Ves. jun. 170, 185.

Option, Consent or Request of Third Persons.] Where there is a mere power of sale or discretionary power vested in trustees to convert or not, there will, as a general rule, be no conversion unless the power be exercised (see *Bourne v. Bourne*, 2 Ha. 35); nor, where it is exercised, will there be a constructive conversion, until there is a sale or conversion under it. *Re Ibbitson's Estate*, L. R., 7 Eq. 226. For the direction to convert must be absolute and unconditional, and not in the nature of a mere authority, and there must be no option to invest either in land or other securities; otherwise a constructive conversion of personal into real estate will not be effected. *Amler v. Amler*, 3 Ves. 583; see *Van v. Barnett*, 19 Ves. 102; *Smithwick v. Smithwick*, 12 Ir. Ch. R. 181; *Lucas v. Brandreth*, 28 Bea. 273. But a power of sale coupled with a direction that the donee of it "shall and may divide" the proceeds, makes the power imperative, and there will be a conversion. *Grievesson v. Kirsopp*, 2 Ke. 653. If there be in terms an option to lay out money in land, but the limitations expressed are applicable only to land, this will show an intention that the money should be so laid out. See *Johnson v. Arnold*, 1 Ves. sen. 169; *Cowley v. Hartstonge*, 1 Dow. 361; *Hereford v. Ravenhill*, 5 Bea. 51; *Simpson v. Ashworth*, 6 Bea. 412; consider *Cookson v. Cookson*, 12 Cl. & F. 121, in which the judgment of Lord Campbell on this point seems to be opposed to or scarcely consistent with the judgments of Lords Brougham and Cottenham; see *Davies v. Goodhew*, 6 Sim. 585; *De Beauvoir v. De Beauvoir*, 3 H. L. C. 524, and *Re De Lancey*, L. R., 5 Ex. 102, where the point arose on the question whether legacy or succession duty was payable. If trustees have and exercise a discretionary power as to the investment, the property will in general pass according to the conversion they have effected. In *Rich v. Whitfield*, L. R., 2 Eq. 583, the trustees were directed to invest in land or government securities. They invested in the latter, and an infant became absolutely entitled, who afterwards died while still an infant. It was held that the property passed as personal estate, and Lord Romilly, M.R., expressed a doubt whether, after the infant's death, the trustees could change the security and invest in land. As a general rule, mere trustees have no option or right of determining the nature of the trust fund or property unless expressly given to them (*Earlom v. Saunders*, Amb. 241), though they may have a discretion as to the time of conversion. *Doughty v. Bull*, 2 P. W. 320; *Yates v. Yates*, 28 Bea. 637. Where the direction to convert is imperative, it operates from the death of the testator. *Morris v. Griffiths*, 26 Ch. D. 601.

Money directed to be invested in land with consent, and *not without*, is not converted until consent be given. *Davies v. Goodhew*, 6 Sim. 585; *Sykes v. Sheard*, 33 Bea. 114. But consent must not be withheld from improper or interested motives. *Lord v. Wightwick*, 4 D., M. & G. 803. And an ordinary direction to convert into real estate

on request appears to justify a conversion without any express request where all the limitations are applicable to real estate. *Thornton v. Hawley*, 10 Ves. 129. But not in those cases in which a contrary intention may be inferred, as if there be a trust for sale of realty, upon request, with a proviso that, until sale, it is to be realty. *Re Taylor's Settlement*, 9 Ha. 596.

Property at Home—Election.] Where property, subject to a direction to convert, comes unconverted to the possession of the person absolutely entitled to it, and he continues to deal with it in its unconverted form, a presumption arises in the absence of evidence to the contrary, that he has elected to take it in the shape in which it has come to him. Thus, if money directed or agreed to be laid out in land, comes to the hands of the person who would be absolutely entitled to the land if purchased, it will thenceforth be considered as money in the absence of evidence of an intention to the contrary. *Pulteney v. Ld. Darlington*, 1 B. C. C. 223. But if the money be in the hands of some third person, the absolute owner must do some act showing an election to take it as money. *Wheldale v. Partridge*, 8 Ves. 235; see *Re Pedder*, 5 D., M. & G. 890. The person also who would, if the lands were purchased, be tenant in tail, may elect, and by a disentailing deed entitle himself to the receipt of the money (3 & 4 Will. 4, c. 74, ss. 70, 71); and such a deed is necessary even where the fund is in court, and represents land in settlement. *Re Butler's Will*, L. R., 16 Eq. 479; *Re Broadwood's Settled Estates*, 1 Ch. D. 438; *Re Reynolds*, 3 Ch. D. 61; in effect overruling *Re Wood's Settled Estates*, L. R. 20 Eq. 372. *Re Holden*, 1 H. & M. 445; *Re Watson*, 10 Jur., N. S. 1011; and *Notley v. Palmer*, L. R., 1 Eq. 241. Prior to the act of Will. 4 (*sup.*), the court had power under the 39 & 40 Geo. 3, c. 56, and 7 Geo. 4, c. 45 (both now repealed), to order payment of money subject to be invested in the purchase of an estate to be entailed, to the tenant in tail or as the court should appoint.

A person entitled in remainder may, it would seem, elect subject and without prejudice to prior interests, and he may dispose of his interest as he has elected to take it. *Stead v. Newdigate*, 2 Mer. 521, 531. So where no conversion is required by the tenant for life, and the remainderman dies intestate, or does not by his will show a clear intention to elect; then, as between his real and personal representatives, the property will devolve according as it is real or personal in its unconverted state. See *Re Stewart*, 1 Sm. & G. 32; *Re Skeggs*, 2 D., J. & S. 533. But how far, in such a case, his mere election, if he make one, to take the property in a particular state, *e.g.* as money, is sufficient to bind his real and personal representatives when the tenant for life has required a conversion of the money into land, is doubtful. See *Holloway v. Radcliffe*, 23 Bea. 163; *Lewin on Trusts*, 7th ed., 817. Where money was liable to be invested in land to be settled to uses in strict settlement, and all the uses were exhausted except a legal jointure, it was held that the

jointress had an equity to compel the investment of the money in land, and that, consequently, the same must be treated as real estate as between the real and personal representatives of the person who, subject to the jointure, was entitled thereto. *Walrond v. Rosslyn*; *Walrond v. Fulford*, 11 Ch. D. 640. It would be otherwise as to portioners, *semble*. *Ib.* And where money in the funds was subject to a trust for investment in land, a husband having a general power by will, to appoint, subject to a life interest in his wife, and he bequeathed "money and money in the funds," and died leaving his wife surviving, it was held that the money in the funds passed to his heir-at-law. See *Chandler v. Pocock*, 15 Ch. D. 491; *In re Greaves' Settlement Trusts*, 23 Ch. D. 313.

Infants (*Van v. Barnett*, 19 Ves. 102), except under the direction of the court (*Robinson v. Robinson*, 19 Beav. 494; *Re Harrop*, 3 Drew. 734), and of course lunatics (*Ashby v. Palmer*, 1 Mer. 296; *Re Wharton*, 5 D., M. & G. 33), are incapable of electing. Under the 3 & 4 Will. 4, c. 74, a married woman may, by an acknowledged deed, convey her interests in real estate or money directed to be invested in land (s. 77), or the proceeds of the sale of lands (*Tuer v. Turner*, 20 Beav. 560), and in this way may make an election. So where she has an absolute power to appoint by deed or will the rents of property conveyed in trust for sale, she may by will elect. *Sharp v. De St. Sauveur*, 4 W. N. 175. And with respect to money subject to be converted into land, a married woman may also elect, on being examined in court, to take it as money (where it is not settled), and an acknowledged deed is unnecessary. See *Oldham v. Hughes*, 2 Atk. 452; *Re Hayes*, 9 W. R. 769. Where several are absolutely and indefeasibly entitled they may elect to take the property in its unconverted state. *Sisson v. Giles*, 9 Jur., N. S. 951. And when the trust is for the investment of money, one of several may elect to take his share in money, which will not prevent the investment of the residue. *Seeley v. Jago*, 1 P. W. 389; see *Elliott v. Fisher*, 12 Sim. 505. But he cannot so elect, in the converse case, when the trust is for the sale of realty, as otherwise this might prevent the sale altogether. *Fletcher v. Ashburner*, 1 B. C. C. 497, 500; *Deeth v. Hale*, 2 Moll. 317; *Holloway v. Radcliffe*, 23 Bea. 163.

Any act will amount to an election, if an intention to elect can be inferred from it (*Bradish v. Gee*, Amb. 229), and a parol direction or declaration will be sufficient. *Puteney v. Ld. Darlington*, 1 B. C. C. 236, 237; *Van v. Barnett*, 19 Ves. 109; see, however, *Bradish v. Gee*, *sup.*

An election may appear by will. *Biddulph v. Biddulph*, 12 Ves. 161: see *Harcourt v. Seymour*, 2 Sim., N. S. 12; *Sharp v. De St. Sauveur*, L. R. 7 Ch. 343. Putting out money on security and treating it as money in private accounts, amounts to an election to take the property as money. *Ib.*; *Lingen v. Sowray*, 1 P. W. 172, 176; see *Cookson v. Cookson*, 12 Cl. & Fin. 12. So taking money from trustees (*Puteney v. Ld. Darlington*, 1 B. C. C. 223, 238; *Chandler v. Pocock*, 16 Ch. D. 648), but not merely taking the interest

of money, though for a long time. See *Gillies v. Longlands*, 4 De G. & Sm. 372; *Re Pedder*, 5 D., M. & G. 890. When a person entitled to elect lets land reserving rent to himself, his heirs and assigns (*Crabtree v. Bramwell*, 3 Atk. 680; *Roberts v. Gordon*, 6 Ch. D. 531; see *Griesbach v. Freemantle*, 17 Bea. 314), or takes the title deeds into his own possession, and continues in possession of the estates until his death, this will amount to an election to take the property as land. *Davies v. Ashford*, 15 Sim. 42; see *Inwood v. Twyne*, 2 Ed. 148. But not if he merely enter into and continue in possession for a short time, for instance, two years. *Kirkman v. Miles*, 13 Ves. 337; see *Griesbach v. Freemantle*, *sup.*, where the period of continuing in possession was sixteen years. Where three persons were entitled to the proceeds of land directed to be sold, and one was in possession until he died (a period of upwards of three years), accounting for rents to the other two, it was held that there was no election by them to take the property as land. *Brown v. Brown*, 33 Bea. 399. In *Mutlow v. Bigg*, 1 Ch. D. 385, a testator, after giving certain legacies, devised a freehold house to three persons, in trust for sale, the proceeds to be considered part of his personal estate, and gave his residuary real and personal estate to them, they paid all the legacies except two out of other parts of the testator's estate, and kept the house unsold, granting a lease of it to a tenant. The house remained unsold for fifty years, and the two legatees permitted their legacies to remain during all that time unpaid, without requiring a sale or any formal security on the house. It was held, in a suit by the personal representative of one of the three, that they had by their conduct elected to take the house as reconverted into real estate, and that the assent of the unpaid legatees might be inferred. Treating property as land by tacitly allowing leases to be granted and plans prepared for building purposes, will amount to an election to take as land; *Martin v. Trimmer*; *Davidson v. Trimmer*, 11 Ch. D. 341.

An act which will amount to an election in respect of property in possession is not, however, necessarily an election in respect of property in remainder. *Meredith v. Vick*, 23 Bea. 559.

CHAPTER II.

CONVERSION BECOMING UNNECESSARY, OR DIRECTED FOR OBJECTS
CONTRARY TO LAW.

<i>Devise of Land to be converted—No residuary Bequest</i>	115	<i>Devise of Land, &c.—continued.</i>	
<i>In general what fails or lapses results as Land</i>	115	<i>Proceeds of Real and Personal Estate blended</i>	116
<i>Gift in Mortmain</i>	116	<i>Failure of Residuary Gift</i>	117
<i>Proceeds of Realty and Personalty blended</i>	116	<i>General and particular Residue</i>	117
<i>Conversion to all Intents</i>	116	<i>Effect of Proceeds resulting</i>	117
<i>Conversion for Purposes of Will only</i>	116	<i>Where wholly or partially Result</i>	117
<i>Devise of Land to be converted—Residuary Bequest</i>	116	<i>Conversion under Deed</i>	118
		<i>Money directed to be converted</i>	118

Devise of Land to be converted—Where no residuary Bequest.]
It not unfrequently happens that when a testator has directed a conversion of real estate into money, circumstances render such a conversion unnecessary. This may arise from various causes which will presently be referred to, the result being that the land, or if actually sold the proceeds of it, will remain unaffected by the trusts declared by the will. The question then arises, *who* is entitled to the property directed to be converted, the expressed trusts having failed. To a certain extent, this question depends upon another, whether, namely, there is or is not a residuary bequest in the will. It will be more convenient to consider the cases, first, where there is no residuary bequest; secondly, where there is such a bequest.

Where there is no residuary bequest the general rule may be stated to be, that if a testator directs real estate to be sold, and a sale becomes unnecessary (*Chitty v. Parker*, 2 Ves. jun. 271), or the proceeds are only partially given, or the gift cannot take effect by reason of its being void, or failing by lapse or otherwise (see *Edwards v. Tuck*, 23 Bea. 268), the proceeds to the extent that they are undisposed of, or the gift of them is inoperative, result *as land*. Thus, if the *interest* of such proceeds only be given, the *capital* results (*Wilson v. Major*, 11 Ves. 205), not to the next of kin of the testator, but to the person entitled as his heir-at-law under wills subject to the old law, and (as it would seem) to the residuary devisee under wills subject to the 1 Vict. c. 26 (see s. 25). This must be borne in mind in considering cases which were decided prior to this Act; for the effect

of this section is to place the residuary devisee on the same footing, with regard to realty, as the residuary legatee stands with regard to personalty. See *Cogswell v. Armstrong*, 2 K. & J. 227; *Carter v. Haswell*, 3 Jur., N. S. 788. So if only part of the proceeds be given, the rest results. *Collins v. Wakeman*, 2 Ves. jun. 683; *Watson v. Hayes*, 5 M. & C. 125. So where there is a lapse (*Ackroyd v. Smithson*, 1 B. C. C. 503), or the gift is in mortmain (*Jones v. Mitchell*, 1 S. & S. 294), or infringes the rule against perpetuities (*Buchanan v. Harrison*, 1 J. & H. 662; see *Burley v. Evelyn*, 16 Sim. 290);—in such cases that which is so undisposed of, fails, or lapses, results as land, notwithstanding there is a declaration that nothing shall result, and that the heir-at-law shall not take (*Fitch v. Weber*, 6 Ha. 145), or that such proceeds shall be considered as personal estate, *Taylor v. Taylor*, 3 D., M. & G. 190, overruling *Phillips v. Phillips*, 1 M. & K. 649; see *Collins v. Wakeman*, *sup.*; *Robinson v. Lon. Hospital*, 10 Ha. 19. And if the proceeds of realty are blended with personal estate in a common fund, this rule will apply to the proceeds of the realty. *Ackroyd v. Smithson*, *sup.*; *Eyre v. Marsden*, 2 Ke. 574; *Jessop v. Watson*, 1 M. & K. 665; *Taylor v. Taylor*, *sup.* For in order to prevent the application of the rule, it must appear that the testator's intention was that the real estate should be personal to *all intents*, and not only for the purposes of the will; and it will be presumed that the conversion was for the purposes of the will only, unless it can be collected that on failure of those purposes conversion was nevertheless intended as between the heir and next of kin. See *Cruse v. Barley*, 3 P. W. 20, 22, n. by Cox; 1 Jarm. on Wills, 4th ed. 623; *Edwards v. Tuck*, 23 Beav. 268; *Wall v. Colshead*, 2 D. & J. 683; *E. Bective v. Hodgson*, 10 H. L. C. 656.

It may be observed, that if a person is entitled to the surplus proceeds of a sale of land after providing for certain purposes, he may himself so provide and take the land. *Pearson v. Lane*, 17 Ves. 101.

Devise of Land to be converted—Where residuary Bequest.] The effect of a residuary bequest where there is a direction to convert is material. There are cases in which the proceeds of the sale of real estate directed to be sold have been held to be personal estate where there is a direction that out of them and the personal estate debts and legacies shall be paid, the whole of the surplus or residue formed of the mixed proceeds of the real and personal estate being included in a residuary bequest of personalty. See *Mallabar v. Mallabar*, Ca. t. Tal. 78; *Hutcheson v. Hammond*, 3 B. C. C. 128, 148; *Durour v. Motteux*, 1 Ves. sen. 321; 3 P. W. 22 n. (1); *Kennell v. Abbott*, 4 Ves. 802; *Byam v. Munton*, 1 R. & My. 503; *Green v. Jackson*, 2 R. & My. 238; *Wildes v. Davies*, 1 Sm. & G. 482; *Salt v. Chattaway*, 3 Bea. 576, and the observations of Lord Langdale in that case; *Court v. Buckland*, 1 Ch. D. 605. In these cases it was considered that the proceeds of the real and personal estate being blended, the intention sufficiently appeared to include in the residuary bequest everything that could not take effect under the gift of legacies. But where there

is a distinct and separate gift of real and personal estate, the proceeds of both not being blended in a common fund, this rule will not apply. *Maugham v. Mason*, 1 V. & B. 410. See *Spencer v. Wilson*, L. R. 16 Eq. 501, 507. And if the *residuary gift itself* or any part of it fails by lapse, then to the extent that it represents the proceeds of land, it results as land. *Taylor v. Taylor*, 3 D. M. & G. 190; see also *Digby v. Legard*, 3 P. W. 21. It has been held, indeed, under a direction to convert, the proceeds to be taken as personal estate, out of which legacies were given and the residue over, that a failure by the death of one of the legatees enured for the benefit of the heir. *Amphlett v. Parke*, 2 R. & M. 221, in which case Lord Brougham reversed the decision of Sir John Leach, 4 Russ. 75; and see *Cruse v. Barley*, 3 P. W. 20; *Gibbs v. Rumsey*, 2 V. & B. 294. But this would seem to be by no means so clear a case as when a gift of part of the residue itself fails, as in *Taylor v. Taylor*, *sup.*; for then the contest is in effect between the heir and *next of kin*, and is governed by the principles established in such cases. The observations on the preceding cases in 1 Jarm. Wills, 4th ed. 632, 644, will be found very instructive; and it must be observed that Mr. Jarman appears to approve of Lord Brougham's decision in *Amphlett v. Parke*, *sup.* Where the will itself clearly directs the whole of the testator's real estate (except the part specifically devised to a particular person) to be turned into money, so as to be converted out and out, not for a special purpose only, but for the general objects of the will, after satisfying those objects, the surplus goes to the residuary legatee, and not to the heir. *Singleton v. Tomlinson*, 3 App. C. 404.

If the proceeds of the sale of realty are given, in part to A. and the residue to B., and there is a general residuary bequest, if the part given to A. lapses, it does so for the benefit of the testator's *real* representatives, neither falling into the *particular residue* given to A. nor the general residue. *Hutcheson v. Hammond*, 3 B. C. C. 128; consider the observations of the M. R. in *Kennell v. Abbott*, 4 Ves. 802, as to a particular and a general residue.

Effect of Proceeds resulting.] In those cases in which the proceeds of realty result as land, they will in general devolve on the heir or residuary devisee, as the case may be (see *ante*, p. 114), as converted, and as so converted will go to *his personal representatives*. *Wright v. Wright*, 16 Ves. 188; *Jessopp v. Watson*, 1 M. & K. 665; *Hatfield v. Pryme*, 2 Coll. 204; *Mordaunt v. Benwell*, 19 Ch. D. 302. In case, however, the devise wholly fails, and no conversion or dealing with it is required for the benefit of any person, as where all the legatees whose legacies are payable out of the proceeds of the estate die in the testator's lifetime (*Smith v. Claxton*, 4 Madd. 484), the whole property will then result, as land, to the testator's heir or residuary devisee, and will descend as such to *his* real, not personal, representatives (*Davenport v. Coltman*, 12 Sim. 610; see *Bagster v. Fackerell*, 26 Bea. 469; *Wilson v. Coles*, 28 Bea. 215): and if sold

the proceeds in such case will nevertheless devolve as *land*. *Ib.*; see *E. Bective v. Hodgson*, 10 H. L. C. 656.

Conversion of Realty under a Deed.] Where a conversion of land into money is directed by deed, and the purposes for which a conversion was directed wholly fail, the property results to the settlor in the character of real estate (*Ripley v. Waterworth*, 7 Ves. 435; *Clarke v. Franklin*, 4 K. & J. 257); but as personal estate where they only partially fail, and to the extent of such failure (*Hewitt v. Wright*, 1 B. C. C. 86; see *Van v. Barnett*, 19 Ves. 102) and from the time of the delivery of the deed. *Clarke v. Franklin, sup.*

Money directed by will to be converted.] By analogy to the rule that the undisposed of proceeds of the sale of real estate result as land, the undisposed of interests in money directed by will to be invested in land will result for the benefit of the testator's personal representatives (*Cogan v. Stevens*, 1 Bea. 481, n.; *Hereford v. Ravenhill, ib.*), or residuary legatee, if there be one (*Hereford v. Ravenhill, ib.*, 5 Bea. 51), and as real estate, and as such will devolve upon the heir or devisee of the person so entitled (*Curteis v. Wormald*, 10 Ch. D. 172, overruling *Head v. Godlee*, *Reynolds v. Godlee*, 1 Johns. 536).

CHAPTER III.

CONVERSION AS BETWEEN TENANT FOR LIFE AND REMAINDERMAN.

<i>Where testator directs Conversion</i>	118	<i>Where Testator does not direct Conversion—continued.</i>	
<i>Conversion which cannot be effected</i>	119	<i>Enjoyment of Property in Specie</i>	121
<i>Rights of Tenant for Life as to Income</i>	119	<i>Indications of Testator's Intentions</i>	121
<i>Conversion in Equity at End of the Year</i>	119	<i>Specific Legacies given for Life, then over</i>	122
<i>Conversion at a Loss</i>	120	<i>Property taken by Railway Company</i>	123
<i>Where Testator does not direct Conversion</i>	120	<i>Where Testator directs a partial Conversion</i>	124
<i>Conversion in Equity</i>	120		

Where Testator directs Conversion.] Where property, producing income, is directed to be converted, the income, until conversion, will go according to the directions (if any) of the will. *Sparling v. Parker*, 9 Bea. 524.

If the testator direct his residuary estate to be converted, and that, in the meantime, the interest shall accumulate for the purposes of investment; if the investment cannot be made in a year after the

testator's death, the tenant for life will, as from that time, be entitled to the income of the residue. *Sitwell v. Bernard*, 6 Ves. 520; *Kilvington v. Gray*, 2 S. & S. 396. So where there are no directions as to the application of the income until conversion, but the testator has directed his residuary estate to be invested, from time to time and at convenient opportunities, in real estate, the income to go as the income of his other real estates. *Tucker v. Boswell*, 5 Bea. 607. Under a direction that the proceeds of the conversion shall be laid out in certain securities, the income thence arising to be given to a tenant for life, he will be entitled, as from the testator's death, to the income of investments (if any) in securities of the same description made by the testator in his lifetime (*Angerstein v. Martin*, T. & R. 232; *Hewitt v. Morris*, ib. 241; *Caldecott v. Caldecott*, 1 Y. & C., C. C. 312; *Alhusen v. Whittell*, L. R., 4 Eq. 295; *Brown v. Gellatly*, L. R., 2 Ch. 751), and to the income of similar investments made, within the year, by the executors from the time of their being made; the income arising before such investment being capital. *La Terriere v. Bulmer*, 2 Sim. 18. A testator, who was possessed of long annuities at the time of his death, directed a conversion of such parts of his estate as should not consist of money, "or investments in any of the public funds or government securities:" it was held that the direction did not apply to the long annuities. *Wilday v. Sandys*, L. R., 7 Eq. 455. But in *Tickner v. Old*, L. R. 18 Eq. 422, where there was a trust to convert and invest on government or real securities, and power to continue invested any government stocks or real securities; it was held that the trustees under the will were empowered to retain such government securities only as were of a permanent character, and that long annuities ought to have been sold and the proceeds invested on permanent securities. When there are no investments of the kind authorized by the testator existing at his death, the property is considered as converted at the end of the year after his death; and the tenant for life will be entitled, as from the death, not to the actual income of the property (as held in *Douglas v. Congreve*, 1 Ke. 410), but to dividends on so much £3 per cent. stock as the proceeds, if a conversion had taken place, would have purchased at the end of the year, the surplus forming part of the corpus of the residue. *Dimes v. Scott*, 4 Russ. 195; *Morgan v. Morgan*, 14 Bea. 72; *Macpherson v. Macpherson*, 1 Macq. H. L. C. 243; *Taylor v. Clark*, 1 Ha. 161; *Brown v. Gellatly*, L. R., 2 Ch. 751. In *Robinson v. Robinson*, 1 D., M. & G. 247, interest at £4 per cent. (but not exceeding the actual income) was given.

In applying the preceding rules, it must be borne in mind that investments made by the testator himself are not necessarily the same as investments authorized by his will, and, if not so authorized, must be considered, for the purposes of the will, simply as unauthorized. L. R., 2 Ch. 759. If the testator direct that trustees shall use great caution in realizing his estate, the tenant for life will be entitled to the income of the property *in specie* until conversion. *Scholefield v. Redfern*, 2 Dr. & Sm. 173; and see *Mackie v. Mackie*, 5 Ha. 70.

But in *Brown v. Gellatly*, *sup.*, where the direction was in effect to convert cautiously (see L. R., 2 Ch. 758), it was held that the tenant for life was only entitled, from the death, to *four per cent.* out of the profits on the amount of the value of the property, estimated at the death, the residue of the profits being directed to be invested. (*Ib.*, minutes of decree, No. 1.) Where there was a direction for sale and conversion, with power to postpone, the income of the proceeds when invested being given to A. for life, with remainder to a class, and the testator's business formed the bulk of his estate, which the executors carried on for two years with a view to its sale as a going concern, it was held that the profits were to be treated as income. *In re Chancellor*, 26 Ch. D. 42. In this case, *Brown v. Gellatly*, *sup.*, and *Kirkman v. Booth*, 11 Bea. 279, were distinguished.

If the property cannot be converted without loss and damage to the estate, it will not be converted, but a value set upon it, the tenant for life receiving interest on such value at 4l. per cent. from the testator's death. *Gibson v. Bott*, 7 Ves. 89; *Meyer v. Simonsen*, 5 De G. & Sm. 723; see *Brown v. Gellatly*, L. R., 2 Ch. 751. In *Briggs v. Sharp*, L. R., 20 Eq. 317, a testator, the owner of an advowson, directed his executors when the church was full to sell the advowson, and invest the proceeds, in which he (in effect) gave a life interest to his wife. He died in 1874, the church then being full, and he left his widow and five infant daughters, his co-heiresses-at-law, him surviving. The executors did not sell the advowson, and on the death of the incumbent in 1875, the question arose who was entitled to nominate to the vacant benefice. It was held that the right to nominate was in the widow. In this case, the nature of the property, an advowson, the church not being full, appears to have prevented the application of one of the two rules otherwise applicable to the case, viz., that the property should be sold and proceeds invested, the wife taking a life interest, or that a value should be set upon it giving her interest on the value.

Where Testator does not direct Conversion.] Where there is no direction to convert, and the residuary personalty is given to different persons in succession, whatever is of a wasting or reversionary nature, for instance leaseholds, and does not consist of securities authorized as investments by the court (see General Orders, 1 February, 1861, *post*, tit. "TRUSTS") is to be converted into money and the proceeds invested in securities so authorized, the income being payable to the tenant or tenants for life. *Howe v. Ld. Dartmouth*, 7 Ves. 137; *Thornton v. Ellis*, 15 Bea. 193; see *Mills v. Mills*, 7 Sim. 501; *Sutherland v. Cooke*, 1 Coll. 498; *Johnson v. Johnson*, 2 Coll. 441; *Blann v. Bell*, 2 D., M. & G. 775. Where a testatrix, being possessed of reversionary interests, bequeathed them to a tenant for life, with remainder over, and before the reversionary interests fell into possession, the devisee for life died. The reversionary interests having afterwards fallen in, it was held, that, in estimating what was due to the estate of the devisee for life, the value of the reversions

must be calculated as at the end of a year from the testatrix's death, on the assumption that they would fall in when they actually did; and that the devisee for life was entitled to 4l. per cent. on that amount from the death. *Wright v. Lambert*, 6 Ch. D. 649. And see *Wilkinson v. Duncan* (23 Bea. 469). If the conversion of property is properly postponed, and eventually falls in, it should, on falling in, be apportioned as between capital and income by ascertaining the sum which, put out at interest at 4 per cent. per annum on the day of the testator's death, and accumulating at compound interest calculated at that rate with yearly rests and deducting income tax, would, with the accumulations of interest, have produced, at the day of receipt, the amount actually received; and the sum so ascertained should be treated as capital and the residue as income. *In re Earl of Chesterfield's Trusts*, 24 Ch. D. 643.

If property ought to have been, but has not been, converted, and the tenant for life has been allowed to receive the income of it, he must refund the overplus beyond what he was entitled to, to the trustees, who are themselves liable to those entitled in remainder. *Hood v. Clapham*, 19 Bea. 90. In this, and other similar cases, there was nothing from which an intention on the part of the testator could be inferred that the tenant for life was to enjoy the property and take the income of it unconverted or in *specie*. But if such an intention can be collected effect will be given to it, as where in a bequest of leaseholds there is a direction to keep in repair or renew (*Crouce v. Crisford*, 17 Bea. 507), or demise (*Hind v. Selby*, 22 Bea. 373); *Thursby v. Thursby*, L. R., 19 Eq. 395; and the use of the word "rents" may in some cases show that the testator intended leaseholds to be enjoyed in *specie*. *Cafe v. Bent*, 5 Ha. 36; comp. *Pickup v. Atkinson*, 4 Ha. 624; *Skirring v. Williams*, 24 Bea. 275; *Blann v. Bell*, 2 D., M. & G. 775; *Vachell v. Roberts*, 32 Bea. 140. So if in the ulterior gift the testator has referred to the property in terms showing that he is disposing of it in its *unconverted* state or condition (*Collins v. Collins*, 2 M. & K. 703; *Pickering v. Pickering*, 4 M. & C. 289), as where he disposes of his estate, term and interest therein, in trust for his wife for life, and after her death gives "the same and all his estate, term and interest therein" to his son. *Harris v. Poyner*, 1 Drew. 174; *Hubbard v. Young*, 10 Bea. 203; see *Bethune v. Kennedy*, 1 M. & C. 114; *Vaughan v. Buck*, 1 Ph. 75. A bequest to a wife for her life of all the income, dividends, and annual proceeds of testator's entire estate, and postponement of the payment of all legacies and of the distribution of all estates till after her death, will not negative the application of the rule in *Hove v. Earl of Dartmouth*, 7 Ves. 137, *ante*, p. 120; *Macdonald v. Irvine*, 8 Ch. D. 101; *dissentiente Baggallay*, L.J.

A direction not to sell without consent (*Hinves v. Hinves*, 3 Ha. 609; *Ellis v. Eden*, 23 Bea. 543), or to divide, after the death of the tenant for life (*Collins v. Collins*, 2 M. & K. 703; *Holgate v. Jennings*, 24 Bea. 623; comp. *Pickup v. Atkinson*, 4 Ha. 630), or to sell at the discretion of the trustees (*Simpson v. Lester*, 4 Jur., N. S.

1269; *Gray v. Siggers*, 15 Ch. D. 74); shows that the testator intended the property to be enjoyed in specie. So it would seem where there is a discretionary or general power to sell at such time as trustees think fit. *Burton v. Mount*, 2 De G. & Sm. 383; see, however, *Jebb v. Tugwell*, 20 Bea. 84. And this rule may operate to the disadvantage as well as to the advantage of the tenant for life, as if the property be building ground, but not sold, the tenant for life will be merely entitled to the rent which the land, as agricultural land, produces. *Yates v. Yates*, 28 Bea. 637. A direction to sell *at a particular time* gives the tenant for life the enjoyment of the property in specie until that time. *Alcock v. Soper*, 2 M. & K. 699; *Daniel v. Warren*, 2 Y. & C., C. C. 290; *Skirring v. Williams*, 24 Bea. 275; *Rowe v. Rowe*, 29 Bea. 276; *Green v. Britten*, 1 D., J. & S. 649; comp. *Brown v. Gellatly*, L. R., 2 Ch. 751; *Thursby v. Thursby*, L. R., 19 Eq. 395.

In cases of *specific* legacies given for life, then over, the tenant for life takes the income in specie, though the corpus is of a wasting nature. Thus in a case where the testator, who had only terminable or long annuities, gave the dividends of his *funded* property to A. for life, with a gift over of the principal after his death, A. was held entitled to the income of the annuities unconverted. *Vincent v. Newcombé*, 1 You. 599. Where property, in which there are life and other interests in remainder, becomes changed, the principle of the court is to place all parties interested as nearly as possible in the same position with respect to the new property as they would have been in, had the original property not been converted. Thus a tenant for life, who is entitled to the enjoyment of wasting property (for instance, leaseholds) in specie, and who consents to a sale and investment of proceeds, will be entitled to the *capital* of such investments if he is living when the lease expires, for in effect in such a case he has become entitled to the entire interest. *Phillips v. Sarjent*, 7 Ha. 33; see *Re Beaufoy*, 1 Sm. & G. 20; *Harvey v. Harvey*, 5 Bea. 134 (case of a lease for life). And if property be taken by a railway company, and the money paid into court and invested, the tenant for life is entitled to the same benefit as if the property had not been so taken, and not merely to the dividends of the money. *Jeffreys v. Conner*, 28 Bea. 328; *Re Phillips' Trusts*, L. R., 6 Eq. 250; *Re Pfleger*, *ib.* 426; *Re Chamberlain*, cited *ib.* 427; see *Littlewood v. Pattison*, 10 Jur., N. S. 875; 8 & 9 Vict. c. 18, s. 74. It has been held also, that money authorized under trusts of a permissive or discretionary nature to be applied for the purposes of the renewal of a lease which becomes impracticable, belongs to the tenant for life, where the renewal fund has been set apart out of the income which would otherwise have gone to him. *Tardiff v. Robinson*, 27 Bea. 629, n. (e); *Morres v. Hodges*, 27 Bea. 625; *Re Money's Trusts*, 2 Dr. & Sm. 94. But in *Hollier v. Burne*, L. R., 16 Eq. 163, in which the will contained directions amounting to an absolute trust for renewal, prior and paramount to the interest of the tenant for life, Lord Selborne, C., sitting for the M.R., sanctioned the purchase of a reversion of the

Ecclesiastical Commissioners, notwithstanding the objection of the tenant for life.

And where a testator gave to his trustees a tithe rent-charge held under an ecclesiastical lease for twenty-one years, which was in practice renewed every seven years on payment of a fine, upon trust to renew out of the proceeds, and to apply the surplus in a certain way during the life of his wife, and directed that after her death it should form part of his residuary estate, and the trustees had power at any time to sell the leasehold interest, and the lease ceased to be renewable, it was held that the leasehold interest ought to be sold and the proceeds invested, and only the income of this fund and of the renewal fund applied as income. *Maddy v. Hale*, 3 Ch. D. 327; *Re Wood's Estate*, L. R., 10 Eq. 572; *Re Barber's Settled Estates*, 18 Ch. D. 624; see *Hayward v. Pile*, L. R. 5 Ch. 214. In cases of this description, one property, *i.e.*, money, is substituted for another, which the testator intends shall be of an enduring character, to last at all events during the lives of tenant for life and remainderman, and it would seem inequitable to give the whole *corpus* of the substituted property to the tenant for life. But of course, the nature of the property, the duration of the testator's interest in it, has to be considered in determining the equities of the tenant for life and remainderman. Where a tenant for life was entitled to leaseholds, which had eight years to run, and the trustees of the settlement had power to sell with his consent, which he declined to give, and the leaseholds were taken under the powers of the *Lands Clauses Act*, and the proceeds of sale were paid into court, and invested, the purchase-money being sufficient to provide an annuity for eight years of much larger amount than the net annual proceeds of the leaseholds, it was held that the tenant for life was entitled to receive an annuity of such an amount that the payment of it would exhaust the fund in the number of years which the leaseholds had to run. *Askew v. Woodhead*, 14 Ch. D. 27.

In a case in which the tenant for life and remainderman joined in a lease at a rack-rent, and afterwards, before the expiration of the lease, the property was purchased under an act of parliament and the purchase-money invested, the tenant for life was held entitled during the remainder of the term to so much only of the income of the investments as equalled the rent, the rest of the income being accumulated. *Re Mette's Estate*, L. R., 7 Eq. 72. When leasehold houses are vested in trustees on behalf of a tenant for life and remainderman, it is the duty of the trustees to keep the property free from the risk of forfeiture by a breach of the covenants of the lease, and they are entitled to have the rents applied in keeping the houses in proper repair and to require the covenants to be specifically performed, and if the tenant for life is allowed to receive the rents, and the houses are not kept in proper repair, the Court will appoint a receiver of the rents, for the purpose of enforcing the proper repair. *Fowler v. Odell*, 16 Ch. D. 723.

Partial Conversion directed by Testator.] There are cases in which the testator directs a partial conversion only, that is, of so much of his property as shall not consist of certain specified descriptions. In such cases the property so specified will be considered as authorized by the testator to remain in its unconverted state, and will be subject to the rules upon the subject which have already been considered. In cases of this description, it does not follow that because an investment in a particular fund would not be *authorized*, that therefore such fund, if existing at the testator's death, must be converted, if in point of fact the terms of the will can be considered as authorizing the continuance of such investment. Thus a direction to convert such parts of the testator's property as should not be invested in the public funds or government securities does not authorize a conversion of long annuities, though an investment in them would not have been proper. *Howard v. Kay*, 27 L. J., Ch. 448; *Wilday v. Sandys*, L. R., 7 Eq. 455. Where trustees are authorized and empowered to allow moneys to remain in the same state of investment in which they should find them at the testator's decease, long annuities must be converted. *Porter v. Baddeley*, 5 Ch. D. 542. Where under the trusts of a settlement, a business was assigned to trustees on trust for successive tenants for life and remaindermen, a receiver and manager was appointed to carry on the business, and during the life of the first tenant for life the business was carried on by the receiver at a loss; but during the life of the second tenant for life profits were earned. It was held that the loss must be made good out of the subsequent profits, and not out of capital. *Upton v. Brown*, 26 Ch. D. 588. See *Gow v. Forster*, *ib.* 672, as to adjusting the equities between tenant for life and remaindermen where the business was carried on at a profit, then at a loss, and then again at a profit.

COPYRIGHT.

CH. 1.—BOOKS AND DRAMATIC AND MUSICAL WORKS, p. 125.

CH. 2.—SCULPTURES, PAINTINGS, PRINTS, DESIGNS, p. 134.

CHAPTER I.

COPYRIGHT IN BOOKS AND DRAMATIC AND MUSICAL WORKS.

<i>Nature of Copyright</i>	125	<i>Infringement</i>	131
<i>At Common Law</i>	125	<i>Abridgment—Quantity taken</i> .	131
<i>By Statute</i>	125	<i>Reviews—Fair Quotations</i>	132
<i>Present Term allowed</i>	125	<i>Dictionaries—Directories</i>	132
<i>Dramatic and Musical Pieces</i> .	126	<i>Incidents of Novels and Dramas</i>	132
<i>Importation from Abroad</i>	127	<i>Acquiescence, Laches</i>	132
<i>Registration—Assignment</i>	128	<i>Rights of Plaintiff</i>	132
<i>“Edition,”</i>	129	<i>Injunction—Time</i>	132
<i>In what may exist</i>	129	<i>Sold—Unsold Copies</i>	132
<i>MS.—Distinct parts of Work</i> .	129	<i>International Copyright</i>	133
<i>Translations</i>	130	<i>Authors of Books, &c. published</i>	
<i>Cartoons, &c.</i>	130	<i>Abroad</i>	133
<i>Law Reports—Marginal Notes</i>	130	<i>Reciprocal advantages in</i>	
<i>As to Title of Book</i>	130	<i>Foreign Country</i>	133
<i>As to Newspapers</i>	130	<i>Right of Translation must be</i>	
<i>Music</i>	130, 131	<i>reserved</i>	133
<i>Lectures</i>	130	<i>Publication</i>	133
		<i>Registration</i>	133

Nature of Copyright.] Copyright, as defined in the principal statute now regulating copyright, the 5 & 6 Vict. c. 45, means the sole and exclusive liberty of printing or otherwise multiplying copies of any subject to which the word is applied in the act (s. 2). Copyright does not exist at common law; per Lords Brougham and St. Leonards, *Jefferys v. Boosey*, 4 H. L. C. 815; *Reade v. Conquest*, 9 C. B., N. S. 755. The 8 Anne, c. 19, in effect gave authors the copyright of their works for a term of fourteen years from publication, and a further term of fourteen years if the author should be living at the expiration of the first term. The 54 Geo. 3, c. 156, extended the copyright term to twenty-eight years absolutely, or to the end of the author's life if he should be living at the expiration of this period. The 5 & 6 Vict. c. 45 repeals the two last-mentioned acts, and enlarges the copyright term to the end of the author's life and a period of seven years after his death; or if this term falls short of forty-two years, or if the work is published after the author's death, the copyright is to endure

for forty-two years from publication absolutely, to be the property of the author, or the proprietor of the MS. if published after his death (s. 3). A person who employs another for remuneration to compile a work, is himself entitled to copyright in the work. *Grace v. Newman*, L. R., 19 Eq. 623. Under this act the first publication must be in the United Kingdom. *Routledge v. Low*, L. R., 3 H. L. 100. When once the copyright exists it extends over every part of the British Dominions (s. 29). As to a joint authorship, see *Nottage v. Jackson*, 11 Q. B. D. 627; on the 25 & 26 Vict. c. 68, *post*, p. 133. The copyright extends to every volume, part or division of a volume, pamphlet, sheet of letter-press, sheet of music, map, chart or plan, separately published, 5 & 6 Vict. c. 45 (s. 2). The act applies to *previously published books*, unless assigned for value, and then also if the proprietor and author, or his representatives, agree (s. 4). See *Marzials v. Gibbons*, L. R., 9 Ch. 518. After the death of the author the privy council may authorize a publication, if the proprietor of the copyright refuses to republish (s. 5). By the 3 & 4 Will. 4, c. 15, authors of dramas not printed and published had the sole right of representing their pieces, and if published within ten years before that act or thereafter, of representing them for twenty-eight years after the first publication, and if the author was then living for the remainder of his life. As to a joint authorship of a dramatic piece, see *Levy v. Rutley*, L. R., 6 C. P. 523. The provisions of this act are extended to musical compositions (5 & 6 Vict. c. 45, s. 20), and the provisions of the last act are extended to dramatic and musical pieces, which are to be the property of the author for the term provided for the duration of copyright in books, the first *representation or performance* being equivalent to the first publication of books. *Ib.* See *Ex parte Hutchins & Romer*, 4 Q. B. D. 483. The words "dramatic piece" include every tragedy, comedy, play, opera, farce, or other scenic, musical, or dramatic entertainment (5 & 6 Vict. c. 45, s. 2). By sect. 21, the remedies given by the 3 & 4 Will. 4, c. 15, are reserved. The publication in this country of a dramatic piece, or musical composition, as a book before it has been publicly represented or performed does not deprive the author of such dramatic piece, or musical composition, or his assignee, of the exclusive right of representing or performing it. *Chappell v. Boosey*, 21 Ch. D. 232. There cannot be a violation of the 3 & 4 Will. 4, c. 15, s. 2, where the matter or thing taken from the first work and introduced into the second is not material and substantial. The words in the statute "production or any part thereof" must receive a reasonable construction, and are to be treated as implying some part that is substantial and material. *Chatterton v. Cave*, 3 App. C. 483. Where A. and others joined in representing a dramatic piece in a room of an hospital, without the consent of the proprietor of the copyright in the drama, and the performance was merely for the entertainment of the nurses, attendants, and others connected with the hospital, who were admitted free of charge, it was held, by Brett, M.R., and Bowen, L.J., Fry, L.J., dissenting, that the room where the drama was represented was not a place of public

entertainment, and consequently that A. was not liable to damages or penalties under 3 & 4 Will. 4, c. 15, ss. 1, 2. *Duck v. Bates*, 13 Q. B. D. 843. The part owner of a dramatic entertainment cannot grant a licence for its representation without the consent of all the other owners. Therefore, where the registered owner of the undivided moiety of the copyright of an opera alone granted a licence for its representation, an action by the owner of the other moiety will lie to recover the penalty under 3 Will. 4, c. 15, s. 2. *Powell v. Head*, 12 Ch. D. 686. By the 45 & 46 Vict. c. 40, proprietors of copyright in a musical composition first published after the passing of the act may print on the title page of every copy of it a notice that the right of public representation or performance is reserved (s. 1). The second and third sections contain provisions where the rights of performance and copyright are vested in different owners. If a plaintiff does not recover more than forty shillings, the costs shall be in the discretion of the judge (s. 4).

Any person printing for sale or exportation any copyright book without the proprietor's written consent, or importing for sale or hire any book so unlawfully printed abroad, or selling or publishing, or having in his possession for sale or hire any book so unlawfully printed, is liable to a special action on the case. 5 & 6 Vict. c. 45, s. 15. Before proceeding for an infringement, an entry of the work must first be made in the register of the Stationers' Company (s. 24), and the day of publication of the book is material. *Matthieson v. Harrod*, L. R., 7 Eq. 270. This provision does not apply to separate articles in periodicals (see s. 18). A periodical or magazine is a book within the meaning of s. 24 of 5 & 6 Vict. c. 45, and its proprietor, if he has, pursuant to s. 19, registered the first number at Stationers' Hall, is entitled to restrain the publication without his consent in a separate form of a serial published in successive numbers of the periodical, the copyright of which belongs to him under s. 18, although neither the serial nor the first number containing it has been separately registered. *Henderson v. Maxwell*, 4 Ch. D. 163; *Mayhew v. Maxwell*, 1 J. & H. 312. The Act applies to maps. *Stannard v. Lee*, L. R., 6 Ch. 346. No person except the proprietor of the copyright shall under penalties import into any part of the British dominions, for sale or hire, or knowingly sell, or have in his possession for sale or hire, any book first composed or written, printed and published within the united kingdom, in which there shall be copyright, and reprinted out of the British dominions (s. 17). The offences mentioned in this section are, to "import for sale" and to "sell knowingly" foreign piracies of copyright. A distinction is created by the addition in the statute of the word "knowingly" to the one offence, and therefore that a plaintiff who proceeds in respect of "importing for sale" is not required to give the defendant any notice, but may at once obtain an *ex parte* injunction. If, however, it is intended to take proceedings in respect of "selling knowingly," notice of the nature of the copies complained of should properly be sent to the importer. *Cooper v. Whittingham*, 15 Ch. D. 501. In

this case, Jessel, M.R., also held that where an action is brought to enforce a legal right, and there is no misconduct on the part of the plaintiff, the Court has no discretion to refuse him costs. Where a statute creates a new offence and imposes a penalty, the ancillary remedy by injunction may still be claimed. By the 39 & 40 Vict. c. 36, there is a prohibition against the importation *into the United Kingdom* of (*inter alia*), "books wherein the copyright shall be first subsisting, first composed, or written or printed, in the United Kingdom and printed or reprinted in any other country, as to which the proprietor of such copyright or his agent shall have given to the Commissioners of Customs a notice in writing, duly declared, that such copyright subsists, such notice also stating when such copyright will expire" (s. 42). Lists of such prohibitive books are to be exposed at the Custom Houses of the United Kingdom (s. 44). Persons complaining of the insertion of any book in the lists may apply to a judge in chambers, who shall have power to order the book to be expunged from the list. But nothing is to prevent aggrieved persons from proceeding at law or in equity (s. 45). There is a section (s. 152) corresponding with s. 42 prohibiting the importation of such books as therein mentioned into the *British possessions abroad*, such notice being given as required by s. 42. Lists of the books of which such notice has been given shall be sent to the several ports in British possessions abroad and publicly exposed. By the 10 & 11 Vict. c. 95, the Queen may by orders in council suspend the prohibitions against the importation of books in the colonies. And see as to Canada, 38 & 39 Vict. c. 53. The proprietor of copyright in a book may register it at Stationers' Hall, and the registered proprietor may assign his interest by an unstamped entry in the register, which has the same effect as a deed (5 & 6 Vict. c. 45, s. 13). In registering the copyright of a book at Stationers' Hall it is sufficient to enter the first publisher, under the trade name of the firm, and the actual proprietor of the copyright at the time of registration, without stating who the first proprietor was, or how the copyright devolved upon the present proprietor. *Weldon v. Dicks*, 10 Ch. D. 247. Registration of a copyright is bad, if the name entered as that of "the publisher" is not that of the *first* publisher. *Coote v. Judd*, 23 Ch. D. 727.

An agreement which is merely personal to the individuals composing a publishers' firm, cannot, without the consent of the authors, be assigned by the publishers' firm to a firm which had succeeded to their business, but which contained none of the partners of the original firm. *Stevens v. Benning*, 6 D. M. & G. 223; *Hole v. Bradbury*, 12 Ch. D. 886. An assignment by deed of the *copyright* in musical compositions and all "property" and "benefit" therein passes the sole liberty of *performing* the musical compositions. *Ex parte Hutchins and Romer*, 4 Q. B. D. 483. Where the work is dramatic, registration is not necessary to give a right of action for penalties. *Marsh v. Conquest*, 17 C. B., N. S. 418. But no copyright is acquired by the registration of a work before its actual publication. *The Correspondent Newspaper Co. v. Saunders*, 11

Jur., N. S. 540 ; *Henderson v. Maxwell*, 5 Ch. D. 892. Neither an entry in the register nor a deed is necessary to an assignment, which is valid though made merely by writing and unattested. See *per Parke, B., Jefferys v. Boosey*, 4 H. L. C. 931. Any person aggrieved by any entry on the register may apply to have it expunged or varied (s. 14). See *Ex parte Davidson*, 18 C. B. 297 ; *Ex parte Hutchins and Romer*, 4 Q. B. D. 483. The assignment of the copyright of dramatic or musical pieces is not to convey the right to *represent or perform* them unless so expressed in the entry of assignment (s. 22). Copyright in articles, &c., composed for encyclopædias or periodicals on the terms that the copyright shall belong to the proprietors of the encyclopædias, &c., and paid for by them, belongs, when paid for (*Richardson v. Gilbert*, 1 Sim., N. S. 336), to such proprietors, except that the right of publishing in a *separate form* articles in magazines or other periodicals of the like kind, after twenty-eight years, reverts to the author, and during the twenty-eight years such articles cannot be published separately without his consent. And the author may reserve to himself, by *express or implied contract*, the right of publication in a separate form during the twenty-eight years (s. 18). See *Bp. Hereford v. Griffin*, 16 Sim. 190 ; *Sweet v. Benning*, 16 C. B. 459 ; *Smith v. Johnson*, 4 Giff. 632 ; *Mayhew v. Maxwell*, 1 J. & H. 312.

Alien friends are entitled to the protection of the act, for the word *author*, as used in the act, is equally applicable to foreigners as to British subjects. *Routledge v. Low*, L. R., 3 H. L. C. 100. In this case Lords Cairns, C., and Westbury, considered that the protection of the Copyright Act extended to every author who first publishes in the United Kingdom, wheresoever he may then be *resident*, whether in the United Kingdom or abroad. Lords Cranworth and Chelmsford, *dub.* See *Jefferys v. Boosey*, 4 H. L. C. 815, decided on the statute of Anne ; *Low v. Ward*, L. R., 6 Eq. 415. Where there is no special contract to the contrary, the assignor of the copyright is entitled, after the assignment, to continue selling copies of the work printed by him before the assignment and remaining in his possession. *Taylor v. Pillow*, L. R., 7 Eq. 418. Under an agreement that a publisher shall publish a work at his own expense, and pay a royalty to the author on the copies sold, there is no implied agreement on the part of the author not to bring out another edition until all the first edition is sold, but the publisher may continue to sell all the unsold copies of the first edition. *Warne v. Routledge*, L. R., 18 Eq. 497.

As to the meaning of the word "edition" in a contract between author and publisher, see *Reade v. Bentley*, 3 K. & J. 271 ; 4 K. & J. 656.

In what Copyright may Subsist.] The author of an unpublished work will be protected by injunction against an attempted publication of it. *Macklin v. Richardson*, Amb. 694 ; *D. of Queensbury v. Shebbeare*, 2 Ed. 329 ; see *Prince Albert v. Strange*, 1 Mac. & G. 25. Copyright may subsist in a work consisting partly of compilations and partly of original matter (*Tonson v. Walker*, 3 Sw. 672 ; *Lewis v. Fullarton*, 2 Bea. 6 ; consider *Cary v. Fadin*, 5 Ves. 24) ; in distinct parts

of a work which can be separated from the rest, as in part of a magazine story (*Low v. Ward*, L. R., 6 Eq. 415); in notes, corrections, &c., to an existing work (*Cary v. Longman*, 1 Ea. 358; *Lewis v. Fullarton*, *sup.*); in a catalogue, unless it is a mere dry list of names (*Hotten v. Arthur*, 1 H. & M. 603; *Grace v. Newman*, L. R., 19 Eq. 623; *Maple v. Junior Army, &c., Stores*, 21 Ch. D. 369, overruling *Cobbett v. Woodward*, L. R., 14 Eq. 407); in a calendar (*Longman v. Winchester*, 16 Ves. 269); in translations (*Wyatt v. Barnard*, 3 V. & B. 77); in songs, though adapted to old airs (*Chappell v. Sheard*, 2 K. & J. 117; see *Chappell v. Davidson*, *ib.* 123); in law reports (*Butterworth v. Robinson*, 5 Ves. 709; *Saunders v. Smith*, 3 M. & C. 711); in the marginal notes of law reports (*Sweet v. Benning*, 16 C. B. 459), and in cartoons or engravings in periodical works, those of *Punch* for instance (*Bradbury v. Hotten*, L. R., 8 Ex. 1). There is no copyright in the mere title of a work, e.g., "Post Office Directory," *Kelly v. Byles*, 13 Ch. D. 682; *Dicks v. Yates*, 18 Ch. D. 76, in effect overruling *Weldon v. Dicks*, 10 Ch. D. 247; but if the registration of the title be followed by the publication of numbers, as in the case of a magazine or periodical, for some time, a right to the exclusive use of such title will be gained according to the principles regulating the use of trade marks. *Hogg v. Maxwell*, and *Maxwell v. Hogg*, L. R., 2 Ch. 307; see *Correspondent, &c. Co. v. Saunders*, 11 Jur., N. S. 540; *Clement v. Maddick*, 1 Giff. 98; *Ingram v. Stiff*, 5 Jur., N. S. 947. And where the title is part of the book, a mere colourable alteration in the title is an infringement, as where the title is "The Birthday Scripture Text-book," and the alteration "The Children's Birthday Scripture Text-book" *Mack v. Petter*, L. R., 14 Eq. 431. See, as to the right to a particular business name, *Lee v. Haley*, L. R., 5 Ch. 155. It has been held that a newspaper is not within the Copyright Act, 5 & 6 Vict. c. 45, and does not require registration; but the proprietor has such a property in its contents as will entitle him to sue in respect of a piracy. *Cox v. Land and Water Journal Co.*, L. R., 9 Eq. 324. But in *Walter v. Howe*, 17 Ch. D. 708, it was held that a newspaper was within the act and required registration. See further, as to newspapers, *Platt v. Walter*, 17 L. T., N. S. 157; *Kelly v. Hutton*, L. R., 3 Ch. 703. The author or publisher of a libellous or immoral work has no legal property in it. *Stockdale v. Onwhyn*, 5 B. & C. 173; *Lawrence v. Smith*, Jac. 471; see *Southey v. Sherwood*, 2 Mer. 435. Copyright in correspondence belongs to the writer, not to the receiver. *Pope v. Curl*, 2 Atk. 342; *Thompson v. Stanhope*, Amb. 737; *Percival v. Phipps*, 2 V. & B. 26; *Gee v. Pritchard*, 2 Sw. 402. But the receiver must produce them if ordered by the court, and he must undertake not to use them for any collateral purpose. *Hopkinson v. Ld. Burghley*, L. R., 2 Ch. 447. See *Williams v. Prince of Wales, &c., Comp.*, 23 Bea. 338. As to the words "private and confidential," see *Goodall v. Little*, 1 Sim., N. S. 155. With respect to music, although the question, in a case of infringement, is, in general, whether the airs can be recognised by the ear to be substantially the same (*D'Almaine*

v. Boosey, 1 Y. & C. 302), yet there may be copyright in a *pianoforte score* of an opera, as distinguished from the opera itself. *Wood v. Boosey*, L. R., 3 Q. B. 223. An infringement of the registered copyright of the music of an opera may be committed where the opera itself has not been published, and so no copy of it could be deposited. *Fairlie v. Boosey*, 4 App. C. 711.

So, copyright may subsist in the words and title page of a song representing it to be sung by a favourite singer, which will be protected, though there may be no copyright in the *air*. *Chappell v. Sheard*, 2 K. & J. 117.

The author of lectures, or person to whom he has sold or conveyed the copyright, has the sole right of publishing them (5 & 6 Will. 4, c. 65, s. 1), with certain exceptions (s. 5). See *Abernethy v. Hutchinson*, 1 H. & Tw. 28. A person is not entitled to take down a lecture delivered by another, and publish it in shorthand, but he may take the fullest notes for his own personal use. *Nicols v. Pitman*, 26 Ch. D. 374.

Infringement of.] The remedy in equity for infringement of copyright is by injunction restraining the publication complained of, on an undertaking by the plaintiff to bring an action. *Bentley v. Foster*, 10 Sim. 329; *Sheriff v. Coates*, 1 R. & My. 159; *Ingram v. Stiff*, 5 Jur., N. S. 947. The judge in equity determines whether a *prima facie* case of piracy is made out. *Fradella v. Weller*, 2 R. & M. 249; *Bramwell v. Halcomb*, 3 M. & C. 737. The question of infringement must necessarily depend upon the circumstances of each case. An abridgment is said not to be piracy (*Bell v. Walker*, 1 B. C. C. 451; and see per Lord Lyndhurst, *D'Almaine v. Boosey*, 1 Y. & C. 298; consider *Butterworth v. Robinson*, 5 Ves. 709). The quantity taken is not always the criterion. *Bramwell v. Halcomb*, *sup.*; and see *Bell v. Walker*, *sup.*; *Gyles v. Wilcox*, 2 Atk. 143; *Campbell v. Scott*, 11 Sim. 31. Under the Dramatic Copyright Act, the plaintiff must show that a material and substantial part has been pirated. *Chatterton v. Cave*, 2 C. P. D. 42. Copying seventy-five pages out of 118 and several plates, is piracy (*Roworth v. Wilkes*, 1 Camp. 94), as indeed a very much less proportion would be. See *Scott v. Stanford*, L. R., 3 Eq. 718. "In short, we must in deciding questions of this sort look to the nature and objects of the selections made, the quantity and value of the material used, and the degree in which the use may prejudice the sale or diminish the profits or supersede the objects of the original work." Per Mr. Jus. Story, *Folsom v. Marsh*, 2 Story (Amer.), 100—116; acc. *Scott v. Stanford*, L. R., 3 Eq. 722; and see *Mawman v. Tegg*, 2 Russ. 385; *Jarrold v. Houlston*, 3 K. & J. 708; *Bramwell v. Halcomb*, 3 M. & C. 737; *Pike v. Nicholas*, L. R., 5 Ch. 251; *Bradbury v. Hotten*, L. R., 8 Ex. 1; *Chatterton v. Cave*, L. R., 10 Ex. 572. If there is an infringement it makes no difference that the work complained of is not intended for sale. *Novello v. Sudlow*, 12 C. B. 177; *Ager v. P. & O. Steam. Co.*, 26 Ch. D. 637.

Although a portion of a work may be taken, it may by mental labour be subjected to such revision and correction as to produce an

original result. See *Spiers v. Brown*, 6 W. R. 352; *Cary v. Kearsley*, 4 Esp. 168. A translation of a French work, which is itself a translation of an English work, is an infringement of the copyright in the latter. *Murray v. Bogue*, 1 Drew. 353. In reviews a certain latitude is allowed (*Whittingham v. Wooller*, 2 Swan. 428), and fair quotation is allowable, though it is difficult to define the limits of it. *Wilkins v. Aikin*, 17 Ves. 424. "In the case of a dictionary, map, guide-book or directory, where there are certain common objects of information, which must, if described correctly, be described in the same words, a subsequent compiler is bound to set about doing for himself that which the first compiler has done." Per Wood, V.-C., *Kelly v. Morris*, L. R., 1 Eq. 701; see *Morris v. Ashbee*, L. R., 7 Eq. 34; *Morris v. Wright*, L. R., 5 Ch. 279. An author who has been led by a former author to refer to older writers may, without committing piracy, use the same passages in the older writers which were used by the former author. *Pike v. Nicholas*, L. R., 5 Ch. 251. There is no monopoly in any *theory* propounded by a writer. *Ib.* The representation of the incidents of a novel in a dramatic form is not piracy (*Reade v. Conquest*, 9 C. B., N. S. 755); *Toole v. Young*, L. R., 9 Q. B. 523; but it is to *publish* a play so constructed (*Tinsley v. Lacy*, 1 H. & M. 747); and if the author of a play turn the incidents of it into a novel, it is piracy of the *play* to take the novel and dramatize it. *Reade v. Lacy*, 1 J. & H. 524; *Reade v. Conquest*, 11 C. B., N. S. 479. See *Boosey v. Fairlie*, 7 Ch. D. 301. In *Toole v. Young*, *sup.*, the author of the novel had himself written a drama founded on his novel, but had not printed or represented the drama, and it was held that he had no right against another who had dramatized the novel and represented the drama on the stage. There must be no acquiescence in the piracy on the plaintiff's part (*Saunders v. Smith*, 3 M. & C. 711; see *Rundell v. Murray*, Jac. 311); nor delay in applying to the court. *Baily v. Taylor*, 1 R. & My. 73; *Lewis v. Chapman*, 3 Bea. 133.

If it be established to the satisfaction of the court that there is an infringement, the owner of the copyright will be entitled to the unsold copies of the piratical work, without making any compensation for them, and to the *clear* profits arising from the sale of the other copies. *Delfe v. Delamotte*, 3 K. & J. 581; see *Colburn v. Simms*, 2 Ha. 543. Where the defendant alleges that his work is a fair compilation from many others and not a copy of any one, the production of his original manuscript is of the highest importance. *Hotten v. Arthur*, 1 H. & M. 603. Where the plaintiffs had purchased the copyright of and the right to use the name of the defendant in the publication of a work, and the defendant agreed to give his whole time to the service of the plaintiffs, and not to engage in any other business; he was restrained from advertising a rival work. *Ward v. Beeton*, L. R., 19 Eq. 207. By the 26th section of the 5 & 6 Vict. c. 45, proceedings for any offence against the Act are to be brought within 12 calendar months after the offence committed. This section does not apply to prevent a suit for an injunction to restrain a piracy of copyright by sale of a

book published more than twelve months before bill filed. *Hogg v. Scott*, L. R. 18 Eq. 444. Mere delay in taking proceedings after knowledge of a piracy is not in itself such acquiescence as will deprive a plaintiff of his right to an injunction at the hearing. *Ib.*

International Copyright.] By the 7 & 8 Vict. c. 12, the International Copyright Act (extended to paintings, drawings and photographs by the 25 & 26 Vict. c. 68, s. 12), the Queen, by order in council, is authorized to give the authors, &c., of books, prints, and works of art, to be defined in the order, first published in any foreign country, the privilege of copyright in this country during the period named in such order, not exceeding the term of copyright to which authors, &c., of the like works in England are entitled (s. 2). By a like order the Queen may direct that composers of dramatic and musical pieces first represented abroad shall have similar rights in Great Britain (s. 5). Provisions are made for registering similar to those contained in the Copyright Act (ss. 6—8). See *Boosey v. Fairlie*, 7 Ch. D. 301. The benefit of the Act is limited to foreign countries where reciprocal protection is secured (s. 14). The authors of works first published abroad are not entitled to any copyright save under the Act (s. 19), and this provision extends to Englishmen publishing abroad (*Boucicault v. Delafield*, 1 H. & M. 597), or representing a drama abroad (*Boucicault v. Chatterton*, 5 Ch. D. 267). By the 15 & 16 Vict. c. 12, which recites a convention with France for extending in each country the enjoyment of copyright in works of literature and the fine arts first published in the other, and that it is expedient that the Queen should be enabled to make similar stipulations with any foreign power, it is enacted that the Queen may by order in council direct that authors of books published abroad may be empowered to prevent the unauthorized translations of such books in the British dominions, but for not more than five years (s. 2). Sect. 3 contains similar provisions with reference to the representation here of translations from foreign dramatic pieces. The existing law of copyright in this country shall be applied to prevent such translations as are mentioned in s. 2, and such representations as are mentioned in s. 3 (ss. 3, 5). Fair imitations or adaptations of foreign dramatic pieces are not prevented (s. 6). Where by an order in council a translation of a dramatic piece first represented abroad has been protected, an order in council may direct that this section shall not apply to such piece; 38 & 39 Vict. c. 12. The following provisions must be complied with:—(1) The original work must be registered. (2) The author of the original work must notify that the right of translation is reserved. (3) The translation, or part of it sanctioned by the author, must be published in the foreign country or here within one year after registration, and the whole translation within three years. (4) The translation must be registered. (5) As to books published in parts, each part must be registered within three months after first publication abroad. (6) The translation of dramatic pieces must be published within three months of registration of the original

work. (7) These regulations apply to newspapers and periodical articles if published in a separate form, not otherwise, 15 & 16 Vict. c. 12 (ss. 7, 8). This act and the convention with France do not exempt authors of works in France claiming copyright in this country from the conditions and restrictions affecting authors of works in this country. *Cassell v. Stiff*, 2 K. & J. 279. If a foreigner translates into his own language an English work, and an Englishman retranslates the work into English, that is an infringement of the original copyright. *Murray v. Bogue*, 1 Drew. 353. The intention of the framers of the International Copyright Act, 1852, in requiring that in order to entitle the foreign author of a dramatic piece to the benefit of the Act, a translation sanctioned by the author must be published within three calendar months of the registration of the original work, was to give to English people the opportunity of knowing the foreign work as accurately as is possible by means of a translation. A translation, such as the act requires, must be one of the *whole work*; and it is not sufficient that it be a version which the foreign author may have sanctioned as a translation. *Wood v. Wood*, *Wood v. Chart*, L. R., 10 Eq. 193.

CHAPTER II.

SCULPTURES, PRINTS, PAINTINGS, DESIGNS.

<i>Sculptures, Casts, &c.</i>	134	<i>Paintings, Drawings, Photographs</i>	135
<i>Prints, Engravings, &c.</i>	134	<i>Common Law Right</i>	135
<i>Engravings in Books</i>	135	<i>Designs</i>	135

Sculptures, Casts, &c.] The 38 Geo. 3, c. 71, contained provisions giving a right of property in sculpture. This Act was amended by the 54 Geo. 3, c. 56, and repealed by the 24 & 25 Vict. c. 101. The 54 Geo. 3, c. 56, the Act now in force, gives the sole right and property to inventors of new and original sculptures and models, copies or casts of the human figure, or of any busts, or of any animals, or of *any subject, being matter of invention*, for fourteen years from first putting forth or publishing the same, the name of the proprietor and the date being on the sculpture (s. 1), and the further term of fourteen years if the original inventor should be living at the expiration of the first term (s. 6). The remedy for infringement is by special action on the case (s. 3).

Prints, Engravings, &c.] By the 7 Geo. 3, c. 38, the property in prints and engravings is vested in the inventor for twenty-eight years from the first publication, the date of which and proprietor's

name are to be affixed to each print. And see 8 Geo. 2, c. 13; 17 Geo. 3, c. 57. *Gambart v. Sumner*, 5 H. & N. 5. The Copyright Act, 5 & 6 Vict. c. 45, extends to an engraving in a book which is printed with the letter-press, on the same paper, at the same time. *Bogue v. Houlston*, 5 De G. & S. 267; *Bradbury v. Hotten*, L. R., 8 Ex. 1. An action on the case is given for piratically engraving, etching, &c., copying, publishing or selling any engraving or print, &c. (extended to lithographs and other prints taken by mechanical process, 15 & 16 Vict. c. 12, s. 14). A reproduction of an engraving in tapestry or Berlin wool is not a copy within the act. *Dicks v. Brooks*, 15 Ch. D. 22. See *Graves v. Ashford*, L. R. 2 C. P. 410.

Paintings—Drawings—Photographs.] By the 25 & 26 Vict. c. 68, s. 1, the exclusive right of copying, engraving and multiplying paintings, drawings and photographs belongs to the author, being a British subject, or resident within the dominions of the crown, for his life and seven years after his death. The provisions of the International Copyright Act (*ante*, p. 133) are to be taken as included in this act (s. 12). As to the common law right, see *Turner v. Robinson*, 10 Ir. Ch. 510. Photographic copies have been held to be within the 17 Geo. 3, c. 57. *Gambart v. Ball*, 14 C. B., N. S. 306; *Graves v. Ashford*, L. R., 2 C. P. 410; see *Strahan v. Graham*, 15 W. R. 487; *Lucas v. Cooke*, 13 Ch. D. 872. As to a joint authorship, see *Nottage v. Jackson*, 11 Q. B. D. 627.

Designs.] The copyright of designs is regulated by the Patents, Designs, and Trade Marks Act, 46 & 47 Vict. c. 57, repealing several acts. For some decisions on these acts which may perhaps be useful under the last act, see *Norton v. Nicholls*, 4 K. & J. 475; *Sarazin v. Hamel*, 32 Bea. 151; *Wendover v. Smith*, *ib.* 200; *Holdsworth v. M'Crea*, L. R., 2 H. L. 380; *Adams v. Clementson*, 12 Ch. D. 714. A design is not a proper subject of registration under the 46 & 47 Vict. c. 57, unless there is a clearly marked and defined difference involving substantial novelty between it and any design previously in use. *Le May v. Welch*, 28 Ch. D. 24.

DONATIO MORTIS CAUSÂ.

<i>What is</i>	136	<i>Delivery</i>	138
<i>Gift in Last Illness in contemplation of Death</i>	136	<i>Actual Delivery</i>	138
<i>Where not in contemplation of Death</i>	136	<i>Constructive—Giving Key</i>	138
<i>Where a Testamentary Gift is intended</i>	136	<i>Donor retaining Power over</i> ...	138
<i>Who may be Donee</i>	137	<i>Revocation of Gift</i>	138
<i>What may be subject of</i>	137	<i>Resuming Possession</i>	138
<i>Money — Mortgages — Bills—</i>		<i>Legacy in lieu of</i>	138
<i>Cheques—Policies</i>	137	<i>Not affected by Wills Act</i>	138

What]. *Donatio mortis causâ* is where a man lies in extremity or last illness (*Blount v. Burrow*, 1 Ves. Jun. 546; *Miller v. Miller*, 3 P. W. 356), and not having an opportunity of making his will, lest he should die before he could make it, gives with his own hands, or by the hands of another (*Miller v. Miller, sup.*), his goods to his friends. This, if he die, shall operate as a legacy; but if he survive, the property reverts to him (*per cur. Hedges v. Hedges*, Prec. Chanc. 269; *Jones v. Selby, ib.* 300); and the donee is a trustee for him. *Staniland v. Willott*, 3 Mac. & G. 664. There must be a gift prior to the death; a direction to a third person to keep the goods until the donor's death and to deliver them afterwards is insufficient. *Powell v. Hellicar*, 26 Bea. 261. The gift must be absolute, but in contemplation of and to take effect upon the donor's death. *Tate v. Hilbert*, 2 Ves. jun. 120; see *Cosnahan v. Grice*, 15 M. P. C. 215. If made while the donor is ill and shortly before his death, it will be presumed to be made in contemplation of death and in the donor's last illness. *Lawson v. Lawson*, 1 P. W. 441; *Williams, Exors.*, 8th ed., 777.

Where an *immediate gift* is intended, and not a gift contingent upon the death of the donor, this principle will not apply, and such a gift will take effect or fail, according to the nature of the property on which it affects to operate: if it be a gift of property which passes by delivery only, it will be good, but otherwise where delivery alone would be insufficient to pass an interest in it. *Ward v. Turner*, 2 Ves. sen. 431; *Edwards v. Jones*, 1 M. & C. 226; *Lambert v. Overton*, 13 W. R. 227. And if a *testamentary gift* be intended, which fails for want of proper attestation, a *donatio mortis causâ* cannot be presumed. *Re Patterson, Mitchell v. Smith*, 33 L. J., Ch. 596. It

is not necessary that the donor should expressly say that the gift is conditional upon his death; this fact may be inferred from the circumstances of the case. *Gardner v. Parker*, 3 Madd. 184.

A *donatio mortis causâ* is subject to the donor's debts. *Tate v. Leithead*, Kay, 658.

The burthen of proof is on the donee to show that such a gift was intended. *Cosnahan v. Grice*, 15 M. P. C. 215.

The gift may be to the wife of the donor. *Tate v. Leithead*, Kay, 658; *Boutts v. Ellis*, 4 D., M. & G. 249. Where the donee is a person who stands in a fiduciary or confidential relation to the donor, the evidence of the gift should be unexceptionable (*Clarke v. Bathe*, 3 W. N. 74), as where the former is a priest in the habit of visiting the latter and exercising the natural influence attached to his position. *Thompson v. Heffernan*, 4 Dr. & War. 285. So where the donee is the solicitor of the donor. *Walsh v. Studdart*, *ib.* 159. See *post*, tit. "FRAUDULENT AND VOLUNTARY CONVEYANCES, &c."

What may be the subject of.] Anything may be the subject of a *donatio mortis causâ*, the property in which passes by delivery, as money (*Shanley v. Harvey*, 2 Ed. 125); even mortgage securities and bonds (*Duffield v. Elwes or Hicks*, 1 Bli., N. S. 497; *Gardner v. Parker*, 3 Mad. 184; see *Hurst v. Beach*, 5 Mad. 351; *Clavering v. Yorke*, 2 Coll. 363, n.; *Re Patterson*, 10 Jur., N. S. 578); bank notes (*Shanley v. Harvey*, 2 Ed. 125; *Miller v. Miller*, 3 P. W. 356); bills or promissory notes payable to the donor's order, although not indorsed by him (*Veal v. Veal*, 27 Bea. 303; *Rankin v. Wequelin*, cited *ib.* 309); *Clement v. Cheesman*, 27 Ch. D. 631; or, as it would seem, bills or promissory notes of the donor himself, and in some cases cheques drawn by him (*Lawson v. Lawson*, 1 P. W. 411; *Boutts v. Ellis*, 4 D., M. & G. 249); but a cheque drawn by him on his own banker must be paid before his death to be a valid *donatio mortis causâ* (*Hewitt v. Kaye*, L. R., 6 Eq. 198; *Austin v. Mead*, 15 Ch. D. 651. The delivery of the donor's pass book with the cheque will not make the gift of the latter a valid *donatio mortis causâ*, unless it be presented before the donor's death. *Beak v. Beak*, L. R., 13 Eq. 489. The gift of a cheque will be good, however, if the cheque is presented before the donor's death, the bank refusing to pay, not on account of want of funds, but in consequence of doubts as to the signature being genuine. *Bromley v. Brunton*, L. R., 6 Eq. 275. But a cheque drawn by a testator payable to A. or order, indorsed by A. and paid into a foreign bank, against the amount of which he drew, is a good *donatio mortis causâ*, although the cheque was not presented for payment at the bank on which it was drawn till after the death of the testator. *Rolls v. Pearce*, 5 Ch. D. 730. If the cheque had been payable to bearer, *quære*. Policies of assurance (*Witt v. Amis*, 1 B. & S. 109), and a banker's deposit note (*S. C.*, 33 Bea. 619; *Moore v. Moore*, L. R. 18 Eq. 474), or receipt for money (*Moore v. Darton*, 4 De G. & S. 517), are valid *donationes mortis causâ*. But not public stock or funds, which must be trans-

ferred; and a delivery of the stock receipt is insufficient. *Ward v. Turner*, 2 Ves. sen. 431. So in the case of railway stock. *Moore v. Moore*, L. R. 18 Eq. 474.

Delivery.] There must be a delivery of the thing given (*Thompson v. Heffernan*, 4 Dr. & War. 285) by the donor, or by his order, to the donee, or for his use. *Drury v. Smith*, 1 P. W. 404; see *Farquharson v. Cave*, 2 Coll. 356. Thus property cannot be given by mere words, or by writing the names of the donees on the subject-matter of the gift, without an *act of gift* (*Tate v. Hilbert*, 2 Ves. jun. 120; *Bunn v. Markham*, 7 Taun. 224; *Powell v. Hellicar*, 26 Bea. 261); but it has been held that the delivery of the key of a trunk is a gift of the trunk and its contents (*Jones v. Selby*, Pr. Ch. 300; see *Farquharson v. Cave*, 2 Coll. 356); and the delivery of the key of a warehouse is a delivery of the contents of the warehouse. *Smith v. Smith*, 2 Str. 955; see *Ward v. Turner*, 2 Ves. sen. 441; *Jones v. Selby*, Pr. Ch. 300.

The delivery must be absolute to this extent, that if the donor retain the ownership over the subject-matter of the gift, as by keeping the key of a box, the box being re-delivered to him from time to time, the gift will not be a *donatio mortis causâ*. *Reddell v. Dobree*, 10 Sim. 244; *Farquharson v. Cave*, *sup.*; see *Powell v. Hellicar*, 26 Bea. 261; *Maguire v. Dodd*, 9 Ir. Ch. 452—458. The gift, however, may be coupled with a trust, for instance, to provide for the funeral expenses of the donor. *Hills v. Hills*, 8 M. & W. 401.

Revocation of Gift.] The donor may resume possession of the gift on recovering from his illness (*Bunn v. Markham*, 7 Taun. 232); but cannot revoke it by his will (*Jones v. Selby*, Pr. Ch. 300), though it may be satisfied by a legacy. *Ib.*; see *Johnson v. Smith*, 1 Ves. sen. 314. A *donatio mortis causâ* is not affected or abolished by the 1 Vict. c. 26 (*Moore v. Darton*, 4 De G. & S. 517), nor does it require the assent of the executor (*Tate v. Hilbert*, 2 Ves. jun. 120); but it is subject to legacy duty. 8 & 9 Vict. c. 76, s. 4.

EASEMENTS.

CH. 1.—NATURE OF, IN GENERAL, p. 139.

CH. 2.—ACQUIRED BY GRANT OR PRESCRIPTION, p. 141.

CH. 3.—PRESCRIPTION GENERALLY, 2 & 3 WILL. 4, c. 71, p. 148.

SEC. 1.—PRESCRIPTION PRIOR TO ACT, p. 148.

SEC. 2.—PRESCRIPTION ACT, p. 148.

CH. 4.—OF PARTICULAR EASEMENTS AND RIGHTS IN THE NATURE OF EASEMENTS, p. 155.

SEC. 1.—RIGHT OF WAY, p. 155.

SEC. 2.—RIGHT TO LIGHT, AIR AND PROSPECT, p. 157.

SEC. 3.—RIGHTS IN RESPECT OF WATER, p. 162.

SEC. 4.—RIGHT TO SUPPORT FOR LAND OR BUILDINGS, p. 166

SEC. 5.—EASEMENTS IN RESPECT OF NUISANCES, p. 170.



CHAPTER I.

NATURE OF, IN GENERAL.

<i>Affirmative—Negative</i>	139		<i>Apparent—Non-apparent</i>	140
<i>Continuous—Discontinuous</i>	140		<i>How acquired</i>	140

AN easement may be defined or described as a right which the owner of one tenement, called the *dominant* tenement, has in, upon or over the tenement, called the *servient* tenement, of another. Easements are of infinite variety, but are reducible, so far as regards the principle applicable to them, to a few leading divisions.

An easement is said to be affirmative when the owner of the dominant tenement has a right to do some act in or upon or affecting the servient tenement. Thus, rights of way (Gale, Easements, 5th Ed. 28) of access, to take water from a spring (*Race v. Ward*, 4 E. & B. 702) to discharge water (*Wright v. Williams*, 1 M. & W. 77) or smoke through a flue (*Hervey v. Smith*, 1 K. & J. 389) over, in or upon the land of another, are affirmative easements. A man may have as an easement a hatch in another man's soil (*Wood v. Hewett*, 8 Q. B. 913), or a pile fixed in a waterway (*Lancaster v. Eve*, 5 C. B., N. 8

717), or a sign board fixed on a common (*Hoare v. Metropolitan Board of Works*, L. R., 9 Q. B. 296), or hanging from the wall of another man's house (*Moody v. Steggles*, 12 Ch. D. 261). A right to prevent the owner of the servient tenement from doing some particular act which would interfere with the enjoyment of the dominant tenement is a negative easement. Thus, the right to light and air, that is, the right that the owner of the servient tenement shall do nothing to obstruct its access to the dominant tenement, is negative. Gale, Easements, 5th Ed. 24. User which is neither physically capable of prevention by the owner of the servient tenement, nor actionable, cannot support an easement. And this is applicable both to affirmative and negative easements. *Sturges v. Bridgman*, 11 Ch. D. 852. Easements may also be distinguished as *continuous*, without any necessity for actual interference, or what may be termed *active user*, as a right to light or watercourse (*Watts v. Kelson*, L. R., 6 Ch. 166; *discontinuous*, which requires such interference or active user, as a right of way; *apparent*, where some outward sign of it exists, as a window; *non-apparent*, where no such sign exists, as an underground channel for water. See also Gale, Easements, 5th Ed. 25; *Suffield v. Brown*, 4 D. J. & S. 185. A right of way may also be appurtenant to property, the owner of which may use it, and it goes with the property, or it may be in gross or personal, and not assignable. Where A. had a right of way to the yard of his house over a passage belonging to B., and afterwards released this right in consideration of a grant to him and his heirs of a fresh way over a different passage, this is not a right in gross, but appurtenant to A.'s property and available for his lessee of the house. *Thorpe v. Brumfitt*, L. R., 8 Ch. 650.

Easements cannot subsist *as such* where the two tenements belong to one owner, for *an easement* pre-supposes dominant and servient tenements. See *Unity of Possession*, post. Easements are acquired by express or implied grant, by prescription, and sometimes by statute. *Richards v. Richards*, Johns. 255.

CHAPTER II.

ACQUIRED BY GRANT, EXPRESS OR IMPLIED.

<i>Express Grant</i>	141	<i>Implied Grant—continued.</i>	
At Law—In Equity	141	Grantor cannot derogate from	
Who bound by—Who may take		his own Grant	145
advantage of	141-142	Non-apparent Easements	145
Conveyancing Act	142		
<i>Implied Grant</i>	142	Unity of Possession	146
Easements of Necessity ...	142-143	Extinguishes Easement	146
Apparent and Continuous Easements	143	Re-grant	146
Implied Contracts between Vendor and Purchaser	144	Estates not of equal duration .	147
		Obligation to repair	147
		Owner of Dominant Tenement .	147

Express Grant.] The right to an easement, if by express grant, must at law be created by an instrument under seal (*Hewlins v. Shipham*, 5 B. & C. 221; *Wood v. Leadbitter*, 13 M. & W. 838); but in equity it may be created by a parol promise, licence or permission, which will be enforced where there has been *expenditure* on the faith of it (*D. of Devonshire v. Eglin*, 14 Bea. 530; see *Somerset, &c., Co. v. Harcourt*, 2 D. & J. 596; *Bell v. Mid. R. Co.*, 3 D. & J. 673; *Mold v. Wheatcroft*, 27 Bea. 510; *Cotching v. Bassett*, 32 Bea. 101); and even at law a parol licence by the owner of the dominant tenement to the owner of the servient tenement to use such servient tenement in a way prejudicial to the *easement* of the former is good, and not countermandable. *Liggins v. Inge*, 7 Bing. 682; *Fisher v. Moon*, 11 L. T., N. S. 623; *Waterlow v. Bacon*, L. R., 2 Eq. 514. It has been said that a grant, if obscure as to its meaning, must be read most strongly against the grantor. But in *Taylor v. Corporation of St. Helen's*, 6 Ch. D. 264, Jessel, M.R., observed (p. 270), "I do not see how, according to the now established rules of construction as settled by the House of Lords in the well-known case of *Grey v. Pearson*, 6 H. L. C. 61, followed by *Roddy v. Fitzgerald*, 6 H. L. C. 823, and *Abbott v. Middleton*, 7 H. L. C. 68; that maxim can be considered as having any force at the present day. The rule is to find out the meaning of the instrument according to the ordinary and proper rules of construction. If we can thus find out its meaning, we do not want the maxim. If, on the other hand, we cannot find out its meaning, then the instrument is void for uncertainty, and in that case it may be said that the instrument is construed in favour of the grantor, for the grant is annulled."

A purchaser or grantee of the servient tenement, with actual or constructive notice of the easement, is bound by it in equity, though

it is not granted by an instrument valid at law. *Hervey v. Smith*, 22 Bea. 299. But it must be an easement, not a mere right granted by licence during a tenancy and revocable. *Russell v. Harford*, L. R., 2 Eq. 507; *Daniel v. Anderson*, 8 Jur., N. S. 328. As to the distinction at law between a covenant in respect of an easement and grant of an easement, where the former does not run with the land, see *Rowbotham v. Wilson*, 8 H. L. C. 362. The grantee of the tenement to which an easement is attached, and those claiming under him, are entitled to the easement by the grant of the tenement, whether the grant be in fee or for a lesser estate. See *Fentiman v. Smith*, 4 Ea. 107; *Canham v. Fiske*, 2 C. & J. 126; *Skull v. Glenister*, 16 C. B., N. S. 81. As to the apportionment of an easement on a transfer of the dominant tenement to several persons, see *Codling v. Johnson*, 9 B. & C. 934; *Harris v. Drewe*, 2 B. & Ad. 164; Gale, Easements, 5th Ed. 88 n., 569.

By the Conveyancing Act, 1881, 44 & 45 Vict. c. 41, s. 62, “(1) A conveyance of freehold land to the use that any person may have, for an estate or interest not exceeding in duration the estate conveyed in the land, any easement, right, liberty, or privilege in, or over, or with respect to that land, or any part thereof, shall operate to vest in possession in that person that easement, right, liberty, or privilege, for the estate or interest expressed to be limited to him; and he, and the persons deriving title under him, shall have, use, and enjoy the same accordingly; (2) This section applies only to conveyances made after the commencement of this Act” (1st January, 1882).

Implied Grant.] It is an ancient rule of law that whenever property or a right is granted or reserved, everything necessary to render the property or right available is tacitly granted or reserved with it. Thus if a lessor except trees from the demise, he has, as incident to the exception, a right to enter on the demised ground for purposes connected with the trees, for instance, to cut them down. *Liford's Case*, 11 Rep. 52 a; see *Pinnington v. Galland*, 9 Ex. 1. So where a person grants or devises land to another, he impliedly grants a right of way to it over his own land, if there be no other way. 1 Wms. Saun. 321, n. (b) to *Pomfret v. Ricroft*; *Gayford v. Moffatt*, L. R., 4 Ch. 133; see *Hinchcliffe v. Ld. Kinnoul*, 5 B. N. C. 25; *Pearson v. Spencer*, 3 B. & S. 761. And such a right does not seem to be determined merely by reason of another way being subsequently made. See *Proctor v. Hodgson*, 10 Ex. 824; and comp. *Holmes v. Goring*, 2 Bing. 84, from which case, however, Parke, B., dissented in *Proctor v. Hodgson*, *supra*. Ways to church or market, and watercourses are easements of necessity. *Sury v. Pigot*, Poph. 166. But a way is not necessarily one of necessity because it is the most convenient way. *Barlow v. Rhodes*, 1 C. & M. 449; questioning *Morris v. Edgington*, 3 Taun. 31. If, however, there are two ways of necessity, the grantor may in general select that which is most convenient for him. *Ib.* See *Pheysey v. Vicary*, 16 M. & W. 484.

Thus, where a grantee is entitled to a way of necessity over another tenement belonging to the grantor, and there are more ways than one to the tenement granted, the grantee is entitled to one way only, which the grantor may select. *Bolton v. Bolton*, 11 Ch. D. 968; and see *Pearson v. Spencer*, 1 B. & S. 571, 585; 3 B. & S. 761. By the grant of part of a tenement there will pass to the grantee all those continuous and apparent easements over the other part of the tenement which are necessary to the enjoyment of the part granted and have been hitherto used therewith; but as a general rule there is no corresponding implication in favour of the grantor, though there are certain exceptions to this, as in the case of ways of necessity. *Wheeleldon v. Burrows*, 12 Ch. D. 31. In this case the court dissented from the decision in *Pyer v. Carter*, 1 H. & N. 916, following that in *Suffield v. Brown*, 4 D. J. & S. 185; *Watts v. Kelson*, L. R., 6 Ch. 166; *Barkshire v. Grubb*, 18 Ch. D. 616; *Russell v. Watts*, 25 Ch. D. 559; *Palmer v. Fletcher*, 1 Lev. 122; *Tenant v. Goldwin*, 2 Raym. 1093. And this is so although the dominant tenement at the time of the alienation is in lease, and consequently not in the possession of the alienor. *Barnes v. Loach*, 4 Q. B. D. 494. Where the owner of a close surrounded by his own land grants the land and reserves the close, the implied right to a way of necessity to and from the close over the land operates by way of re-grant from the grantee of the land, and is limited by the necessity which created it. This re-grant, however, does not create a right to a way of necessity for all purposes for which the close may at any time be used, but only such a right of way as will enable the owner of the close to enjoy it as in the condition it happened to be at the time of the re-grant. For instance, if at the time of the re-grant the close was agricultural land, the owner of the close can only claim such a right of way as is suitable to the enjoyment of land in that condition: he cannot claim a right of way suitable to the user of the close as building land. *Semble*, the same rule applies if the grant is of the landlocked close with an implied grant of a way of necessity over the surrounding land. *Corporation of London v. Riggs*, 13 Ch. D. 798. See *Gayford v. Moffatt*, L. R., 4 Ch. 133, and *post*, p. 156, as to the user of the easement in any other way than it exists at the time of the grant. And if the vendor of land adjoining other land of his own under which are mines and minerals, and who knows at the time of the sale that the vendee is about to erect upon the land so purchased substantial buildings, he impliedly covenants that he will not use or permit the adjoining land to be used in such a manner as to derogate from his grant. *Siddons v. Short, Harley & Co.*, 2 C. P. D. 572. And if on the sale of land to a purchaser who has notice that the adjoining land of the vendor is to be laid out in building in a manner which will make a right of way over the purchased land necessary, such right of way is reserved to the vendor by implication as a way of necessity. *Davies v. Sear*, L. R., 7 Eq. 427. An important question sometimes arises, where there are several grants, as to the equities between the several grantees. In *Russell v. Watts*, 25 Ch. D., p. 573, Cotton, L.J., observed in substance, "Where there

are several grants, not absolutely at the same moment, but so far at the same moment that they are to be considered as one transaction, and done at the same time; then each of the grantees gets the benefit of an implied grant of easements, and as taking from the grantor, while he has still the power to give it, what it is right that the grantee should get: so that there is an implied grant against all the other grantees of those easements which will be reasonably necessary for the property which is conveyed." This case was reversed in the House of Lords, Lord Blackburn, *diss.*, W. N., 1885, p. 162, but probably the principle laid down by Cotton, L.J., was not questioned. See *Master v. Hansard*, 4 Ch. D. 718. And where the owner of a dwelling-house and adjoining lands sells the house to one person and the land to another under contemporaneous conveyances, each purchaser being aware of the conveyance to the other, the purchaser of the land is not entitled to build thereon so as to obstruct the lights of the house. *Swansborough v. Coventry*, 9 Bing. 305; *Allen v. Taylor*, 16 Ch. D. 355. But if the land was sold for building purposes and it was impossible to build without interfering with the lights, *Qu.*, see *Rigby v. Bennett*, 21 Ch. D. 559, 567; *Hall v. Lund*, 1 H. & C. 676; *Davies v. Marshall*, 1 Dr. & Sm. 557; *Frewen v. Phillips*, 11 C. B., N. S. 449.

A purchaser is not in general bound by any implied reservation of rights by his vendor in respect of the property retained by him, unless in case of necessity, as where there is no other way than over the sold land. *Clark v. Cogge*, Cro. Jac. 170; *Crossley Co. v. Lightowler*, L. R., 2 Ch. 478, 486. But in general the purchaser is not bound. Thus if the owner of a house and adjoining land sell the land and retain the house, the purchaser of the land will not be restricted in the user of it as against the vendor or those claiming under him (*White v. Bass*, 7 H. & N. 722), but may build so as to obstruct even the ancient lights of his vendor. *Curriers' Co. v. Corbett*, 2 Dr. & Sm. 355. A purchaser, however, will be bound by contract or conditions of sale under which he purchased, restricting him to build in such a way as not to obstruct a neighbour's window, though recent. *Compton v. Richards*, 1 Pri. 27. A grant may bind the grantor in respect of an interest he has at the time of the grant, but not in respect of a new interest acquired by him taking effect after the expiration of the first. Thus, where a lessor granted a lease for twenty-one years of a house with its lights, and at the time of the grant he held an adjoining house for a term of years, and subsequently acquired the reversion expectant on the term in such adjoining house; and after the expiration of the term he proceeded to build on the site of it, in a manner which might interfere with the lights of the demised house, those lights not being ancient lights; it was held that he was not by his grant prevented from so building. *Booth v. Alcock*, L. R., 8 Ch. 663. A lessor who grants a lease of a house and garden is not precluded merely by his covenant for quiet enjoyment from building on open ground retained by him adjacent to the house and garden, though by so doing the enjoyment of the garden as pleasure ground is interfered

with, there being no obstruction of light and air. *Potts v. Smith*, L. R., 6 Eq. 311.

This case was held not to come within the general rule. Where, however, the owner of two closes sells one, having a right to a flow of water over it from the other, which he retains, he cannot, nor can any one claiming under him, stop the flow of water; for the land is conveyed with at all events the continuous and apparent easements upon it, without any express grant of them. *Canham v. Fisk*, 2 C. & J. 126; *Skull v. Glenister*, 16 C. B., N. S. 81 (a right of way on a demise); *Ewart v. Cochrane*, 7 Jur., N. S. 925; *Hall v. Land*, 1 H. & C. 676; *Herz v. Union Bank*, 2 Giff. 686; see *Wardle v. Brocklehurst*, 1 E. & E. 1058, where there was an express grant of "all waters, watercourses, liberties," &c. And if a grant be made of land for the purpose of making a railway or building a house upon it, such grant carries with it, by implication, the right of reasonable and necessary support for the railway or house from the subjacent and adjacent lands of the grantor. *Cal. R. Co. v. Sprot*, 2 Macq. 449; see *Metrop. Board of Works v. Metrop. R. Co.*, L. R., 3 C. P. 612; *Richards v. Jenkins*, 17 W. R. 30.

With respect, however, to rights of way and discontinuous easements, there must be an express grant of them by appropriate words; for such a grant will not be implied unless in the case of easements of necessity.

In *Phelysry v. Vicary* (16 M. & W. 484), the owner of two houses with grounds in front had a carriage entrance from the main road into the grounds, with a circular sweep round the front of both houses, then back to the same entrance. He devised the houses with their easements to different persons. It was held, that the devisee of one had a right to stop up the carriage way where it passed opposite his house; for it was not a way of necessity for the other devisee. See *Sury v. Pigot*, Poph. 166; *Pearson v. Spencer*, 3 B. & S. 761; comp. *Skull v. Glenister*, 16 C. B., N. S. 81.

As we have seen, many of the preceding cases relating to continuous and apparent easements depend in a great degree upon the principle that no man can derogate from his own grant, although the converse of this rule is not in general applicable where the vendor or grantor retains the tenement which has the benefit of an easement upon or over another tenement which he sells, unless of such a nature as to be one of necessity and apparent.

It has been held, indeed, that even where an easement is non-apparent, for instance, a drain communicating between two houses, if it can be ascertained to exist on a careful inspection, the vendor of the servient tenement, although he conveys it absolutely, without any reservation to himself, is entitled, if he retains the dominant tenement, to the use of the drain as against the purchaser. *Pyer v. Carter*, 1 H. & N. 916. But this case was not followed by Lord Westbury in *Suffield v. Brown*, 4 D. J. & S. 485, who held that a grantor cannot impliedly reserve such rights; he must do so expressly, even where the easements are continuous and apparent. And this view was also taken by Lord

Chelmsford in *Crossley v. Lightowler*, L. R., 2 Ch. 486. But Lord Romilly, M.R., who had acted upon *Pyer v. Carter* in *Suffield v. Brown* (9 Jur., N. S. 999), in a later case (*Morland v. Cook*, L. R., 6 Eq. 265), again expressed his concurrence in the decision in *Pyer v. Carter*. In *Watts v. Kelson*, L. R., 6 Ch. 166, 171, James and Mellish, LL.JJ., also expressed their approval of *Pyer v. Carter*. Comp. *Ewart v. Cochrane*, 7 Jur., N. S. 925, 4 Macq. Sc. App. 117, where, however, the question was whether an easement passed to the grantee; and it was held that it did. See *Nicholas v. Chamberlain*, Cro. Jac. 121. In *Polden v. Bastard* (L. R., 1 Q. B. 156), A., the owner of two houses, one of which he occupied, the other being in the occupation of B., devised the latter "*as now in the occupation of B.*" B. had been in the habit of using a pump on the premises of A. It was held, that this right of user did not pass to A.'s devisee, not being an easement of necessity nor a continuous easement.

Where a lessor had let a house to A., reserving the right of using the flat roof at the top, and afterwards let the house to B. without any reservation, but under the description "*as the same was late in the occupation of A.,*" it was held (K. Bruce, L.J., *diss.*), that no right to use the roof was thereby reserved to the lessor. *Martyr v. Laurence*, 2 D., J. & S. 261. See *Francis v. Hayward*, 22 Ch. D. 177.

It will be seen from the foregoing cases, that the law upon the subject of implied grants and reservations of easements is not quite settled, and an authoritative decision finally reviewing and settling the doctrines enunciated in *Pyer v. Carter*, *Suffield v. Brown*, and other cases of that description, is much to be desired.

Unity of Possession.] When the dominant and servient tenements are united and in the possession of one person, there can be no easement. See *Battisill v. Reed*, 18 C. B. 696. This unity of possession will, as a rule, have the effect of completely extinguishing discontinuous easements *as such*, so that on a *re-grant* to another of the dominant tenement, they will not in general pass with it. See Gale, Easements, 5th ed., 145; *Onley v. Gardiner*, 4 M. & W. 497. Continuous and apparent easements, however, will pass, as will a right of way of necessity. See Gale, Easements, 5th ed. 90, acc. per Crompton, J., in *Worthington v. Gimson*, 2 E. & E. 618. If there be something to show an intention to create the right *de novo*, it will again arise. See *Pearson v. Spencer*, 1 B. & S. 571; *S. C.* in error, 3 B. & S. 761. In such cases, it has been said, the grantor should use express words of creation, or introduce the terms *therewith used and enjoyed*. *Plant v. James*, 4 A. & E. 749, 761. It was at one time considered that the words in italics or other similar words would only have the effect of a *re-grant* or grant of right of way (except in the case of a way of necessity), where there has been an easement *prior* to the unity of possession, which is followed by a *re-grant* of that part of the land to which the right originally attached. *Thomson v. Waterlow*, L. R., 6 Eq. 36; *Langley v. Hammond*, L. R., 3 Ex. 161. The former case was distinguished by the Master of the Rolls from *Plant v. James*,

upon the ground that in *Plant v. James* there had been a right of way prior to the unity of possession, which on a severance of the unity was held to be revived; but that in the case before him there had been no such right, as the road had been made during the continuance of the unity of possession. L. R., 6 Eq. 41. But this distinction has been denied in recent cases; *Watts v. Kelson*, L. R., 6 Ch. 166; *Kay v. Oxley*, L. R., 10 Q. B. 360, and it has been expressly held that a grant by the owner of two tenements of one of them, "together with all ways now used or enjoyed therewith," will pass to the grantee a right of way over a clearly defined path constructed over the other tenement, and at the date of the grant actually used for the purposes of the tenement which is granted, even though the path did not exist prior to the unity of possession. *Barkshire v. Grubb*, 18 Ch. D. 616. In this case it was considered that *Thomson v. Waterlow and Langley v. Hammond*, *supra*, so far as they are contrary to this view, must be taken to have been overruled by *Watts v. Kelson* and *Kay v. Oxley*, *supra*. *Bayley v. G. W. R. Co.*, 26 Ch. D. 434, and *Barkshire v. Grubb*, *supra*, are to the same effect on the point in question. See also *Wardle v. Brocklehurst*, 1 E. & E. 1058; *Dugdale v. Robertson*, 3 K. & J. 695. As to the restriction of the right to the same kind of user as that existing at the time of the grant, see *post*, pp. 156, 157.

There is an exception to the rule as to extinguishment by unity of possession where the estates in the dominant and servient tenements are not co-extensive; for instance, if there is an estate in fee-simple in one and an estate for life in the other. *Simper v. Foley*, 2 J. & H. 555. In such cases, as they are not co-extensive, there is merely a suspension of the right during the unity of possession, which on a conveyance of either tenement revives. *Irviney v. Stocker*, L. R., 1 Ch. 396, 407; see *Thomas v. Thomas*, 2 C. M. & R. 34; *Canham v. Fisk*, 2 Cr. & J. 126; *Gale, Easements*, 5th ed. 582, 583.

Obligation to repair.] An easement being for the benefit of the dominant tenement, the owner of it is in general bound to do necessary repairs; for instance, the grantee of a right of way must repair the way (*Pomfret v. Ricroft*, 1 Wms. Saund. 322; *Duncan v. Louch*, 6 Q. B. 909; *Ingram v. Morecraft*, 33 Bea. 49; *Colebeck v. Girdlers' Comp.*, 1 Q. B. D. 234), and for this purpose he has all necessary rights of entry and other rights. *Ib.* Where the owners of a house had had for many years a supply of water by pipes passing through the adjoining land, and the owner of part of the adjoining land proceeded to build a house over part of the line of pipes, it was held that the owners of the house had a right to go on the adjoining land and repair the pipes when necessary, and that by building the house their means of access to the pipes would be materially interfered with and rendered more expensive; and an injunction was granted to restrain the building of the house: *Goodhart v. Hyett*, 25 Ch. D. 182. But this obligation may by contract or prescription rest with the owner of the servient tenement. *Taylor v. Whitehead*, 2 Doug. 749.

CHAPTER III.

PRESCRIPTION GENERALLY, 2 & 3 WILL. 4, c. 71.

SEC. 1.—*Prescription prior to Act.*

<i>Length of Time</i>	148		<i>Presumption of Lost Grant</i>	148
-----------------------------	-----	--	--	-----

AN easement may also be acquired (like a right of common) by *prescription*, that is, by enjoyment, *in theory*, during time whereof the memory of man runs not to the contrary, which was fixed to commence with the reign of Richard I. See Recital to 2 & 3 Will. 4, c. 71. In practice, however, prescriptive enjoyment would have been presumed, before this act, on proof of user from a time as far back as living witnesses could speak (*Jenkins v. Harvey*, 1 C. M. & R. 894); and after twenty years' enjoyment, there being no evidence to the contrary, a presumption arose of a *lost grant*, which, though a mere fiction of law, was in general sufficient to establish the right. *Campbell v. Wilson*, 3 Ea. 294. The presumption of a grant did not arise against a remainderman whose interest was expectant upon the determination of a tenancy for life (*Barker v. Richardson*, 4 B. & Al. 579), nor against a landlord not cognizant of the adverse enjoyment. *Daniel v. North*, 11 Ea. 372; see *Gray v. Bond*, 2 Br. & B. 667; *Bright v. Walker*, 1 C. M. & R. 222. In the last-cited case, Parke, B., observed, that the act was intended to shorten in effect the period of prescription, making that possession a bar or title in itself, which was so before, only by the intervention of a jury. *Ib.* 218.

SEC. 2.—*Prescription Act, 2 & 3 Will. 4, c. 71.*

<i>Right of Common</i>	149		<i>Periods, how calculated</i>	150
<i>Effect of Thirty Years' and</i>			<i>Next before Suit</i>	150
<i>Sixty Years' Enjoyment</i>	149			
<i>Right to Ways, Easements, Water-</i>			<i>Allegation of Right—Presumption</i>	
<i>courses</i>	149		<i>from Enjoyment</i>	150
<i>Effect of Twenty Years' and</i>			<i>Time excluded from Computation</i> ...	151
<i>Forty Years' Enjoyment</i>	150		<i>In cases of Infancy, &c.</i>	151
<i>Right to Light</i>	150		<i>Action Pending</i>	151
<i>Effect of Twenty Years' Enjoy-</i>			<i>Subsisting Life Interests—</i>	
<i>ment</i>	150		<i>Tenancies</i>	151
			<i>Statute does not supersede</i>	
			<i>Common Law</i>	151

<i>Nature of Enjoyment under Sec-</i>		<i>Enjoyment as of an Ease-</i>	
<i>tion 2 of Act</i>	152	<i>ment</i>	153
<i>Licence</i>	152	<i>By Lessees</i>	153
<i>Unity of Possession</i>	152		
<i>Tenant against Landlord</i>	152	<i>Interruption of Enjoyment</i>	153
		<i>Next before Suit</i>	153
<i>Nature of Enjoyment under Sec-</i>		<i>What is an Interruption</i>	154
<i>tion 3 of Act</i>	152	<i>Who may Sue</i>	154
<i>Person claiming Right</i>	152	<i>Reversioner</i>	154
<i>Custom of London</i>	153		
<i>Interruption for One Year</i> ...	153	<i>Remedy in Equity</i>	154
		<i>Injunction</i>	154

Rights of Common.] By this act (which does not apply to Scotland, s. 9, but is extended to Ireland by the 21 & 22 Vict. c. 42), for shortening the time of prescription in certain cases, it is enacted, that no claim which may be lawfully made at the common law, by custom, prescription or grant, to any right of common or other profit or benefit, to be taken and enjoyed from or upon any land of the king, or of the Duchy of Lancaster or Cornwall, or of any ecclesiastical or lay person or body corporate, except such matters and things as are herein specially provided for, and except tithes, rent and services, shall, where such right, profit or benefit shall have been actually taken and enjoyed by any person *claiming right* thereto without interruption for the full period of *thirty years*, be defeated or destroyed by showing only that such right, profit, or benefit was first taken or enjoyed at any time prior to such period of thirty years, but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated; and when such right, profit or benefit shall have been so taken and enjoyed as aforesaid, for the full period of *sixty years*, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was taken and enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing (s. 1). In order to establish a right under the Prescription Act, it is only necessary to show that the benefit claimed has been actually enjoyed by the claimant for the requisite period as of right and not by permission, and that the right claimed is one which could have a legal origin by custom, prescription, or grant, and it is immaterial on what ground the claimant rests his alleged right to enjoy it. *Earl de la Warr v. Miles*, 17 Ch. D. 535.

This section does not apply to a right claimed by a copyholder on *his own* tenement. *Hammer v. Chance*, 11 Jur., N. S. 397. As to rights of common, see tit. "ESTATES," Chap. I., and Shelford, R. P. S., 7th ed., 38 *et seq.*

Ways, Easements and Watercourses.] No claim which may be lawfully made at the common law, by custom, prescription or grant, to any way or other easement, or to any watercourse, or the use of any water, to be enjoyed or derived upon, over or from any land or water of the king, or being parcel of the Duchy of Lancaster or Cornwall, or being the property of any ecclesiastical or lay person, or body cor-

porate, when such way or other matter as herein last before mentioned shall have been actually enjoyed by any person *claiming right* thereto without interruption for the full period of *twenty years*, shall be defeated or destroyed by showing only that such way or other matter was first enjoyed at any time prior to such period of twenty years, but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated; and where such way or other matter as herein last before mentioned shall have been so enjoyed as aforesaid for the full period of *forty years*, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing (s. 2). An acknowledgment by A., that new windows overlooking the land of B., are opened with B.'s consent, A. agreeing to block them up at any time at B.'s request, and paying a nominal rent for the indulgence, is a consent or agreement within this section, and where the rent was paid up to a period within 20 years, it was held that A. had acquired no statutory right as against B. *Bewley v. Atkinson*, 13 Ch. D. 283.

The word easement, in this section, applies only to affirmative easements. *Ante*, p. 139; *Harbidge v. Warwick*, 3 Ex. 557; *Murgatroyd v. Robinson*, 7 E. & B. 391.

Light.] When the access and use of light to and for any dwelling-house, workshop or other building shall have been actually enjoyed therewith for the full period of *twenty years* without interruption, *the right* thereto shall be deemed *absolute* and *indefeasible*, any local usage or custom to the contrary notwithstanding, unless it shall appear that the same was enjoyed by some consent or agreement, expressly made or given for that purpose by deed or writing (s. 3).

Periods, how calculated.] Each of the periods of years mentioned in the respective sections shall be deemed to be the period *next before* some suit or action, wherein the claim or matter to which such period may relate shall have been or shall be brought in question, and nothing is to be deemed an interruption unless acquiesced in for a year after the party interrupted had notice of it and of the party making or authorizing it (s. 4). *Bennison v. Cartwright*, 5 B. & S. 1; *Glover v. Coleman*, L. R. 10 C. P. 108; *Comp. Gale v. Abbot*, 8 Jur., N. S. 987.

Allegation of Right—Presumption from Enjoyment.] In actions and pleadings a general allegation of right, which was sufficient before the act is so still, and where before the act it was necessary to allege an immemorial right, it is now sufficient to allege enjoyment *as of right* (s. 5), but this is not necessary in the case of right to *light*. See *post*, p. 152. No presumption is to be made upon proof of enjoyment for less than the statutory period (s. 6). A person who alleges a twenty years' enjoyment of light must prove affirmatively a *prima facie*

case of enjoyment. But, when he has done this, the *prima facie* case may be displaced, either by proving the existence of an obstruction at the commencement of the twenty years, or a statutory interruption of the enjoyment at some time during the twenty years, or by showing by other evidence that the evidence of enjoyment cannot be relied upon. *Seddon v. Bank of Bolton*, 19 Ch. D. 462. *Semble*, that the person who asserts that an alleged twenty years' enjoyment of light has been interrupted during that period is bound, under sect. 4 of the Prescription Act, to prove that some notice (other than that which arises from the mere existence of a physical obstruction) was given to the person interrupted, of the person by whose authority the interruption was made. *Id.*

Time excluded from Computation.] The time is not to be computed during which any person otherwise capable of resisting the claim shall be an infant, idiot, insane, *feme covert* or tenant for life, or during which any action, &c., shall have been pending and diligently prosecuted until abated by death, *except where the claim is made infeasible by the act* (s. 7), as it is in the case of the enjoyment of light for twenty years, and in the case of the enjoyment of other easements mentioned in sect. 2 for forty years. See *Clayton v. Corby*, 2 Q. B. 813; *Pye v. Mumford*, 11 Q. B. 666. It is provided, however, that when any land, or water upon over or from which, any such way or other convenient watercourse or use of water shall have been or shall be enjoyed or derived, hath been or shall be held under or by virtue of any term of life, or any term of years exceeding three years from the granting thereof, the time of the enjoyment of any such way or other matter as herein last before mentioned, during the continuance of such term, shall be excluded in the computation of the said period of *forty years*, in case the claim shall *within three years* next after the end or sooner determination of such term be resisted by any person entitled to any reversion expectant on the determination thereof (s. 8). This is not to be construed in the strict sense of the term, so as not to include a remainder. *Laird v. Briggs*, 16 Ch. D. 440. S. C. on App. 19 Ch. D. 22. See *Bright v. Walker*, 1 C., M. & R. 219; *Wright v. Williams*, 1 M. & W. 77. But this section does not apply to the computation of the term of *twenty years*. *Palk v. Shinner*, 18 Q. B. 568. See as to this case a valuable note in Gale on Easements, 5th ed., p. 197, n. (d). Mr. Gale would read the word "*convenient*" as *convenience*, which, in old books, is synonymous with easement (Easements, p. 189); the effect being that sect. 8 applies to such easements and rights as are mentioned in sect. 2. But in *Laird v. Briggs*, 19 Ch. D. 22, Jessel, M.R., observed as to this, "The court cannot change the words of the statute in the manner suggested," *ib.*, p. 27; and in his judgment he says, "That is a question which appears to me one of very considerable difficulty," *ib.*, p. 33.

The statute does not supersede the common law; therefore if a person has a prescriptive right at common law, he may still rely on that right where circumstances render it necessary to do so. See

Onley v. Gardiner, 4 M. & W. 496; *Richards v. Fry*, 7 A. & E. 698; 3 Nev. & Per. 72; *Lowe v. Carpenter*, 6 Ex. 831.

Enjoyment under Section 2.] The claim is liable to be defeated as before the act, by showing that the enjoyment was not as of right, for instance, that it was by stealth or under licence or permission (*Bright v. Walker*, 1 C., M. & R. 211; see *Holford v. Hankinson*, 5 Q. B. 584; *Mon. Can. Co. v. Harford*, 1 C., M. & R. 614; *Tickle v. Brown*, 4 A. & E. 369; *Gaved v. Martyn*, 19 C. B., N. S. 732), or that it was not one which could be lawfully made by custom, prescription or grant. *Clayton v. Corby*, 5 Q. B. 415; *Att.-Gen. v. Mathias*, 4 K. & J. 579. Where the enjoyment has commenced by permission, it is a question of fact whether it has continued by permission (*Gaved v. Martyn*, *supra*), though after an enjoyment of forty years it would be necessary, in order to defeat the claim, to show that the enjoyment was under some *deed* or *writing* (s. 2). See *Tickle v. Brown*, 4 A. & E. 369. As to the distinction between a licence which is revocable and a grant, see Shelford, R. P. S. 7th ed. 59 *et seq.*, and the cases there cited. The right claimed must not exceed the actual enjoyment or user (*Moore v. Webb*, 1 C. B., N. S. 676); and there must be user *as of right* for the statutory period against all persons. *Winship v. Hudspeth*, 10 Ex. 5. In *Hollins v. Verney*, 13 Q. B. D. 304, a right of way was claimed in respect of twenty years' user as of right. It appeared that the way had only been used by the party claiming it, for the removal of wood cut upon an adjoining close, at intervals of several years. Between these intervals the road was occasionally stopped up, but used while the wood was being cut. It was held that there had not been an uninterrupted enjoyment of the way for twenty years within the meaning of this section. Unity of possession during all or part of the period during which the user of the easement is alleged will disprove the claim. *Ante*, p. 146; *Onley v. Gardiner*, 4 M. & W. 496; *Clayton v. Corby*, 2 Q. B. 813; *Battishill v. Reed*, 18 C. B. 696. A tenant or one of two tenants holding under the same landlord cannot by user acquire an easement as against the landlord. See *Daniel v. Anderson*, 31 L. J., Ch., N. S. 610; *Gayford v. Moffatt*, L. R., 4 Ch. 133; *Outram v. Maude*, 17 Ch. D. 391. As to obstruction see *post*, p. 153.

Enjoyment under Section 3.] The difference between sections 2 and 3 is marked. The easements mentioned in the former must have been actually enjoyed by a person "*claiming right*" (see *Flight v. Thomas*, 11 A. & E. 695); but these words are not contained in the latter section, and the actual enjoyment for the statutory period gives an indefeasible right, unless there has been consent by *deed* or *writing*. See *Mayor of London v. Pewterers' Co.*, 2 Moo. & R. 409. Moreover, it is not necessary (under s. 5, *ante*, p. 150) to allege the enjoyment of light *as of right*. *Truscott v. Merchant Tailors' Co.*, 11 Ex. 855; *Frewen v. Phillips*, 11 C. B., N. S. 449; *Simper v. Foley*, 2 J. & H. 555. Nor, in order to acquire the right, is it necessary that the house

or building should be *occupied*, if fit for occupation. *Courtauld v. Legh*, L. R., 4 Ex. 126.

The local custom mentioned in this section has reference to the custom of the city of London, which was to build on the ancient foundations of a house against even the ancient lights of an adjoining house. *Truscott v. Merch. Tailors' Co.*, 11 Ex. 855; *Cooper v. Hubbuck*, 12 C. B., N. S. 456.

As the interruption mentioned in sect. 4 must be for a whole year, enjoyment for upwards of nineteen years confers the indefeasible right, though there may be an interruption acquiesced in for the remainder of the year. *Flight v. Thomas*, 8 Cl. & Fin. 231; *Eaton v. Swansea W. Co.*, 17 Q. B. 267. Enjoyment, though under licence, if by *parol* only for the statutory period of twenty years, would seem sufficient to confer an indefeasible right, for the statute requires that the licence or agreement to *defeat* the right should be by deed or writing (see Gale, *Easements*, 5th ed. 171), unlike, therefore, the easements mentioned in sect. 2, which must be enjoyed by a person *claiming right*. See *Tickle v. Brown*, 4 A. & E. 369. Unity of possession for different estates does not extinguish the easement. *Simper v. Foley*, 2 J. & H. 555. As to payment of rent for the use of lights, see *Plasterers' Co. v. Parish Clerks' Co.*, 6 Ex. 630. The right must be enjoyed as an *easement*. If the owner of a house has lights overlooking land of which he is a tenant, there is no dominant and no servient tenement, and enjoyment for twenty years will not confer the right (*Harbidge v. Warwick*, 3 Ex. 552). And where the owner of a house lets it, and his occupying tenant is also the occupier of the land over which the right would extend, such unity of possession or occupation prevents the prescriptive right being gained. *Ladyman v. Grave*, L. R., 6 Ch. 763. As a general rule, the right acquired against the owner of a leasehold interest is acquired against the owner of the reversion (*Simper v. Foley*, 2 J. & H. 555), unless in the case of lessees who hold under the same landlord, for a *tenant* cannot acquire a prescriptive right against his own landlord (*Gayford v. Moffatt*, L. R., 4 Ch. 133), though one lessee may acquire the right as against another lessee, both holding under the same landlord. *Frewen v. Phillips*, 11 C. B., N. S. 449. Where an obstruction to light is complained of, there is an injury to the right, which may be lost if the reversioner were not able to institute proceedings. *Per Jessel, M.R.*, *Mott v. Shoolbred*, L. R. 20 Eq. 22, 24.

Interruption of Enjoyment.] The enjoyment of the easement must be down to the suit or action mentioned in the 4th section. *Parker v. Mitchell*, 11 A. & E. 788; *Flight v. Thomas*, 8 Cl. & Fin. 242. And an enjoyment next before *any* action or suit in which the claim is brought in question confers the right, which may be set up in any subsequent action or suit. *Cooper v. Hubbuck*, 12 C. B., N. S. 456, *Williams, J., diss.* It is not necessary to prove it in every year of the period, but it should be shown in the first and last years of it. *Bailey v. Appleyard*, 8 A. & E. 161; *Carr v. Foster*, 3

Q. B. 581; see however *Lowe v. Carpenter*, 6 Ex. 825. The interruption mentioned in sect. 4 must be an actual *discontinuance of enjoyment* by reason of some obstruction acquiesced in for a year. *Plasterers' Co. v. Parish Clerks' Co.*, 6 Ex. 630. It must be an obstruction, not a cessation, of user by a person of his own accord. *Carr v. Foster*, 3 Q. B. 587. Whether the interruption has or has not been acquiesced in for a year, is a question of fact to be decided at law by a jury. *Bennison v. Cartwright*, 5 B. & S. 1. Placing carts in a passage over which there is a right of way, and allowing them to remain stationary there, is an obstruction of the right. *Thorpe v. Brumfitt*, L. R. 8 Ch. 650.

A reversioner or landlord may sue in respect of his reversion where the interference is of a permanent nature, or, as it may perhaps be stated, where the act is calculated to abridge or interfere with the estate of the reversioner (see *per Willes, J.*, *Bell v. Midland R. Co.*, 10 C. B., N. S. 287; *Mct. Assn., &c. v. Petch*, 5 C. B., N. S. 504; and the cases collected and commented on, Gale, Easements, 5th ed. 649, n.); but if he do not sue, the uninterrupted user, for the period which is made a statutory bar, will be a bar to him, *subject to sect. 8 where that applies*. *Ante*, p. 151. The grantee of a right of way which has been obstructed by the grantor has a right to deviate over the grantor's land; and the grantee is entitled to have this right protected so long as the obstruction exists, without the necessity of proceeding against the grantor for the removal of the obstruction. Notice of right of way, and also of an obstruction to it is notice of the grantee's right of deviation. *Selby v. Nettlefold*, L. R. 9 Ch. 111. Where a public street was improperly used as a stable-yard for the purpose of loading vans and carts, it was held that the nuisance to the neighbouring houses was not so permanent as to entitle a reversioner to an injunction, although the tenants of the houses would have been entitled. *Mott v. Shoolbred*, L. R., 20 Eq. 22, 24.

Remedies in Equity.] The usual remedy in equity for an interference with an easement is by an injunction. Many examples of the application of this remedy will be found in the following pages. Courts of equity have now also power to award damages where it has jurisdiction to grant injunctions against the commission or continuance of any wrongful act. *Ante*, p. 99; and see the cases *post*, under the several sections. In granting an injunction or awarding damages the court will exercise a reasonable discretion. There is no general rule and each case must depend upon its own special circumstances. See *Aynsley v. Glover*, L. R., 18 Eq. 544; *Smith v. Smith*, L. R. 20 Eq. 500; *Krehl v. Burrell*, 7 Ch. D. 551; *Holland v. Worley*, 26 Ch. D. 578.

CHAPTER IV.

OF PARTICULAR EASEMENTS.

SEC. 1.—*Right of Way.*

<i>Limited by User</i>	155	<i>Agricultural to General User</i>	156
<i>Temporary use of New Way</i>	155	<i>Grant of Right of Way per se</i>	156
<i>Abandonment</i>	155	<i>Drainage</i>	156
<i>Modern Improvements</i>	155	<i>Effect of General Words</i>	157
<i>Extending User</i>	156	<i>Grant of Land and Appurtenances</i>	157

In the preceding chapter the effect of prescription and of the Prescription Acts has been stated. In this chapter it is proposed shortly to consider the most important kinds of easements and rights in the nature of easements and the various incidents affecting them.

Rights of way are of different kinds, and one species of way, *e.g.*, a carriage way, does not necessarily include another, though of an inferior description, *e.g.*, a drift or cattle way. *Ballard v. Dyson*, 1 Taun. 283; see *Higham v. Rabett*, 5 Bing. N. C. 622. And user for some purposes does not prove user for other purposes. *Cowling v. Higginson*, 4 M. & W. 245. The extent of the right is a question of fact, *ib.* Thus, a right of way to carry coal only will be restricted to coal (*Iveson v. Moore*, 1 Salk. 15), and a right to carry all articles except coal will not be extended to coal. *Marquis Stafford v. Coyney*, 7 B. & C. 257; see *Brunton v. Hall*, 1 Q. B. 792. A claim of right of way to a place is not supported by proof of a right of way which falls somewhat short of it. *Wright v. Ratray*, 1 East, 377. The temporary use of a new way for convenience and non-user of the old way, though for upwards of twenty years, is not an abandonment of the latter. *Ward v. Ward*, 7 Exch. 839; see *Lovell v. Smith*, 3 C. B., N. S. 120. And a right of way is not necessarily lost, even by disuse for a considerable period, where no adverse right is gained. *Ward v. Ward*, 7 Ex. 838; *Cook v. Mayor of Bath*, L. R., 6 Eq. 177. But a permanent obstruction acquiesced in for twenty years will be evidence of an abandonment. *Bower v. Hill*, 1 B. N. C. 555. A right of way may, in general, be used with the advantage of modern improvements. Thus, under a right of a sufficient wayleave for coals, a way may be made for carrying them though of a kind not in use when the right was granted. *Senhouse v. Christian*, 1 T. R. 560; *Dand v. Kingscote*, 6 M. & W. 174. A grantee of a right to make a way over the land of another is not necessarily bound to make the shortest way, if a more circuitous one is fairly more expedient, as where, by means of it, a lock is avoided. *Richards v. Richards*, Johns. 255. There has been some conflict of judicial opinion on the question how far an alteration can be made in the user of a way. Thus, it has been held that there must be no material alteration in the user of a way. A way to a wood-house cannot be used as a way to a dwelling-house. *Allan*

v. *Gomme*, 11 A. & E. 759. In *Williams v. James*, L. R., 2 C. P. 577, 580, Bovill, C.J., observed, "Such a right" (of way) "cannot be increased so as to affect the servient tenement by imposing upon it any additional burthen." And Willes, J., said, "Where a way has to be proved by user, you cannot extend the purposes for which the way may be used," *ib.*, p. 582. See *Ballard v. Dyson*, 1 Taun. 279: *Cowling v. Higginson*, 4 M. & W. 245. Again it has been held that where a road had been immemorially used to a farm not only for usual agricultural purposes, but in certain instances for carrying building materials to enlarge the farmhouse and rebuild a cottage on the farm, and for carting away sand and gravel dug out of the farm:—this did not establish a right of way for carting the materials required for building a number of new houses on the land. *Wimbledon, &c., Conservators v. Dixon*, 1 Ch. D. 362. And in *Bradburn v. Morris*, *Morris v. Bradburn*, L. R., 3 Ch. D. 812, it was held that user of a road for twenty years or more for agricultural purposes, did not of itself prove a right of user for the purpose of getting minerals: and see *Corporation of London v. Riggs*, 13 Ch. D. 798. In *Cannon v. Villars*, 8 Ch. D. 415, Jessel, M.R., observed in effect, p. 420, "The grant of a right of way *per se* and nothing else, may be a right of footway, or it may be a general right of way; which it is, is a question of construction which depends on circumstances, one very material circumstance being the nature of the *locus in quo* over which the right of way is granted." And in connection with this subject of enlargement of user of an easement, it may be mentioned that a right to drain into a moat or ditch from particular premises cannot be enlarged to a right to drain from additional premises. *Wood v. Saunders*, L. R., 10 Ch. 582; see *United Land, &c., Co. v. Gr. East Ry. Co.*, *ib.* 586.

On the other hand, in *Henning v. Burnet*, 8 Ex. 187, 194, Parke, B., seems not altogether to have approved of the decision in *Allan v. Gomme*, *sup.*, and in the later case of *Finch v. Great Western Ry. Co.*, L. R., 5 Ex., 254, Stephen, J., delivering the judgment of the court, observed (p. 259), that *Allan v. Gomme* established "no general principle, but turned on the construction of the deed referred to" (in that case), "bearing no resemblance to the grant in the present case." In *Finch v. Great Western Ry. Co.*, *supra*, it was held that where there is an express grant of a private right of way to a particular place to the unrestricted use of which the grantee of the right of way is entitled, the grant is not to be restricted to access to the land for purposes for which access would be required at the time of the grant: see *Newcomen v. Coulson*, 5 Ch. D. 133. In *Bayley v. Great Western Ry. Co.*, 26 Ch. D. 434, a railway company purchased land and a stable on it of A., who retained the adjoining land over which he had previously made a road to the stable. It was held that the railway company had a right to use the road for access to the stable so long as they used it as a stable. But the court did not decide as to their right after they ceased so to use it. It may be observed on this point that where the grant of a right of way rests upon an implied contract not expressly stipulating for *any kind* of user, it is not unreasonable to

suppose that the parties must be taken to have contracted with reference to the particular user existing at the time of the contract, and such user only. And as regards the operation of *general words* as carrying a right of way, the grant being of ways *used and enjoyed* with the granted land, can scarcely be reasonably extended, say, from an agricultural way to a way for general purposes, as *such a way* was never *used or enjoyed* up to the time of the grant. It may here be mentioned that a contract to sell land *with the appurtenances* does not include a right to a way to the land sold which the vendor has used over adjoining land of his own. *Bolton v. Bolton*, 11 Ch. D. 968. See *Harding v. Wilson*, 2 B. & C. 96; *Barlow v. Rhodes*, 1 C. & M. 439. So that, if in such a case general words are introduced which would carry a right of way over the land retained by the vendor, they should be struck out. *Barkshire v. Grubb*, 18 Ch. D. 616. It should be further noted that by the Conveyancing and Law of Property Act, 1881, a conveyance of land will carry such rights unless excluded; see s. 6; *Watts v. Nelson*, L. R., 6 Ch. 166, and *Kay v. Orley*, L. R., 10 Q. B. 360, *ante*, p. 147.

SEC. 2.—Right to Light, Air and Prospect.

<i>Light</i>	157	<i>Light—continued.</i>	
<i>Nature of Right</i>	157	<i>Remedy—Injunction</i>	160
<i>Disuser</i>	157	<i>Slight Obstruction</i>	160
<i>Ancient Window—New Use</i> ...	157	<i>Obstruction complete</i>	160
<i>New Windows</i>	158	<i>Public Companies</i>	160
<i>Alteration</i>	158		
<i>Acquiescence</i>	159	<i>Prospect—Air</i>	162
<i>Obstruction—Direct—Lateral</i> ..	159	<i>Not the subject of Prescription</i> ..	162
<i>Amount of Damage</i>	159	<i>Not an Easement</i>	162

Light.] There is no common law right to the uninterrupted access of light, and unless such right has been acquired under the statute or by grant, any one may build on his own land, though his neighbour's light may thereby be interfered with. The right, however, will be lost if there has been no user for a long time; for instance, if the window admitting the light has been bricked up for twenty years (*Lawrence v. Obee*, 3 Camp. 514), or for a less period, where an *intention* to abandon the right is clearly shown. *Moore v. Rawson*, 3 B. & C. 332; *Stokoe v. Singers*, 8 E. & B. 31; cons. *Tapling v. Jones*, 11 H. L. C. 290; and comp. *Crossley v. Lightowler*, L. R., 3 Eq. 279; 2 Ch. 482; *Cook v. Mayor, &c. of Bath*, L. R., 6 Eq. 177. The right is not lost merely by the owner of the dominant tenement slightly obscuring his own lights. *Arcedeckne v. Kelk*, 2 Giff. 683; *Staight v. Burn*, L. R., 5 Ch. 163. Where the owner of a building having ancient lights enlarges or adds to the number of windows, he does not thereby preclude himself from obtaining an injunction to restrain an obstruction of the ancient lights. *Aynsley v. Glover*, L. R., 18 Eq. 544. He was not, however, held entitled to use an ancient light *in a new way*; for instance, a malt-house window as a dwelling-house window. *Martin v. Goble*,

1 Camp. 320; *Lanfranchi v. Mackenzie*, L. R., 4 Eq. 421, 429. But in *Moore v. Hall*, 3 Q. B. D. 178, *Martin v. Goble*, *sup.*, was dissented from, and it was held that in an action for the obstruction of ancient lights, the jury were to consider whether there had been a sensible diminution of light, so as to make the plaintiff's premises less available for the purposes of occupation or business, to which they were then, or *might thereafter*, be made applicable, and that the damages were to be estimated according to the diminution of value of the premises for such purposes. An ancient window may be replaced by one of the same size, which will have the same privilege as the old one (see *Luttrell's Case*, 4 Rep. 86; *Hutchinson v. Copestake*, 9 C. B., N. S. 863), but the dominant owner must not exceed the old limits (*Turner v. Spooner*, 1 Dr. & Sm. 467; *Curriers' Co. v. Corbett*, 2 Dr. & Sm. 355; and see *Martin v. Headon*, L. R., 2 Eq. 425), otherwise the occupier of the servient tenement may obstruct such parts of the new window or windows as are not privileged, but he must be careful in so doing not to obstruct (a matter in general of great difficulty) the privileged portion. *Tapling v. Jones*, 11 H. L. C. 290; overruling on this point *Renshaw v. Bean*, 18 Q. B. 112; and *Davies v. Marshall*, 1 Dr. & S. 557; see *Weatherley v. Ross*, 1 H. & M. 349; *Wilson v. Townend*, 1 Dr. & S. 324; *Binckes v. Pash*, 11 C. B., N. S. 324; *Cooper v. Hubbuck*, 30 Bea. 160. There must be one window at least in the new building coincident with the ancient window. See the judgments in *Newson v. Pinder*, 27 Ch. D. 43. Where a building containing ancient lights was pulled down and replaced by another, in which the front was set back and a dormer window converted into a skylight, it was held that the right to access of light was not lost. *Nat. Prov. &c. Company v. Prud. Assurance Company*, 6 Ch. D. 757. Any substantial alteration in the plane of the windows destroys the right. *Ib.*, per Jessel, M.R. The right remains where any portion of the light which would have passed over the servient tenement through the old windows passes also through the new windows. *Ib.*, per Fry, J.

Setting back an ancient window does not affect the rights attaching to it (*Bullers v. Dickinson*, 29 Ch. D. 155), neither does the building of a new window before it in a new wall, although at a different angle. *Barnes v. Loach*, 4 Q. B. D. 494. But in the latter case, if the new window could be obstructed without interfering with the light received through the old one, *qu.* See *Tapling v. Jones*, *sup.* The doctrine of *Tapling v. Jones* applies to the equitable remedy by injunction as well as to the legal remedy. *Staight v. Burn*, L. R., 5 Ch. 163; overruling *Heath v. Bucknall*, L. R., 8 Eq. 1. The fact that there are no *existing* windows the access of light to which will be interfered with, is no objection to the granting an injunction if the right to access of light has not been abandoned. *Ecclesiastical Commissioners for England v. Kino*, 14 Ch. D. 213; see *Staight v. Burn*, L. R., 5 Ch. 163. The Ecclesiastical Commissioners have power to sell the site of a church which has been pulled down, with all the easements which had been enjoyed by the church, so that if the church had ancient lights the purchaser would have the benefit of them. *Ib.*

And, *semble*, that such an easement might be effectually created. *Ib.* The owner of the servient tenement will be bound by acquiescence in the alteration of ancient lights. *Cotching v. Basset*, 32 Bea. 101; *Johnson v. Wyatt*, 2 D., J. & S. 18. As to the doctrine of acquiescence, see the observations of Fry, J., in *Willmott v. Barber*, 15 Ch. D. 96, 105. A landlord cannot, nor can any one claiming under him, obstruct new lights erected pursuant to an agreement with him by his tenant. *Davies v. Marshall*, 1 Dr. & S. 557. As to an agreement by way of compromise between A. claiming a right to light, and B. disputing it, being binding on a purchaser from B., see *Allen v. Seckham*, 11 Ch. D. 790. As to cases where there are several grantees claiming under the same grantor, see *ante*, p. 144.

With regard to the important question, what amount of damage or injury must be sustained to give a right of action or suit, it was observed by Wood, V.-C., in *Dent v. Auction Mart Co.* (L. R., 2 Eq. 245), that the doctrine established in *Att.-Gen. v. Nichol* (16 Ves. 343), and recognized by Lord Westbury, in *Jackson v. D. of Newcastle* (3 D., J. & S. 275), was this, that "there are many obvious cases of new buildings darkening those opposite to them, but not in such a degree that an injunction could be maintained or an action upon the case, which however might be maintained in many cases which would not support an injunction." Wood, V.-C., further observed, adopting the ruling of Best, C.J., in *Back v. Stacey* (2 C. & P. 465), "that at law, in order to give a right of action and sustain the issue, there must be a substantial privation of light, sufficient to render the occupation of the house uncomfortable, and [or] to prevent the plaintiff from carrying on his accustomed business on the premises as beneficially as he had formerly done," substituting *or for and*, the word used by the Chief Justice. L. R., 2 Eq. 245, acc. *Aynsley v. Glover*, L. R. 18 Eq. 544, 552. The Vice-Chancellor added, that as to the relief in equity "where substantial damages would be given at law as distinguished from some small sums of 5*l.*, 10*l.*, or 20*l.*, the Court would interfere." *Ib.* 246. In *Robson v. Whittingham* (L. R., 1 Ch. 442), also, it was held, that there must be a *material* (see judgment of Bruce, L.J.) amount of damage to support a bill for an injunction in such cases. See also *Martin v. Headon*, L. R., 2 Eq. 425, 434; *Lyon v. Dillimore*, 14 W. R. 511; *Webb v. Hunt*, *ib.* 725; *Stokes v. City Off. Co.*, 2 H. & M. 650; *Durell v. Pritchard*, L. R., 1 Ch. 244; comp. *Clarke v. Clark*, *ib.* 16; *Beadel v. Perry*, L. R., 3 Eq. 467; *Kino v. Rudkin*, 6 Ch. D. 160. The right is the same whether the obstruction be lateral or not. *Kelk v. Pearson*, L. R., 6 Ch. 809. See *Staight v. Burn*, L. R., 5 Ch. 163. But a greater amount of evidence is needed to prove a material injury to light by lateral than by direct obstruction, more especially when the buildings are erected not upon an open space, but one obstructed by buildings. *City of Lon. Brew. Co. v. Tennant*, L. R., 9 Ch. 212, 220. The owner of a building containing ancient lights is entitled to all the light he enjoyed previous to the interruption complained of, without any *material* diminution of it. *Yates v. Jack*, L. R., 1 Ch. 295; overruling on this

point *Jackson v. D. of Newcastle*, 3 D., J. & S. 275. The Court will have regard not merely to the present but also possible use of the property. *Aynsley v. Glover*, L. R., 18 Eq. 544. There is no distinction between the rights in town and in the country. *Martin v. Headon*, *ib.* 425; *Dent v. Auction Mart Co.*, L. R., 2 Eq. 238. The dictum *contra* in *Clarke v. Clark* (L. R., 1 Ch. 16) cannot, it would seem, be supported. Cons. however *Robson v. Whittingham*, *ib.* 442. The statutory regulation as to the height of buildings in streets is not to be taken as limiting the right by prescription to ancient lights, but such right depends upon the degree and amount of obscuration in each particular case. *Theed v. Debenham*, 2 Ch. D. 165. There is no conclusion of law that a building will not obstruct the light coming to a window if it permits the light to fall on the window at an angle of not less than 45° from the vertical. The question of the amount of obstruction is always a question of fact which depends on the evidence in each case, and a plaintiff whose ancient light is obstructed is entitled to a judgment in general terms. *Parker v. First Avenue Hotel Company*, 24 Ch. D. 282; see *Hackett v. Baiss*, L. R., 20 Eq. 494. As to an actual inspection by the judge, see *Jackson v. D. of Newcastle*, 10 Jur., N. S. 688. The Metropolitan Building Act, 18 & 19 Vict. c. 122, s. 83, authorizing the erection of certain buildings, all damage being made good to the adjoining premises, does not authorize the obstruction of ancient lights. *Crofts v. Haldane*, L. R., 2 Q. B. 194; see *Weston v. Arnold*, L. R., 8 Ch. 1084.

The remedy in equity is by injunction, and the Court has now jurisdiction to decide all questions of fact and award damages (*ante*, pp. 2—99). The Court will sometimes direct an inquiry as to the amount of damage sustained in lieu of granting an injunction. *Isenberg v. East India, &c. Co.*, 10 Jur., N. S. 221; *Curriers' Co. v. Corbett*, 2 Dr. & S. 355; *Senior v. Pawson*, L. R., 3 Eq. 330. Where a plaintiff has established his right to a perpetual injunction against the defendant the Court had no power under Lord Cairns' Act to oblige him against his will to accept damages in lieu of the injunction. *Krehl v. Burrell*, 11 Ch. D. 146. See *ante*, p. 99. The Court, in exercising its discretion to award damages in substitution for an injunction, in the case of a substantial interference with a plaintiff's ancient lights, will not compel him to sell to the defendant if his building would render the plaintiff's property absolutely useless, but if it would continue substantially useful, the Court may award damages. *Holland v. Worley*, 26 Ch. D. 578. If after notice of plaintiff's rights, the defendant continues and completes the erection of the building complained of, the plaintiff's right being established at the trial, and a suggested compromise not being accepted by the defendant, a mandatory injunction will be granted. *Krehl v. Burrell*, 7 Ch. D. 551. In *Smith v. Smith*, L. R., 20 Eq. 500, the defendant raised a low party wall distant only eight feet from the plaintiff's windows to a height of twenty-six feet, and the plaintiff was held to be entitled to a mandatory injunction for the removal of the additional building.

Where the court was not satisfied from the evidence whether the

wall proposed to be built by the defendant would or not be a material obstruction to the plaintiff's lights, the court directed a temporary screen to be erected to the height of the proposed wall, and appointed a surveyor to report on the effect. *Leech v. Schweder*, L. R., 9 Ch. 463. If a mandatory injunction is not granted, an inquiry as to damages may be directed, though not prayed by the bill. *Lady Stanley of Alderley v. Earl of Shrewsbury*, L. R., 19 Eq. 616.

Where there is a slight obstruction to an easement, for instance, an ancient right to light, if it has been acquiesced in for a considerable period, for instance, eight years, although the court will not grant an injunction, it is a case for inquiry as to damages. *Gaunt v. Fynney*, L. R., 8 Ch. 8. There is no difference in the right of an owner of land to the ordinary easement of light, whether acquired by twenty years' user or grant; and if the grant is accompanied by a covenant for quiet enjoyment of the premises, such covenant does not enlarge the right of the covenantee so as to entitle him to an injunction in equity to restrain an obstruction where the damage is not sufficient to enable him to maintain an action at law. But otherwise where the right to light claimed is not the ordinary easement, but a special right created by the covenant; in which case a court of equity will grant an injunction without regard to the amount of damage. *Leech v. Schweder*, L. R., 9 Ch. 463.

Although the obstruction may be complete before the bill is filed, that is not of itself sufficient to disentitle the plaintiff to a mandatory injunction; but in such cases, to induce the court to grant it, the damage must be very serious (*Durell v. Pritchard*, L. R., 1 Ch. 244; see *Curriers' Co. v. Corbett*, *sup.*), and the party applying for it must show that he will sustain *substantial damage*. See *Smith v. Owen*, 14 W. R. 422; *Robson v. Whittingham*, L. R., 1 Ch. 442; consider *Yates v. Jack* and the cases *ante*, p. 159, and in such a case the court may give damages. *City of London Brew. Co. v. Tennant*, L. R., 9 Ch. 212. The defendant is at liberty to propose a scheme with reference to the means of obviating the obstruction or otherwise. *Stokes v. City Off. Co.*, 2 H. & M. 650. It is no objection to the relief being granted, that from accidental clearances in the neighbourhood the plaintiff has acquired more light than he has lost by the erection of the defendant's buildings. *Dyers' Co. v. King*, L. R., 9 Eq. 438.

An easement is an interest in land, and if it be injuriously affected in consequence of the acts of a company or authority acting under the provisions of an act of parliament, so that but for the act an action would lie for the injury occasioned, a right to compensation arises under the Lands Clauses Consolidation Act, 8 & 9 Vict. c. 18. If, for instance, the access of light has been lessened, the party thereby affected is entitled to compensation, though from the accidental increase of value of property in the neighbourhood, the saleable value of it may not be diminished. *Eagle v. Charing Cross R. Co.*, L. R., 2 C. P. 638; see *Beckett v. Mid. R. Co.*, L. R., 3 C. P. 82.

Prospect—Air.] A right to a particular prospect cannot be acquired by prescription, but only by grant or agreement by the owner of the servient tenement that he will do nothing to obstruct it. *Att.-Gen. v. Doughty*, 2 Ves. sen. 453; *Squires v. Campbell*, 1 M. & C. 459; see *Aldred's case*, 9 Rep. 58 b; *Tulk v. Moxhay*, 2 Ph. 774; *Butt v. Imp. Gas Co.*, L. R., 2 Ch. 158—161. And if a person make a representation that a particular view cannot be obstructed by building, upon the faith of which representation a purchase is made or lease taken, he will not himself be allowed to do any act contrary to the representation. *Piggott v. Stratton*, 1 D., F. & J. 33. A right to air and wind cannot be acquired by prescription or presumption of grant arising from twenty years' enjoyment, and such a right is not an easement within the 2 & 3 Will. 4, c. 71, s. 2. *Webb v. Bird*, 13 C. B., N. S. 841; *Bryant v. Lefever*, 4 C. P. D. 172; see, however, the judgment of Blackburn, J., in the former case as to the acquisition of a common law right to air through a window, and the judgment of Wood, V.-C., in *Dent v. Auction Mart Co.*, L. R., 2 Eq. 252. "The nature of the case which would have to be made for an injunction by reason of the obstruction of air is *toto cælo* different from the case which has to be made for an injunction in respect of light. It is only in very rare and special cases involving danger to health, or at least something very nearly approaching it, that the court would be justified in interfering on the ground of diminution of air." *Per* Lord Selborne, L.C., *City of London Brew. Co. v. Tennant*, L. R., 9 Ch. 221.

SEC. 3.—Rights in respect of Water.

<i>Where not Easements</i>	162	<i>Where Rights are Easements</i>	165
<i>Is jure naturæ</i>	162	<i>Easements—Watercourses</i>	165
<i>Right of Interference</i>	162	<i>Unreasonable Use</i>	165
<i>Not to be exercised to injury of</i>		<i>Right to divert Water</i>	165
<i>others</i>	163	<i>Right to discharge Water</i>	165
<i>Stream dividing Lands of dif-</i>		<i>Right to Pollute Streams</i>	166
<i>ferent Owners</i>	163	<i>Artificial Watercourse</i>	166
<i>Tidal Navigable Rivers</i>	163	<i>Water flowing from Lock or</i>	
<i>Underground Stream</i>	164	<i>Canal</i>	166
<i>Wells, Ponds, &c.</i>	164	<i>Alteration in mode of Enjoy-</i>	
<i>Right of Drainage</i>	165	<i>ment</i>	166
<i>Percolating Surface Water</i>	165	<i>Natural Interruption</i>	166

Where the Rights are not Easements.] The right to use water (in a reasonable and proper manner) flowing in a natural stream is enjoyed *jure naturæ* by the owners of the land through which it flows, and does not depend upon prescription (*Wood v. Waud*, 3 Ex. 748; *Chasemore v. Richards*, 7 H. L. C. 349; *Sampson v. Hoddinott*, 1 C. B., N. S. 590; *Rameshur, &c. v. Koonj, &c.*, 4 App. C. 121); and to enforce the right it is unnecessary to show *special* damage in the infringement of it. *Ib.*; *Miner v. Gilmour*, 12 Moo. P. C. 156. As soon as the owner of land on a stream has appropriated the water to a beneficial use he may

sue for the injury done to him in respect of such new use. *Mason v. Hill*, 5 B. & Ad. 1; *Holker v. Poritt*, L. R., 10 Ex. 59. Railway companies, as riparian owners, are entitled to take a reasonable quantity of water for the purpose of supplying their engines and for the general purposes of their stations. *Earl of Sandwich v. G. N. Ry. Co.*, 10 Ch. D. 707. No rights can be granted by a riparian proprietor to a non-riparian proprietor (*Stockport Waterworks Co. v. Potter*, 3 H. & C. 300; *Nuttall v. Bracewell*, L. R., 2 Ex. 1), so as to put the latter in the position of the former. *Kensit v. G. E. Ry. Co.*, 27 Ch. D. 122, 132. In this case, however, it was held that where A., with the licence of B., took water from a stream, returning it unpolluted and undiminished, a lower riparian owner was not entitled to an injunction against either A. or B. See *E. Norbury v. Kitchin*, 15 L. T., N. S. 501. In *Ormerod v. Todmorden Co.*, 11 Q. B. D. 155, it was held that a riparian owner cannot, except as against himself, confer on one who is not a riparian owner any right to use the water of the stream, and any user by a non-riparian proprietor, even under a grant from a riparian owner, is wrongful if it sensibly affects the flow of the water by the lands of other riparian proprietors. See *Holker v. Poritt*, L. R., 8 Ex. 107. The right to the use of flowing water does not extend to the user of the water to the prejudice of the rights of the riparian owners of the land above or below, as by unreasonably diminishing or diverting it (see the judgment, *Miner v. Gilmour*, *sup.*; *Embrey v. Owen*, 6 Ex. 353; *Norbury v. Kitchin*, 9 Jur., N. S. 132; *Hodgkinson v. Ennor*, 4 B. & S. 229; *Elwell v. Crowther*, 31 Bea. 163), altering it or polluting it (*Wood v. Waud*, *sup.*; *Kensit v. G. E. Ry. Co.*, 23 Ch. D. 566, unless in such cases the user is by virtue of some prescriptive right or agreement, or local custom. *Wright v. Howard*, 1 S. & S. 190; *Hall v. Lund*, 1 H. & C. 676.

The formation of a reservoir by a riparian owner in order to supply a neighbouring town with water is not a reasonable user of a stream. *Swindon Waterworks Co. v. Wilts & Berks Canal Co.*, L. R., 7 H. L. 697. As to the pollution of one well by the owner of another, see *Ballard v. Tomlinson*, 29 Ch. D. 115, *post*, sec. 5. The authority over sewers, and the drainage powers given by Parliament to local boards, do not authorize the committal of a nuisance by the boards in their exercise of such powers. *Att.-Gen. v. Hackney Local Board*, L. R., 20 Eq. 626. As to a right to have water diverted so as not to flow on land, see *Mason v. Shrews. & Heref. Ry. Co.*, L. R., 6 Q. B. 579. Where the stream divides the lands of two conterminous proprietors, each is *primâ facie* the owner of the bed of the stream *ad medium filum aquæ*, but neither can use it in such a way as to interfere with the natural flow of the stream. *Bickett v. Morris*, L. R., 1 H. L. Sc. 47. As regards tidal and navigable rivers the principle applicable to them was thus stated by Lord Cairns, L.C. (*Lyon v. Fishmongers' Co.*, 1 App. C. 674): "The riparian owner on a navigable river, in addition to the right connected with navigation to which he is entitled as one of the public, retains his rights as an ordinary riparian owner, underlying and controlled by, but not ex-

tinguished by, the public right of navigation." In this case it was held that the right of navigating a tidal river is common to the subjects of the realm, but it may be connected with a right to the exclusive access to particular land on the bank of the river, and the latter is a private right to the enjoyment of the land, the invasion of which may form the ground for an action for damages, or for an injunction. The right of a riparian owner to the use of the stream does not depend on the ownership of the soil of the stream. In *Orr-Ewing v. Colquhoun*, 2 App. C. 839, it was held that a riparian owner (on both banks) was entitled to erect a bridge over a navigable river provided he did not in so doing interfere with the navigation. The facts in this case must be collected from the judgments. See the prior decisions of *Rose v. Groves*, 5 M. & Gr. 613; *Kearns v. Cordwainers' Co.*, 6 C. B., N. S. 388; *Att.-Gen. v. Conservators of the Thames*, 1 H. & M. 1, and *Marshall v. Ulleswater Co.*, L. R., 7 Q. B. 166. An owner of land at the side of a public navigable river has no right to erect on the bed of the river, for the benefit of his own trade, any structure, whether any actual obstruction to the navigation of the river will or will not be thereby occasioned; and any benefit to his own trade is too remote to be held for the advantage of the public generally, and so to justify the erection. *Att.-Gen. v. Terry*, L. R., 9 Ch. 423; in which *Rex v. Russell*, 6 B. & C. 566, was disapproved of. See *Att.-Gen. v. E. of Lonsdale*, L. R., 7 Eq. 377. In *Original Hartlepool Coll. Co. v. Gibb*, 5 Ch. D. 713, it was held that a navigable river is a public highway, navigable by all her Majesty's subjects in a reasonable manner and for a reasonable purpose, and that a riparian owner has a right to moor a vessel of ordinary size alongside his wharf for the purpose of loading or unloading, at reasonable times and for a reasonable time, even though the vessel may overlap the premises of another, though such vessel would not be allowed to interfere with the proper right of access to the neighbouring premises if used as a wharf, nor to the free entrance to or exit from such premises, if used as a dock, by other vessels. There may exist an interest in a river without any property in the bed or soil; for instance, where owners of lands adjoining a river have watering places for cattle; and this interest is sufficient to give a right of action for fouling the water. *Oldaker v. Hunt*, 6 D., M. & G. 376.

The principle of the right to the use of flowing water by a riparian proprietor applies, though the stream may for part of its course flow underground (*Hodgkinson v. Ennor*, 4 B. & S. 229; *Grand Junc. Can. Co. v. Shugar*, L. R., 6 Ch. 483); but it must be a clear and defined stream throughout: the principle does not apply to unseen underground water or springs, though flowing on towards a stream; therefore the owner of land in which there is a well fed from such sources has no right, except by grant, prescription or agreement, to prevent its diversion or abstraction by the act of the owner of *other land*, for instance, in digging a well in it or the like. *Acton v. Blundell*, 12 M. & W. 324; *Chasemore v. Richards*, 7 H. L. C. 349; *Ennor v. Barwell*, 1 D., F. & J. 529. The case of *Dickinson v. Gd. Junc.*

Can. Co. (7 Ex. 282) is *contrà*, but on this point is overruled. *Chesmore v. Richards*, *sup.*; *Grand Junc. Can. Co. v. Shugar*, L. R., 6 Ch. 483; see *Arkwright v. Gell*, 5 M. & W. 203; *Greatrex v. Hayward*, 8 Ex. 291. As to the effect of a grant, see *Popplewell v. Hodkinson*, L. R., 4 Ex. 248. Upon this principle the owner of land has no right to prevent an abstraction of water in a state of *percolation*, and which but for the abstraction would flow on to his land (*Reg. v. Metrop. Bd. of Works*, 3 B. & S. 710); and the rule applies, although the effect of the withdrawal of the water is to cause the adjacent soil to *subside*. *Popplewell v. Hodkinson*, L. R., 4 Ex. 248. But the *vendor* of land with a stream running through it, which is fed from a spring in the adjoining land of the vendor, cannot, nor can any one claiming under him, divert the stream. *Canham v. Fisk*, 2 C. & J. 126. And this principle applies to *underground* water in the purchased land, where there is an express grant of all streams. *Whitehead v. Parks*, 2 H. & N. 870.

A person may drain his land for agricultural purposes in order to get rid of the water, being casual, and its flow following no regular or definite course, and a neighbouring proprietor cannot complain that he is thereby deprived of such water, which otherwise would have come to his land. *Rawstron v. Taylor*, 11 Ex. 369. So the owner of land may appropriate surface water which flows over it in no definite channel, although the water is thereby prevented from reaching a watercourse which it previously supplied. *Broadbent v. Ramsbotham*, 11 Ex. 602. But it has been held, that the owner of land in which a spring rises, and from which it flows in a defined channel, cannot divert the water at the springhead, and thus interrupt the course of the stream. *Dudden v. Clutton Union*, 1 H. & N. 627.

Where Rights are Easements.] In most of the preceding cases no question arose as to the right in respect of water being an *easement*, or depending upon prescription, nor as to a particular stream being or not being a watercourse within the meaning of the 2 & 3 Will. 4, c. 71. The word "watercourse" may mean not only the flowing of the water in its ordinary sense, which, is its natural meaning being then merely an easement, but also according to the context the corporeal thing through which the water flows. *Taylor v. Corporation of St. Helen's*, 6 Ch. D. 264. As a general rule, the right to interfere with the rights of others *jure naturæ* (*ante*), in respect of flowing water, depends upon the same principle as ordinary easements; for instance, a right of way, which is a right to interfere with the exclusive enjoyment by another of his own land. Thus, a right to an unreasonable use of water to the prejudice of others *primâ facie* equally entitled to it (see *Sampson v. Hoddinott*, 1 C. B., N. S. 611; *Miner v. Gilmour*, 12 Moo. P. C. 156; and other cases, *ante*, p. 162), is an easement or in the nature of an easement. So a right to divert water from neighbouring land into an artificial channel for the use of the dominant tenement. *Beeston v. Weate*, 5 E. & B. 986. So to discharge polluted water on neighbouring land. *Wright v. Williams*, 1 M. & W. 77; see *Chadwick v. Marsden*,

L. R., 2 Ex. 289. As to the right to pollute streams or rivers, see *Moore v. Webb*, 1 C. B., N. S. 673; *Carlyon v. Lovering*, 1 H. & N. 784; *Stockport Waterworks Co. v. Potter*, 7 H. & N. 160; *Murgatroyd v. Robinson*, 7 E. & B. 391; *Goldsmid v. Tunbridge Wells, &c., Comms.*, L. R., 1 Ch. 349; *Att.-Gen. v. Leeds Corporation*, L. R., 5 Ch. 583; *Att.-Gen. v. Hackney Local Board*, L. R., 20 Eq. 626.

It would seem that although a watercourse may have been originally artificial, yet if enjoyed by numerous persons for such a period as to give a prescriptive right, they will acquire the same rights in respect of it as riparian proprietors to an ordinary natural stream. *Sutcliffe v. Booth*, 9 Jur., N. S. 1037; see *Ivimey v. Stocker*, L. R., 1 Ch. 396; *Holker v. Poritt*, L. R., 8 Ex. 107. But this principle does not apply where an owner, for his own convenience, drains his land or other parts of his property by creating an artificial channel to carry off superfluous water, whereby it flows over the land of another. In such a case the latter has no *right* to the continued discharge of the water, though he may have derived benefit from it for upwards of twenty years. *Arkwright v. Gell*, 5 M. & W. 203; *Greatrex v. Hayward*, 8 Ex. 291; *Wood v. Waud*, 3 Ex. 748; see *Rameshur, &c. v. Koonj, &c.*, 4 App. Ca. 121. Water passing from the opening of a lock or canal is not a watercourse, within the 2 & 3 Will. 4, c. 71, s. 2. *Staff. Can. Co. v. Birm. Can. Co.*, L. R., 1 H. L. 254. A slight alteration in the mode of enjoyment, not being detrimental to other persons interested in the stream, will not affect the right (*Hall v. Swift*, 4 B. N. C. 381; *Hale v. Oldroyd*, 14 M. & W. 789); neither will a total interruption of the user even for some years, if occasioned by natural causes; for instance, the excessive dryness of seasons. *Hall v. Swift, sup.*

As to damages in equity where the court has jurisdiction to grant an injunction, see *ante*, p. 99.

SEC. 4.—*Right to Support for Land or Buildings.*

<i>Right to Support for Land</i>	166	<i>Several Houses built by one Owner</i>	168
<i>Not for Buildings upon it</i>	167	<i>Severance of Rights to Surface and</i>	
<i>Unless having Support for Twenty</i>		<i>Mines</i>	168
<i>Years</i>	167	<i>Manorial Rights</i>	169
<i>Land with Buildings on it</i>	168	<i>Letting down Surface</i>	169
<i>Buildings to Support of Buildings.</i>	168	<i>Land taken by Companies</i>	170

The owner of land has a right to support for it from the land of his next neighbour, whether the support be lateral or underground, and this is of *common right*, and not a mere *easement* to be gained in course of time or by grant. Therefore the owners of underground minerals cannot work them without leaving adequate support for the surface land or for minerals vested in the owner of the adjoining land. *Humphries v. Brogden*, 12 Q. B. 739; *Backhouse v. Bonomi*, 9 H. L. C.

503; *Hunt v. Peake*, Johns. 705; *Roberts v. Haines*, 7 E. & B. 625; see *Richards v. Harper*, L. R., 1 Ex. 199. But the owner of land has no right at common law to the support of subterranean water for his land. *Popplewell v. Hodgkinson*, L. R., 4 Ex. 248. The right to support, where it exists, is not an absolute right, and no claim can be made for the infringement of it where there is no appreciable damage. *Smith v. Thackerah*, L. R., 1 C. P. 564. Nor does the right extend as a rule to the *buildings* upon it, and no action lies against the owner of the adjoining land or buildings upon it if by reason of his removal of such land or buildings the *buildings* of his neighbours are injured or destroyed. *Peyton v. Mayor of London*, 9 B. & C. 725; *Wyatt v. Harrison*, 3 B. & Ad. 871; *Gayford v. Nicholls*, 9 Ex. 702. But such removal, though it may be without notice (*Chadwick v. Trower*, 6 B. N. C. 1: see *Massey v. Goider*, 4 C. & P. 161), must not be negligently or improperly effected. *Dodd v. Holme*, 1 A. & E. 493; cons. *Chadwick v. Trower*, *sup.* It would seem that a building is entitled to the support of the adjoining land if it has had it for twenty years. *Humphries v. Brogden*, 12 Q. B. 739; *Backhouse v. Bonomi*, 9 H. L. C. 503; *Hunt v. Peake*, Johns. 705; *Brown v. Robins*, 4 H. & N. 186; cons. *Solomon v. Vintners' Co.*, 4 H. & N. 585; *Murchie v. Black*, 19 C. B., N. S. 190. In *Dalton v. Angus*, L. R., 6 App. C. 740, two dwelling-houses adjoined, built independently, but each on the extremity of its owner's soil and having lateral support from the soil on which the other rested. This having continued for more than twenty years, one of the houses (the plaintiff's) was converted into a factory, throwing much more lateral pressure than before upon the soil under the adjoining house. More than twenty years after this the adjoining house was pulled down, and the soil under it excavated to a depth of several feet, and the plaintiffs' factory being deprived of the lateral support of the adjacent soil sank and fell. It was held that the plaintiffs had acquired a right of support for their factory by the twenty years' enjoyment. *Semble*, per Lord Selborne, L.C., the right of support in such a case is an easement within the meaning of the *Prescription Act*, 2 & 3 Will. 4, c. 71, s. 2. *Ib.* See *Tone v. Preston*, 24 Ch. D. 739; *Bower v. Peate*, 1 Q. B. D. 321. If ancient buildings belonging to different owners adjoin, there is a right of support from the *building* as well as from the land; and this right of support can be claimed under the Act, but the enjoyment must be open. *Lemaitre v. Davis*, 19 Ch. D. 281. The right can be enforced against an ecclesiastical corporation. *Ib.* "If a building is divided into floors or 'flats,' separately owned (an illustration which occurs in many of the authorities), the owner of each upper floor or 'flat' is entitled upon the same principle to vertical support from the lower part of the building, and to the benefit of such lateral support as may be of right enjoyed by the building itself." Per Lord Selborne, L.C., *Dalton v. Angus*, L. R., 6 App. C., p. 793, citing *Caledonian Railway Co. v. Sprot*, 2 Macq. 449. If the owner of land sells part for the express purpose of being built upon, the purchaser is entitled to support for his buildings from the land which is retained by the

vendor. *Elliot v. N. E. R. Co.*, 10 H. L. C. 333; see particularly the judgment of Wood, V.-C., in the court below, 1 J. & H. 145.

The right of land to support from the adjoining land is not affected merely because there are buildings on the former; and the owner of the latter, who in digging or removing it weakens that support, will be liable if there be any subsidence in consequence, *provided* the weight of the buildings *did not contribute to it*. *Brown v. Robins*, 4 H. & N. 186; *Stroyan v. Knowles*, 6 H. & N. 454; *Hunt v. Peake*, Johns. 705; see *Bibby v. Carter*, 4 H. & N. 153; *Popplewell v. Hodgkinson*, L. R., 4 Ex. 248. If the owner of land has himself diminished the subjacent support of his own land, he has no right of action against his neighbour, whose acts by reason of that previous weakening have caused subsidence of the soil of the former. *Partridge v. Scott*, 3 M. & W. 220. The support to which a landowner is entitled from the adjacent land is confined to such an extent of adjacent land as in its natural undisturbed state was sufficient to afford the requisite support. *Corp. of Birm. v. Allen*, 6 Ch. D. 284.

Where several houses are built together by one owner, there is an implied reservation of the right of support in respect of such houses as between the owner and his vendees or lessees, and as between the latter *inter se*. *Richards v. Rose*, 9 Ex. 218; *Dugdale v. Robertson*, 3 K. & J. 695; *Suffield v. Brown*, 10 Jur., N. S. 111, 114. But not, it would seem, unless so built. *Peyton v. Mayor of London*, 9 B. & C. 725; *Solomon v. Vintners' Co.*, 4 H. & N. 585; but see *Lemaitre v. Davis*, 19 Ch. D. 281, *sup*. Where A., a lessee of building land, erects a house upon it, substantially in accordance with the terms of the lease, and to the satisfaction of the lessor, who afterwards grants a building lease of the adjoining land to B., B. must not, in building, endanger the foundations of A.'s house. *Rigby v. Bennett*, 21 Ch. D. 559.

If there is a grant of mines, the grantor retaining the surface land, or a grant of the surface land, the grantor retaining the mines, the person entitled to the surface ground is also presumptively entitled to the underground support for it, and the mines must not be worked so as to weaken or endanger this support (*Humphries v. Brogden*, 12 Q. B. 739; *Harris v. Ryding*, 5 M. & W. 60; *Dugdale v. Robertson*, 3 K. & J. 695; *Smart v. Morton*, 5 E. & B. 30). "In common right the person who owns the surface has a right to have it properly supported below by minerals. A Court of Law has to look at the documents to see whether the parties have agreed upon something different from the common right." *Per* Lord Blackburn, *Davis v. Treharne*, 6 App. C. 460; *Drain v. White*, 8 App. C. 833; *Love v. Bell*, 9 App. C. 286. See *Buchanan v. Andrew*, 2 H. L. 286.

A mine owner will not be liable to the owner of an adjacent mine for injury occasioned to it arising from *natural causes*, beyond his control, though his own acts may have conduced to produce the injury, if such acts have been proper and ordinary in the working of his own mine, without default or negligence. But where, for his own convenience, he does something, *e.g.*, diverts the course of a stream, he must

take care that the new course provided for it shall be sufficient to prevent mischief. *Fletcher v. Smith*, L. R., 2 App. C. 781.

But a right may be acquired usually by contract to work the mines irrespective of the consequences. *Rowbotham v. Wilson*, 8 H. L. C. 348; *Williams v. Bagnall*, 12 Jur., N. S. 987; *Aspden v. Seddon*, L. R., 10 Ch. 394. It would seem, however, that there cannot be a customary right for such a purpose. *Hilton v. E. Granville*, 5 Q. B. 701; *Blackett v. Bradley*, 1 B. & S. 940; *Wakefield v. D. of Buccleuch*, L. R., 4 Eq. 613; on appeal, L. R., 4 H. L. C. 377. The decision in *Hilton v. E. Granville*, *sup.*, would seem to be right, although the dictum in the judgment that even a grant reserving a right in the lord to deprive his grantee of the enjoyment of the thing granted must be rejected as repugnant and absurd (5 Q. B. 730), has been overruled in *Rowbotham v. Wilson*, *sup.*; *Wakefield v. D. of Buccleuch*, L. R., 4 Eq. 613, 652; *Bell v. Love*, L. R., 10 Q. B. D. 547, 561, 9 App. C. 286, in H. L.

Where land on which a mill was to be built was granted, the owner reserving a chief rent and all mines and minerals under the land, with power to take the same at pleasure, he was not restrained from working under the land, although the mill might be injured. *Aspden v. Seddon*; *Preston v. The Same*, 1 Ex. D. 496.

With reference to customary rights, where the lord of a manor had from time immemorial worked the mines *under the waste* without leaving sufficient support for the surface, and by an Inclosure Act it was provided that the lord might hold all mines under the waste, with liberty of working the same as fully and freely as he might in case the act had not been passed, without paying any satisfaction; and that compensation for damage caused by such working should be assessed and paid by the occupiers of the other allotments in the same township, it was held that whether any such custom existed previously to the act or not, the act expressly gave to the lord the right to let down the surface by mining without making any compensation. *Gill v. Dickinson*, L. R., 5 Q. B. D. 159; comp. *Blackett v. Bradley*, 1 B. & S. 940. Where, however, the lord of a manor, as owner of the mines, alleges a right to work the mines and let down the surface, as against the allottees of the surface under an Inclosure Act, and the act gives compensation in certain events if it is clear that such compensation is in respect of *temporary* and not permanent damage, they are entitled to further compensation if by reason of the working there is a subsidence of the soil above. *Love v. Bell*, 9 App. C. 286. This case was distinguished from *Duke of Buccleuch v. Wakefield*, L. R., 4 H. L. 377, where, under an Inclosure Act, the largest possible powers of working the mines were reserved to the lord of the manor, he making full compensation for any injury thereby occasioned to the owners of the surface, and it was held that he might work the mines even to the utter destruction of the surface, subject only to the condition of making the compensation provided by the act. If an Inclosure Act reserves all mines, &c., to the lord of the manor, and at the same time directs that roads shall be made, the lord cannot work the mines so as

to injure the roads. *Benfieldside Local Board v. Consett Iron Co.*, 3 Ex. D. 54. If future damage can be estimated it is recoverable. *Lamb v. Walker*, 3 Q. B. D. 389 (Cockburn, C.J., diss.). But this case has been overruled, and it has been held that each fresh damage—for instance, each fresh subsidence—occasioned by one act of excavation is a distinct cause of action for which damages are recoverable, and that the Statute of Limitations runs only from the time of each such subsidence. *Mitchell v. Darley Main Co.*, 14 Q. B. D. 125. The case is under appeal to the House of Lords. See *Nicklin v. Williams*, 10 Ex. 259; *Whitehouse v. Fellowes*, 10 C. B., N. S. 765.

As to the rights of parties where the surface land has been taken compulsorily by a railway or other company or authority, see *Stourbridge, &c., Co. v. E. Ward*, 7 Jur., N. S. 329; *Cal. R. Co. v. Sprot*, 2 Macq. H. L. C. 449; *Same v. Ld. Belhaven*, 3 ib. 56; *Reg. v. Aire & Cal. Nav. Co.*, 8 Jur., N. S. 115; *Elliot v. N. E. R. Co.*, 10 H. L. C. 356. A railway company purchasing land does not become entitled to the mines under it, and the owner may work them after notice duly given, and if the company does not give compensation for the minerals the owner may work them up to and under the railway in a proper manner. *G. W. R. Co. v. Bennett*, L. R., 2 H. L. 27; *Pountney v. Clayton*, L. R., 11 Q. B. D. 820; *Mid. R. Co. v. Miles*, W. N. 1885, p. 176. As to the rights of several lessees holding under the same landlord, see *Wilson v. Waddell*, 2 App. C. 95. It may perhaps not be out of place to mention that where coal has been wrongfully taken by working into the mine of an adjoining owner, the trespasser will be treated as the purchaser at the pit's mouth, at the market value, less the actual disbursements, for severing and bringing it to bank. *In re United Merthyr Collieries Co.*, L. R., 15 Eq. 46; *Jegon v. Vivian*, L. R., 6 Ch. 742.

SEC. 5.—Easements in respect of Nuisances.

<i>Right to transmit Smoke, &c.</i>	170	<i>Public Bodies</i>	172-174
<i>Twenty Years' User</i>	170	<i>Nuisance restrained where no Right</i>	172
<i>Alteration in User</i>	170	<i>Smoke, Foul Air, Water—Noise, &c.</i>	172
<i>Rule where no Easement</i>	171	<i>No Nuisance, if None affected by...</i>	173
<i>Sic utere tuo, &c.</i>	171	<i>Acquiescence—Laches</i>	174

There may be a right in the nature of an easement to transmit offensive smells, smoke, sounds, or the like, where such right has been exercised for twenty years, but not otherwise, and it will not affect the rights of the complaining party that he has come to the place where the nuisance was previously existing. *Bliss v. Hall*, 4 B. N. C. 183; *Carlyon v. Lovering*, 1 H. & N. 797; *Stockport Waterw. Co. v. Potter*, 7 H. & N. 160; *Goldsmid v. Tunbridge Wells Commissioners*, L. R., 1 Ch. 349. Where the right exists it must not be considerably enlarged in the user of it (*Crossley v. Lightowler*, L. R., 2 Ch. 478), but may to a certain extent be changed, as where the washings of rags used in the manufacture of paper were discharged into a stream, it was held that the washings of a new material used for the same manu-

facture might also be discharged, there being *no increase* in the pollution. *Baxendale v. M'Murray*, *ib.* 790. Where an alteration is made in a building, in consequence of which there is some change in the user of the easement, in the absence of any evidence that a greater burthen is thrown on the servient tenement by the alteration, the easement is not thereby destroyed. *Thomas v. Thomas*, 2 C. M. & R. 34; *Harvey v. Walters*, L. R., 8 C. P. 162. No prescriptive right can be gained to make a common nuisance prejudicial to everyone, for this would be contrary to the common law. See Gale, Easements, 5th ed. 484, n. If there is no *easement*, the rule applicable between the owners of adjacent lands with reference to their respective rights of using their property, is, that where the owner of land, without wilfulness or negligence, uses his land in the ordinary manner of its use, though mischief should thereby be occasioned to his neighbour, he will not be liable in damages. But if he brings upon his land anything which would not naturally come upon it and which is in itself dangerous, and may become mischievous if not kept under proper control, though in so doing he may act without personal wilfulness or negligence, he will be liable in damages for any mischief thereby occasioned. *Rylands v. Fletcher*, L. R., 3 H. L. 330. See *Smith v. Fletcher*, L. R., 9 Ex. 64; and comp. *Anderson v. Oppenheimer*, 5 Q. B. D. 602; *Nichols v. Marsland*, L. R., 10 Ex. 255. In *Broder v. Saillard*, 2 Ch. D. 692, Jessel, M.R., observed (p. 700), "that an artificial work—a work made by man—is a work which, if it causes a nuisance, is a thing for which the owner of the land is responsible."

In *Whalley v. Lanc. & York. R. Co.*, 13 Q. B. D. 131, 135, some important general principles were commented upon and assented to by the Court of Appeal, on the maxim of *sic utere tuo, &c.* Thus, "if the owner of property uses it in the ordinary way, he is not liable if by reason of such user the property of his neighbour is injured. *Ib.* If property is so situated, *e.g.*, with regard to a river, that in the ordinary course of things the river will overflow or injure the land, the owner of it cannot, in order to cure this defect, do something which may turn the stream on to and injure his neighbour's land. *Ib.*, p. 136; citing *Menzies v. E. of Breadalbane*, 3 Bli. N. S. 414. But if an extraordinary danger threatens your land, you may protect yourself, although the danger is so far common that in doing so you do mischief to someone else, if you have not intended to injure him. *Ib.*; citing *Rex v. Pagham Commissioners*, 8 B. & C. 355; *Nield v. L. & N. W. R. Co.*, L. R., 10 Ex. 4. And if a person *brings* anything, *e.g.*, water, on his land, although he does nothing more, he is liable for any injury thereby done to his neighbour. And even if he does not bring it on, but it comes there, and if not removed will injure his land but not his neighbour's, he is liable if, in removing it, he injures his neighbour's land, although what he does is reasonably necessary for the protection of his own land, and is not done negligently." *Ib.* It may be added, that where a man uses his own land in a particular way, and it is not shown that he has thereby injured his neighbour's, the latter can have no ground for complaint. *West Cumberland, &c., Co. v.*

Kenyon, 11 Ch. D. 782. The court will not interfere *quia timet* in a case of alleged nuisance, but the actual existence of it must be proved. *Att.-Gen. v. Mayor of Kingston*, 11 Jur., N. S. 596. If a public body, which has powers given to it by a statute for the performance of a particular object, exercises its powers so as to injure the property of others, it is responsible for the injury, unless the act done was absolutely necessary for the performance of the object of the statute. *Att.-Gen. v. Colney Hatch Asylum*, L. R., 4 Ch. 146, *post*, p. 174.

Nuisances which, if continued, would become easements, or rights in the nature of easements, will be restrained by a Court of Equity upon principles analogous to those on which it acts in restraining an interference with easements. Thus, the court will grant an injunction to restrain a nuisance by fouling water where the injury is serious and permanent (*Goldsmid v. Tunbridge Wells Comms.*, L. R., 1 Ch. 349, 354; *Att.-Gen. v. Colney Hatch Asylum*, L. R., 4 Ch. 146), imminent, and of a substantial nature (*Fletcher v. Bealey*, 28 Ch. D. 688; see *Crossley Co. v. Lightowler*, L. R., 2 Ch. 478), or a nuisance occasioned by polluting the air; but not if the injury be merely occasional and slight (*Cooke v. Forbes*, L. R., 5 Eq. 166; see *Crump v. Lambert*, L. R., 3 Eq. 405); so a nuisance arising from fireworks, and other nuisances arising from public exhibitions and entertainments (*Walker v. Brewster*, L. R., 5 Eq. 25; *Inchbald v. Robinson*, *Same v. Barrington*, L. R., 4 Ch. 388); or noise (*Truman v. L. B. & S. C. R. Co.*, 29 Ch. D. 89); or the nuisance of keeping water in an offensive state in canals (*Att.-Gen. v. Proprs. Bradford Canal*, L. R., 2 Eq. 71); or causing it to flow into a neighbour's house (*Hurdman v. N. E. R. Co.*, 3 C. P. D. 168); or allowing sewage to escape into another's premises (*Humphries v. Cousins*, 2 C. P. D. 239; *Womersley v. Church*, 17 L. T., N. S. 190; see *Ballard v. Tomlinson*, 29 Ch. D. 115, *post*, p. 173); or a nuisance arising from smoke, noise, or offensive vapours will be restrained. *Crump v. Lambert*, L. R., 3 Eq. 409; *Eddleston v. Barnes*, 1 Ex. D. 67. In these and the like cases a Court of Equity will interfere by injunction, if substantial damages would be recoverable at law in respect of the nuisance. *Ib.* And where the evidence of the nuisance is satisfactory, the court will not require the question to be tried before a jury. *Inchbald v. Robinson*, L. R., 4 Ch. 388. Where the injury is occasioned by noxious vapours, from works carried on, so far as the work itself is concerned, in the usual manner, it must be substantial, and such as to occasion visible and actual, as distinguished from contingent, prospective or remote, damage. *St. Helen's Smelting Co. v. Tipping*, 11 H. L. C. 642; *Salvin v. North Brancepeth Coal Co.*, L. R., 9 Ch. 705. That is, "the damage must be such as can be shown by a plain witness to a plain common jurymen." *Per James, L.J., ib.*, p. 709. "A man is entitled to the comfortable enjoyment of his dwelling-house. If his neighbour makes such a noise as to interfere with the ordinary use and enjoyment of his dwelling-house, so as to cause serious annoyance and disturbance, the occupier of the dwelling is entitled to be protected from it. It is no answer to say that the defendant is only making a reasonable use of

his property, because there are many trades and occupations which are not only reasonable but necessary to be followed, and which still cannot be allowed to be followed in the proximity of dwelling-houses, so as to interfere with the comfort of their inhabitants." *Per* Jessel, M.R., *Broder v. Saillard*, 2 Ch. D. 692, 701. It was held formerly that no action would lie for the reasonable use of a lawful trade in a convenient and proper place, although someone might suffer in consequence of its being carried on. *Hole v. Barlow*, 4 C. B., N. S. 334. But now the true doctrine is, that whenever, taking all the circumstances into consideration, including the nature and extent of the plaintiff's enjoyment before the acts complained of, the annoyance is sufficiently great to amount to a nuisance according to the ordinary rule of law, an action will lie, whatever the locality may be. *Bamford v. Turnley*, 3 B. & S. 66; see *ib.*, p. 77; *Carey v. Ledbitter*, 13 C. B., N. S. 470; *Shotts Iron Co. v. Inglis*, 7 App. C. 518; see *Brand v. Hammersmith, &c., Co.*, L. R., 2 Q. B. 223.

No right can be acquired by user unless there is some person affected by the nuisance in such a way that it becomes actionable. Thus a person may make a noise by which the adjoining land of his neighbour is not affected, and no time by user begins to run, but if the neighbour builds in such a way that the noise affects him in the building, the nuisance becomes actionable. *Sturges v. Bridgman*, 11 Ch. D. 852; see *Webb v. Bird*, 13 C. B., N. S. 841. Annoyance caused by the unusual use of a house may be a nuisance where the like annoyance from the ordinary use of it would not be. Thus, where the occupier of a house in London had converted the ground floor into a stable, and long afterwards a new occupier altered the stable so that the noise of the horses was an annoyance to the next-door neighbour, and prevented him from letting his house as lodgings, it was held that the fact of horses having been previously kept in the stable, but so as not to be an annoyance, did not deprive the neighbour of his right to have the nuisance restrained. *Ball v. Ray*, L. R., 8 Ch. 467. The owner or lessee of houses let or sub-let to weekly tenants cannot maintain a suit to restrain a temporary nuisance, such as the noise of machinery in adjacent premises, but, *semble*, such a suit could be maintained by a weekly tenant if the nuisance were of such a nature as to be injurious to his health or comfort. *Jones v. Chappell*, L. R., 20 Eq. 539. Where a structure is not of such a permanent character as necessarily to injure the reversion, the reversioner cannot maintain an action upon the ground that it is a nuisance. *Cooper v. Crabtree*, 19 Ch. D. 193. A county court, under the Judicature Act, 1873, s. 89, has in actions within its jurisdiction power to grant an injunction against a nuisance and to enforce obedience to it by committal. *Martin v. Bannister*, 4 Q. B. D. 491. In *Ballard v. Tomlinson*, 29 Ch. D. 115, where A. and B. were owners of adjoining wells, fed by percolating underground water, and A. turned sewage from his house into his well, and the sewage found its way into the percolating water and thence into B.'s well, it was held that he had a right of action against A. And where

A. allowed water to collect in his cellar and to percolate into B.'s cellar, it was held that B. was entitled to damages. *Snow v. Whitehead*, 27 Ch. D. 588.

Although the nuisance may be of a *public* as well as a private nature, a bill may be filed by a person who has sustained special damage in consequence of it, to restrain it, without making the attorney-general a party. *Spencer v. Lon. and Bir. R. Co.*, 8 Sim. 193; *Soltan v. De Held*, 2 Sim., N. S. 133; see *Att.-Gen. v. United Kingdom Elec. Tel. Co.*, 30 Bea. 287; cons. *Nuneaton Board v. Gen. Sewage Co.*, L. R., 20 Eq. 127; *Att.-Gen. v. Cockermouth Local Board*, L. R., 18 Eq. 172 (No. 1). As to the rights of sanitary authorities and private individuals in respect of nuisances created by or in connection with sewers, see *Att.-Gen. v. Leeds Corporation*, L. R., 5 Ch. 583; *Glossop v. Heston, &c., Board*, 12 Ch. D. 102; *Newington Board v. Cottingham Board*, *ib.* 725; *Metropolitan Board of Works v. London and North Western Ry. Co.*, 17 Ch. D. 246; *Att.-Gen. v. Dorking Guardians*, 20 Ch. D. 595; *Att.-Gen. v. Acton Board*, 22 Ch. D. 221; *Charles v. Finchley Board*, 23 Ch. D. 767. In *Geddis v. Proprietors of Bann Reservoir*, 3 App. Cas. 430, 455, Lord Blackburn observed, "No action will lie for doing that which the legislature has authorized, if it be done without negligence, although it does occasion damage to any one; but an action does lie for doing that which the legislature has authorized if it be done negligently." See *Rex v. Pease*, 4 B. & Ad. 30; *Hammersmith Ry. Co. v. Brand*, L. R., 4 H. L. C. 171; *Managers Met. Asy. Dis. v. Hill*, 6 App. C. 193; *Truman v. London, Brighton and South Coast Ry. Co.*, 25 Ch. D. 421. Where a railway company for the construction of their works erected a mortar-mill on part of their land close to the place of business of the plaintiff, who complained of the injury and annoyance occasioned by the noise and vibration, it was held that the mortar-mill was not necessary for the construction of the line, and an injunction granted accordingly. *Fenwick v. East Lond. Ry. Co.*, L. R., 20 Eq. 544. An act is not "necessary" within the 16th section of the Railway Clauses Consolidation Act, 1845, merely because it enables the company to execute their works more economically. *Ib.* The court will not make an order against a public body or against individuals to do an act unless it is satisfied that it is within their power to do it. In dealing with the question of restraining a public body from continuing a state of things which existed before the commencement of their powers, the court must take into consideration the balance of convenience. *Per Jessel, M.R., Att.-Gen. v. Guardians of Dorking*, 20 Ch. D. 595, 607. See, further, as to nuisances committed or alleged to be committed by public bodies or authorities, *Att.-Gen. v. Corporation of Birmingham*, 15 Ch. D. 423; *Att.-Gen. v. Birmingham Local Board*, 17 Ch. D. 685; *Truman v. London, Brighton and South Coast Ry. Co.*, 29 Ch. D. 89.

The right to an injunction to restrain a nuisance, like the right to

an injunction against the obstruction of, or interference with, an easement, may be lost by acquiescence in the nuisance (see *Johnson v. Wyatt*, 2 D., J. & S. 18), or laches. *Williams v. E. Jersey*, 1 Cr. & Ph. 91; *Wood v. Sutcliffe*, 2 Sim., N. S. 163; *Bankart v. Houghton*, 27 Bea. 425; *Cooper v. Hubbuck*, 30 Bea. 160; and comp. *Imp. Gas Co. v. Broadbent*, 7 H. L. C. 600; *Turner v. Mirfield*, 34 Bea. 390; *Johnson v. Wyatt*, 2 D., J. & S. 18; *Att.-Gen. v. Proprs. Bradford Canal*, L. R., 2 Eq. 71.

ELECTION.

<i>Nature of Election</i>	176	<i>Who bound to elect—continued.</i>	
<i>Person cannot take under and against same Instrument</i> ...	176	<i>Heir of Scotch Property</i>	182
<i>Gift of Testator's Property to A. and A.'s Property to B.</i> .	176	<i>Heir in Tail</i>	183
<i>Doctrine applies to Settlements and Wills</i>	176	<i>Disposition must be by valid Will</i>	183
<i>Applies to Property of every kind</i>	177	<i>Infants—Lunatics</i>	183
<i>Forfeiture or Compensation</i> ...	178	<i>Several entitled</i>	183
<i>Testator having partial Interest only</i>	178	<i>Under Appointments in pursuance of Powers</i>	183
<i>What necessary to</i>	178	<i>Where arises</i>	183
<i>Devise of Estate subject to Incumbrances</i>	178	<i>Testator must give Property of his own</i>	183
<i>Gift of Testator's Property and A.'s to A.</i>	179	<i>Object of Two Powers excluded under One</i>	184
<i>Raised by something in the Instrument</i>	179	<i>Absolute Appointment coupled with a Recommendation to Share</i>	184
<i>Erroneous recital</i>	179	<i>Forfeiture</i>	184
<i>Recommendation in Will</i>	179	<i>Qualified Appointment</i>	184
<i>Gifts in satisfaction of Claims Valuable and Burdensome Property given to one Legatee</i> ...	180	<i>When Election to be made</i>	184
<i>Who bound to elect</i>	180	<i>Delay—Knowledge of Facts—Mistake</i>	184
<i>Widow</i>	180	<i>Can only be inferred from unequivocal Facts</i>	185
<i>Married Woman</i>	181-182	<i>Presumption of</i>	185
<i>Heir</i>	182	<i>Acts indicating Election</i>	185
<i>Heir of Female Minor</i>	182	<i>Taking Income—Recitals</i>	185
		<i>Presumption of Disclaimer</i> ...	185

Nature of Election.] In some cases equity will compel a person to elect between two rights or interests where one of them has been acquired as a gift under a will or deed, and the intention of the testator or grantor is clear that the donee shall not enjoy both. In other words, a person cannot take under and against the same instrument, but must elect. *Dillon v. Parker*, 1 Sw. 359; *ib.* 381, n. (a); 394, n. (b); *Schroder v. Schroder*, 1 Kay, 578; *Stephens v. Stephens*, 3 Drew. 697—701; *Miller v. Thurgood*, 33 Bea. 496; *Box v. Barrett*, L. R., 3 Eq. 244; *Cooper v. Cooper*, L. R., 7 H. L. 53, 63; *Rogers v. Jones*, 3 Ch. D. 688. Thus, if a testator or grantor give property of his own to A., and property of A.'s to B., A. must elect either to part with his own property or to give up the bounty (see *per* Ld. Eldon, *Broome v. Monck*, 10 Ves. 609), or, as it may now perhaps be stated, to make compensation to B. The doctrine is not confined to wills, but embraces settlements and other dispositions. *Green v. Green*,

2 Mer. 86; *Bacon v. Cosby*, 4 De G. & Sm. 261. In *Codrington v. Lindsay*, L. R., 8 Ch. 578, Lord Selborne, C., observed, p. 587, "That the application of the rule that a person cannot accept and reject the same instrument," is illustrated as to cases of voluntary deeds by *Llewellyn v. Mackworth*, Bar. 445, and *Anderson v. Abbot*, 23 Beav. 457; as to cases of contract for valuable consideration resting in articles by *Savill v. Savill*, 2 Coll. 721, and *Brown v. Brown*, L. R., 2 Eq. 481; and as to contracts for value completely executed by conveyance and assignment by *Bigland v. Huddleston*, 3 Bro. C. C. 285, n.; *Chetwynd v. Flectwood*, 4 Bro. P. C. 435, Ed. 1784; *Green v. Green*, 2 Mer. 86; *Bacon v. Cosby*, 4 De G. & Sm. 261; *Mosley v. Ward*, 29 Beav. 407, and *Willoughby v. Middleton*, 2 J. & H. 344. In the case of *Codrington v. Lindsay*, affirmed *nom. Codrington v. Codrington*, L. R., 7 H. L. 854, a lady married while an infant, and after her marriage, and after she had attained twenty-one, she joined in a settlement, by which property of her husband, also property of her father, also property in which her father had a life interest, and in which she had an *absolute interest in reversion*, was settled together on certain trusts. She became *discoverte*, and claimed her reversionary property independently of the settlement. It was held that a case of election arose, and that she could not take the other benefits under the settlement without giving effect to it in respect of her reversionary property; see *Griffith-Boscawen v. Scott*, 26 Ch. D. 358. In *Codrington v. Lindsay*, in Chancery, James, L.J., observed in substance, L. R., 8 Ch., p. 592, "that it was right to read the trusts of a marriage settlement thus; that the parties to it, and issue claiming under it, were, out of the aggregate trust fund, to receive so much and no more, and that if any of them by paramount title received more than such share, it should be taken in full satisfaction of the expressed share or interest; this would give a simple rule to which all the cases, his lordship said, could be referred, except *Campbell v. Ingilby*, 1 D. & J. 393, the propriety of which he more than doubted." In this last case the real estate of a female minor was settled on herself for life, then on her husband for life, with remainder in default of issue (which happened) on her heir. Her personal estate was similarly settled, except that over part of it she had a power of appointment, which she exercised. There was also a covenant by her husband's father to grant her an annuity if she survived her husband. The settlement was never perfected when she attained her majority. It was held on her death, that her heir was entitled to the real estate, and that the husband was not entitled to compensation in respect of his life interest in it. So that, in effect, while she took certain interests under the settlement, her heir was allowed to take under it without giving effect to it.

The rule applies to property of every kind and to interests of every description. *Wilson v. Ld. J. Townshend*, 2 Ves. jun. 697; *Graves v. Forman*, cited 3 Ves. 67; *Webb v. Ld. Shaftesbury*, 7 Ves. 480. For the doctrine to apply, the instrument must be effectual not only at the time it is made, but also at the time it is relied upon as raising a case

of election. Thus, there is no election under the will of a married woman who survives her husband, but whose will as to part of the property comprised in it is valid only in the event of her predeceasing him. *Blaklock v. Grindle*, L. R., 7 Eq. 215.

It was formerly not settled whether the party electing to take against an instrument forfeits absolutely what is intended for him, or is bound merely to make compensation out of it for that of which his election deprives the other party, and according to the value of the interests of which the latter is disappointed. In favour of the doctrine of forfeiture even under wills, would seem to be the great authority of Ld. St. Leonards. Powers, 8th Ed. 576; but see *ib.* 579. Against it are the cases of *Dashwood v. Peyton*, 18 Ves. 49; *Gretton v. Haward*, 1 Sw. 409, and several cases cited 1 Sw. p. 433, n. (a); *Welby v. Welby*, 2 V. & B. 190; *Howells v. Jenkins*, 1 D., J. & S. 617; *Willoughby v. Middleton*, 2 J. & H. 344; *Griggs v. Gibson*, L. R., 1 Eq. 685; *Rogers v. Jones*, L. R., 3 Ch. D. 688, and other cases. The later authorities, therefore, are against the doctrine of forfeiture. Under deeds, it has been held, that an election to take one property is a forfeiture of the other. See *Green v. Green*, 2 Mer. 92—95; consider, however, the cases last cited. The point was argued in *Spread v. Morgan*, 11 H. L. C. 588, but not decided.

Upon the principle of compensation, the party electing may retain what is given to him, and also his own property, giving up the money value of the latter. See Mr. Swanston's note to *Gretton v. Haward*, 1 Sw. 443, 444; *Pickersgill v. Rodger*, 5 Ch. D. 163, and the judgment, *ib.* 173, *et seq.*; the case is stated, *post*, p. 179.

Where the testator or grantor has only a *partial interest* in property and disposes of *the whole*, giving some of his own property to the owner of the other part, the latter must elect. *Miller v. Thurgood*, 33 Bea. 496; *Howells v. Jenkins*, 1 D., J. & S. 617; see *Grissell v. Swinhoe*, L. R., 7 Eq. 291; *Wilkinson v. Dent*, L. R., 6 Ch. 339. Though, if the language of the instrument will admit of it, the court will construe it so as to confine the gift to that which belonged to the testator or grantor. *Padbury v. Clark*, 2 Mac. & G. 298; *Fitzsimons v. Fitzsimons*, 28 Bea. 417; *Honywood v. Foster*, 30 Bea. 14; *Wintour v. Clifton*, 8 D., M. & G. 641; *Stephens v. Stephens*, 1 D. & J. 62.

It is immaterial whether the testator or donor does or does not know that he has no right to dispose of the property in respect of which the election has to be made. *Whistler v. Webster*, 2 Ves. jun. 371; *Welby v. Welby*, 2 V. & B. 199. To raise a case of election under a will there must be a form of gift as to property, which the donor had no power to dispose of. *Att.-Gen. v. Lonsdale*, 1 Sim. 105. *Prima facie*, the devise of an estate which is subject to incumbrances is made *subject* to them, so that the incumbrancers deriving benefits under the will are not bound to elect, for their interests are not dealt with nor disposed of. *Ayres v. Willis*, 1 Ves. sen. 230; *Stephens v. Stephens*, 1 D. & J. 62. The rule as to election is not applicable to cases in which a testator, erroneously thinking property is his own, gives it to another to whom in point of fact it belongs, and also gives

to him other property which is really the testator's own. For, in such cases, the testator intends that the devisee shall have *both*, though he is mistaken as to his own title to one. *Cull v. Shouell*, Amb. 727. Nor does a case of election arise unless the person benefited is entitled, in his own right, to the property given to another, and not in his representative capacity, though in effect he may be beneficially entitled,—for instance, where he takes as his wife's administrator. *Grissell v. Swinhoe*, L. R., 7 Eq. 291. But it will be sufficient to bring the case within the general rule, if a person, though taking one fund by representation, be, by reason of such representation, the true owner of it at the time of the death of the testator, whose disposition of it gives rise to the question of election. Thus, if there be an appointment by A. to B. by deed which exhausts the power, and after B.'s death A. bequeaths property to B.'s children (who have become entitled to the appointed fund in his right), and gives the appointed fund to another, the children must elect. *Cooper v. Cooper*, L. R., 6 Ch. 15 (affirmed on this point, L. R., 7 H. L. 54), in which *Grissell v. Swinhoe*, L. R., 7 Eq. 291, is explained.

A case of election under a will must be raised by something *in the will itself*, not *dehors*; that is, evidence *dehors* of intention is not admissible. *Stratton v. Best*, 1 Ves. 285. See *Wintour v. Clifton*, 8 D., M. & G. 654; *Stephens v. Stephens*, 1 D. & J. 62. But the rule as to election is to be applied as between a gift under the will and a claim *dehors* the will and adverse to it, and is not to be applied as between one clause in a will and another clause in the same will (*Wollaston v. King*, L. R., 8 Eq. 165), and it must be raised by something in the nature of a gift or disposition of property. Therefore an erroneous recital in a will, and misconception of the testator as to the effect of the rights of persons, will not raise a case of election, though the testator, in consequence of his mistake as to those rights, gives more to one person than to another, and the former is not bound to compensate the latter. *Box v. Barrett*, L. R., 3 Eq. 244; see *Langslow v. Langslow*, 21 Bea. 552. Where a testator, having power to appoint to children of his first marriage only, appointed the property under the power as his own in favour of a son of the first marriage subject to a charge in favour of his other children, including the children of his second marriage, and he devised property of his own to the same son subject to the same charges in favour of his other children, "so as to equalize the shares of all his children in all his property," it was held that a case of election arose in favour of the children of the second marriage. *White v. White*, 22 Ch. D. 555. Where a mother devised an estate to her son A., and bequeathed money belonging to him to B., and the mother survived her son, but died without altering her will, it was held that A.'s real representative, while taking the estate under the 1 Vict. c. 26, s. 33, took it charged with the sum bequeathed to B., which was not to be deducted from or raised out of the interests of those taking the *personal estate* of A. *Pickersgill v. Rodger*, 5 Ch. D. 163.

A devise of property, with a recommendation to continue certain

persons *as tenants* of it, may operate so as to compel the devisee to give effect to the recommendation, or give compensation for not acting upon it. *Tibbits v. Tibbits*, 1 Jac. 317.

A case of election will also be raised by gifts to persons *in satisfaction* of liabilities which the donor or testator is bound to satisfy; thus, if a child be entitled to a portion under a settlement, and the parent gives an estate or benefit to such child by will in satisfaction of all claims upon him, the child must elect (*Macnamara v. Jones*, 1 B. C. C. 481; see *Coleman v. Jones*, 3 Russ. 312; *Bennett v. Houldsworth*, 6 Ch. D. 671); and if a legacy be given on condition that the legatee release his claims on the testator's estate, he must execute the release before he can take the legacy. *D. Northumberland v. Egremont*, Amb. 657. But a legacy to a person who is the testator's next of kin, to be void if he make any claim on the testator's estate, will not bar the legatee from claiming the *undisposed of residue* as next of kin as well as the legacy, and no case of election is raised. *Att.-Gen. v. Parkin*, Amb. 566.

The doctrine does not apply to a case in which two properties, one beneficial, the other burdensome, are given to the same person; for, as a general rule, a devisee or legatee may take the former and refuse the latter (*Andrew v. Trinity Hall*, 9 Ves. 525; *Warren v. Rudall*, 1 J. & H. 1; *Moffett v. Bates*, 3 Sm. & G. 468), unless an intention can be collected that the gift of the one was conditional upon the acceptance of the other. *Talbot v. Earl Radnor*, 3 M. & K. 254; *Warren v. Rudall*, *sup.* In *Guthrie v. Walrond*, 22 Ch. D. 573, Fry, J., stated the rule on this point to be that when by a will two distinct legacies are bequeathed to the same person, one of them being onerous and the other beneficial, *primâ facie* the legatee is entitled to disclaim the onerous legacy and to take the other. If, however, onerous property and beneficial property are included in the same gift, *primâ facie* the legatee cannot disclaim the onerous and accept the beneficial; he must take the whole gift or none of it. But this *primâ facie* rule may be rebutted if the will manifests a sufficient intention of the testator to the contrary. See *Green v. Britten*, 42 L. J., Ch. 187.

Who bound to elect.] All persons are bound to elect unless they are under some disability, for instance, infancy or lunacy (*post*); but coverture is no disability in this respect. Very frequently a widow was put to her election between her dower and benefits given her by her husband's will. But this particular form of election is not likely to occur so frequently since the Dower Act. See tit. "HUSBAND AND WIFE." A widow, however, may be put to her election between other interests than rights to dower, and benefits given her by her husband's will. Thus, she must elect between stock purchased in their joint names, which would survive to her, or property of her own, which he has bequeathed wholly or partially to another, and legacies, &c. given to her (*Worthington v. Wiginton*, 20 Bea. 67; compromised on appeal, 1 Jur., N. S. 1195; *Grosvenor v. Durston*, 25 Bea. 97;

Fitzsimons v. Fitzsimons, 28 Bea. 417; *Whitley v. Whitley*, 31 Bea. 173; but the bequest to another, of the interest belonging to the wife, must be clear and unequivocal to put her to an election. See *Dummer v. Pitcher*, 2 M. & K. 262; *Coleman v. Jones*, 3 Russ. 312; *Poole v. Odling*, 31 L. J., Ch. 439. If the widow does not elect in her lifetime, her representatives must do so. *Fytche v. Fytche*, L. R., 7 Eq. 494; see *Padbury v. Clarke*, 2 Mac. & G. 298.

It has been held that a married woman may elect without the intervention of the court; and, although the election affects real estate, it need not be by an acknowledged deed. *Ardesoife v. Bennet*, 2 Dick. 463; *Barrow v. Barrow*, 4 K. & J. 409; see *Willoughby v. Middleton*, 2 J. & H. 344; *Campbell v. Ingilby*, 21 Bea. 567; *Anderson v. Abbott*, 23 Bea. 457; *Griggs v. Gibson*, *Maynard v. Gibson*, L. R., 1 Eq. 685; comp. *Nicholl v. Jones*, L. R., 3 Eq. 696. But in *Cooper v. Cooper*, L. R., 7 H. L. 53, it was held that a married woman cannot declare an election, and an inquiry was therefore directed in the case of a married woman (one of two next of kin required to elect) for the purpose of ascertaining whether it was for her benefit and the benefit of her children to take under or against a will. The point does not appear to have been argued, and the preceding cases were not cited. See also *In re Queade's Trusts*, W. N. 1885, p. 99. In the case of a married woman to whom an interest with a restraint on anticipation attached thereto is given by the same instrument as that which gives rise to a question of election, the doctrine of election does not apply, as the value of her interest in the property to be relinquished by way of compensation has, by the terms of the instrument, been made inalienable. *In re Wheatley*, 27 Ch. D. 606.

The share of a married woman in the proceeds of sale of real estate devised to her in fee, and which has been sold under an order in a partition action, may be paid to her husband on her electing by examination in court to take the money as personal estate. *Standerling v. Hall*, 11 Ch. D. 652. See *In re Hayes*, 9 W. R. 769.

A female minor who covenants to settle her property by a deed not under the 18 & 19 Vict. c. 43, may, on attaining her majority and during the coverture, confirm the covenant. *Barrow v. Barrow*, 4 K. & J. 409; *Smith v. Lucas*, 18 Ch. D. 531; *Wilder v. Pigott*, 22 Ch. D. 263. Such election, however, cannot, it has been held, be made where it would affect property settled to her separate use with restraint on anticipation. *Smith v. Lucas*, *sup.*; *In re Wheatley*, 27 Ch. D. 606. But *Willoughby v. Middleton*, 2 J. & H. 344, is *contrà*, and was followed in *Re Vardon's Trusts*, 28 Ch. D. 124. Where the wife can and does elect she binds only that separate property to which she is entitled at the date of the confirmation, not that to which she may subsequently become entitled. *Smith v. Lucas*, *sup.* See *Pike v. Fitzgibbon*, 17 Ch. D. 454. The election may be made by the court where the wife is a lunatic, although not found so by inquisition. *Wilder v. Pigott*, *sup.* See *Jones v. Lloyd*, L. R. 18 Eq. 265. A married woman cannot, by her election, prejudice or affect her husband's marital rights. *Brodie v. Barry*, 2 V. & B. 127;

cons. *Ly. Cavan v. Pulteney*, 2 Ves. jun. 544; *Rutter v. Maclean*, 4 Ves. 531. A married woman could not formerly, at all events in general, by election deal with her reversionary choses in action. *Williams v. Mayne*, Ir. Rep. 1 Eq. 519; see *Wall v. Wall*, 15 Sim. 520, *contrà*; consider the 20 & 21 Vict. c. 57, and 45 & 46 Vict. c. 75, in cases where those acts apply. See *post*, tit. "HUSBAND AND WIFE."

The principle of election applies to cases in which some benefit is given to the testator's heir by the will, and property descends to him which it is clear the testator intended for another. Thus, prior to the 1 Vict. c. 26, where the testator devised to a stranger "all his real estate which he should die seised of," the heir was held bound to elect between benefits given to him by the will and lands purchased (*Churchman v. Ireland*, 1 R. & My. 250; *Abdy v. Gordon*, 3 Russ. 278; *Schroder v. Schroder*, Kay, 578, affirmed 18 Jur. 987; *Hance v. Truwhitt*, 2 J. & H. 216) or contracted for (*Theilsson v. Woodford*, 13 Ves. 211; *S. C.*, nom. *Rendlesham v. Woodford*, 1 Dow, 249) after the date of the will, and which descended to him as heir. See *Unett v. Wilkes*, Amb. 430; *Brodie v. Barry*, 2 V. & B. 127; *Back v. Kett*, Jac. 534; *Johnson v. Telford*, 1 R. & My. 244.

But this rule did not apply unless it was clear that the will was intended to operate on the after-acquired property. *Plowden v. Hyde*, 2 D., M. & G. 684. For there is no case of election between property given by the will to the heir and that which he takes by descent, and of which there is no disposition, and no such reference to it in the will as to lead to the clear inference that the testator intended to dispose of it. *Maxwell v. Maxwell*, 2 D., M. & G. 705; see *Johnson v. Telford*, 1 R. & My. 244; *Allen v. Anderson*, 5 Ha. 163; *Maxwell v. Hyslop*, L. R., 4 Eq. 407. But in such cases if the will refers to property and purports to dispose of it, though ineffectually, a case of election will arise. As where a testator attempts to dispose of Scotch property by a will valid only as regards property in England. *Brodie v. Barry*, 2 V. & B. 127. Where a testator devised all the residue of his real estate, situate in any part of the United Kingdom or elsewhere, and he had property in Scotland as well as England, but the will did not operate on the Scotch estate, it was held, that the heir taking it was put to his election. *Orrell v. Orrell*, L. R., 6 Ch. 303. If the heir takes nothing but what comes to him as heir, there is no case of election. *Anon.*, Gilb. Eq. Rep. 15; *Acc. Schroder v. Schroder*, Kay, 578. And it has been held, that if the real estate of a female minor be settled on her marriage, but the settlement is not afterwards perfected by her by an acknowledgment in her lifetime, and therefore not binding, her heir will not be bound by the settlement under which he takes no interest, where he takes such real estate only (*Campbell v. Ingilby*, 21 Bea. 567; 1 D. & J. 393. But see *ante*, p. 177. *Brown v. Brown*, L. R., 2 Eq. 481, 485. If, in addition, he takes some interest under the settlement in other property, he must elect between such interest and what he takes as heir. *Brown v. Brown*, L. R., 2 Eq. 481; see *Savill v. Savill*, 2 Coll. 721; *Anderson v. Abbott*, 23 Bea. 457.

An election will be raised by the devise of an estate tail to a stranger and benefits given to the heir in tail. *Wilson v. Ld. Townshend*, 2 Ves. jun. 693; *Welby v. Welby*, 2 V. & B. 187; *Honywood v. Foster*, 30 Bea. 14. And if the produce of entailed property be settled, but *not disentailed*, the heir in tail who accepts benefits under the settlement must give effect to it. *Mosley v. Ward*, 29 Bea. 407.

The heir cannot be put to an election by the will of his ancestor, unless there is a disposition by a valid will, and it does not arise if the testator be under disability; nor where he disposes, or attempts to dispose, of property by a will not *duly executed*. *Thellusson v. Woodford*, 13 Ves. 223; *Gardiner v. Fell*, 1 J. & W. 22.

A residuary legatee under a will, and the next of kin under an intestacy, have a clear and tangible interest in the residue, and may therefore be subject to the rule of election. *Cooper v. Cooper*, L. R., 7 H. L. 53.

An infant cannot elect, and in those cases in which the infant, if adult, would have to elect, the ordinary practice is to direct an inquiry whether it is to his advantage to do so or not. See *Gretton v. Haward*, 1 Sw. 413; *Brown v. Brown*, L. R., 2 Eq. 481, 486.

The court has power, in certain cases, to elect on the part of a lunatic. See *Re Marriott*, 2 Moll. 516. When several are entitled to elect, each has a separate right of election, and the election of any of them does not prejudice the rights of the others. *Ward v. Baugh*, 4 Ves. 623; *Fytche v. Fytche*, L. R., 7 Eq. 494.

Under Appointments in pursuance of Powers.] Cases of election may also arise under appointments in pursuance of powers. Thus, in the case of a void appointment by will to a stranger to the power, and gift of the appointor's own property to the object of it, who takes also under the power, in default of appointment, he must elect. Whistler v. Webster, 2 Ves. jun. 367; *Tomkyns v. Blane*, 28 Bea. 422; see *England v. Lavers*, L. R., 3 Eq. 63.

To raise a case of election the appointor must give property of *his own* to the object of the power, if he appoints the property subject to it to a stranger. *Re Fowler*, 27 Bea. 362. For if no property be given but what is subject to the power, there is nothing out of which compensation can be made. *Bristow v. Warde*, 2 Ves. jun. 336; Sug. Pow. 579, 8th Ed.

In *Coutts v. Acworth*, L. R., 9 Eq. 519, a lady, on her marriage, appointed 3,000*l.* to trustees, the interest to be paid to her husband for life; after his decease the capital was given over. The deed contained a power to revoke the trusts subsequent to the life estate. By her will, after marriage, she revoked *all* the trusts of the deed, and gave 1,000*l.* to her husband and 2,000*l.* to another person. It was held, that the testatrix having revoked all the trusts of the deed, while the power only extended to the remainder, the husband was put to his election.

If there are two powers, one exclusive and the other not, and there are several objects of both, an appointment of the whole fund, under

the exclusive power, to A., who is an object of both powers, and an appointment of the whole fund, under the non-exclusive power, to the other objects, excluding A., will not prevent A.'s sharing in the property, subject to the second power, which is defectively appointed by reason of his exclusion, and he is not bound to elect. *Re Aplin*, 13 W. R. 1062. And where there are two powers, both exclusive, children and grandchildren being the objects of one, and children only of the other, and an appointment is made under the former to children only and under the latter to children and a grandchild (not an object therefore), the children are not compellable to elect in order to give effect to the void appointment to the grandchild. *Re Fowler*, 27 Bea. 362. A case of election will not arise if a testator appointor merely requests or directs the appointees, who are also legatees of other property, to give the appointed property to strangers to the power. *Blacket v. Lamb*, 14 Bea. 482. Nor will it where the appointment is *absolute*, with a subsequent superadded direction or condition in favour of strangers. *Carver v. Bowles*, 2 R. & My. 301; *Woolbridge v. Woolbridge*, Johns. 63; *Churchill v. Churchill*, L. R., 5 Eq. 44; see *Wollaston v. King*, L. R., 8 Eq. 165; the case of *Moriarty v. Martin*, 3 Ir. Ch. R. 26, appears *contra*; but see the previous cases, and consider Sug. Pow. 8th Ed. 582. But a case of election does arise if the testator directs that the legacies shall be *forfeited* on the direction or condition not being complied with. *King v. King*, 15 Ir. Ch. R. 479.

No case of election arises under a void appointment, the appointor declaring that he makes it only in case he has power to do so. *Church v. Kemble*, 5 Sim. 525. An appointee under two appointments, one of which becomes inoperative, is not bound to elect between the well-appointed fund and an interest to which he becomes entitled as next of kin of the appointor in the ill-appointed fund which devolves on such next of kin in consequence of the appointment of it proving inoperative. *Blakelock v. Grindle*, L. R., 7 Eq. 215; see *Rich v. Cockell*, 9 Ves. 369.

When Election to be made.] There is, as a rule, no limit in point of time to a right to elect, unless it can be shown that injury would result to third persons by delay. *Brice v. Brice*, 2 Moll. 21. On the other hand, it would seem that a person having an equity to compel an election does not, in general, forfeit the right by delay in enforcing it. Per Lord Chelmsford, *Spread v. Morgan*, 11 H. L. C. 588.

A person is not bound to elect until all the circumstances which may influence his election are known to him, and an election made in ignorance of material facts is not binding. *Dillon v. Parker*, 1 Sw. 359; 1 Jac. 505; 1 Cl. & F. 303. So a person is not bound to elect without knowing the circumstances and value of the properties between which he is to elect. *Wake v. Wake*, 1 Ves. jun. 335; *Boynton v. Boynton*, 1 B. C. C. 445; *Chalmers v. Storil*, 2 V. & B. 222. And an election under a mistake will not, in general, be binding. *Pusey v. Desbouvrie*, 3 P. W. 315; *Dillon v. Parker*, 1 Cl. & F. 303.

Where there is no express election, it may be inferred from acts.

But to raise an inference of election it should appear that the person knew of his right to elect and not merely of the instrument giving it. *Edwards v. Morgan*, 1 Bli., N. S. 401. Even the receipt of a provision for sixteen years in ignorance of a right to elect will not estop a person (*Sopwith v. Maughan*, 30 Bea. 235); though an election may be presumed from acquiescence where there is *full knowledge*. *Worthington v. Wiginton*, 20 Bea. 67.

Election is a question of intention, and, in general, may be inferred from a series of unequivocal acts. *Spread v. Morgan*, 11 H. L. C. 588.

Settling one of two funds, as to which there is a right of election, will amount to an election to take the fund so settled. *Briscoe v. Briscoe*, 1 Jo. & Lat. 334. Suffering a recovery of lands devised in tail is an election to take those lands. *Giddings v. Giddings*, 3 Russ. 241.

Taking the interest or income of a fund or property is in general an election to take the fund or property producing the interest or income. *Ardesoife v. Bennet*, 2 Dick. 463; see *Dewar v. Maitland*, L. R., 2 Eq. 834. But where a person who has to elect between two estates continues in possession of both without being required to elect, there is no evidence of preference and consequently of election. *Padbury v. Clark*, 2 Mac. & G. 298; *Spread v. Morgan*, 11 H. L. C. 588. A recital in a deed may amount to an election or evidence of an election. *Dillon v. Parker*, 1 Jac. 505; 1 Cl. & Fin. 303.

In the absence of any evidence of election, express or implied, the question would seem to be whether a *disclaimer* can be presumed, particularly where the death of the party who is to elect follows very soon after that of the testator. In such cases it is a highly important ingredient in the case, whether it would be most for the benefit of the person entitled, to disclaim or not, and by this consideration, in the absence of all other evidence, the court will be materially influenced. *Harris v. Watkins*, 2 K. & J. 473.

When the presumption of an election arises, it is binding on those claiming under the party electing. *Dewar v. Maitland*, L. R., 2 Eq. 834; *Rogers v. Jones*, 3 Ch. D. 688.

As to election in cases where the doctrine of conversion applies, see *ante*, p. 112 *et seq.*

ESCHEAT AND FORFEITURE.

<i>Propter defectum Sanguinis</i>	186	<i>Propter delictum—continued.</i>	
<i>Realty—Personalty</i>	186	<i>Contingent Interests</i>	189
<i>Copyholds</i>	186	<i>Attainder—Conviction</i>	189
<i>Equitable Estates</i>	186	<i>Treason—Felony</i>	189
47 & 48 Vict. c. 71	187	<i>Felo de se</i>	190
<i>Mortgagor in Fee dying intestate and without Heir</i>	187	<i>Effect of Pardon</i>	190
<i>Trust Estate devised for purposes which fail</i>	187	<i>Practice of Crown</i>	190
<i>Liability to Charges</i>	188	33 & 34 Vict. c. 23	190
<i>Re-entry by the Crown</i>	188	<i>Abolition of Forfeiture except for Outlawry</i>	190
<i>Propter delictum</i>	188	<i>When Convict ceases to be subject to Act</i>	190
<i>Real Estate</i>	188	<i>Convict's disabilities</i>	190
<i>Treason—Felony</i>	188	<i>Administrators</i>	190-191
54 Geo. 3, c. 145	188	<i>Powers of</i>	191
<i>Felo de se</i>	189	<i>Where Property to revert</i>	191
<i>Contingent Interests</i>	189	<i>Liability of Administrators</i>	191
<i>Copyholds</i>	189	<i>Interim Curator</i>	191
<i>Gavelkind Lands</i>	189	<i>Accountability of Administrators, &c.</i>	191
<i>Equitable Estates</i>	189	<i>What Property not subject to Act</i>	191
<i>Trustees—Mortgagees</i>	189		
<i>Personal Estate</i>	189		

ESCHEATS are of two kinds. First, *propter defectum tenentis vel sanguinis*, or, as it may in other words be described, for want of a successor, either heir, or next of kin, according to the nature of the property. Secondly, *propter delictum*, for crime. Co. Lit. 13 a; *ib.* 92 b.

Propter defectum Sanguinis.] Escheat for want of successors takes place where a person dies intestate, leaving no one who can take as heir or next of kin, in which case his estates in fee, whether freehold, customary freehold or copyhold, will escheat to the lord of the fee (2 Blac. Com. 72; see *Walker v. Denne*, 2 Ves. jun. 170; *Weaver v. Maule*, 2 R. & My. 100), and his personalty to the crown (*post*). Therefore, if a bastard who has no lawful issue die intestate, his estate in fee escheats, for being *filius nullius* he can have no other heirs than his own issue. Co. Lit. 3 b.

But equitable estates formerly did not escheat, for they were not the subject of tenure, and where there was a conveyance or devise to a trustee upon trusts which fail, and there was no heir of the grantor or testator, the trustee held for his own use absolutely. *Burgess v. Wheate*, 1 Ed. 177; *Cox v. Parker*, 22 Bea. 168. Now by the 47 &

48 Vic. c. 71 (14th August, 1884), "From and after the passing of this act, where a person dies without an heir, and intestate in respect of any real estate, consisting of any estate or interest, whether legal or equitable, in any incorporeal hereditament, or of any equitable estate or interest in any corporeal hereditament, whether devised or not devised to trustees by the will of such person, the law of escheat shall apply in the same manner as if the estate or interest above mentioned were a legal estate in corporeal hereditaments" (s. 4); see *post*, tit. "TRUSTS," Ch. 5; *Burgess v. Wheate*, 1 Ed. 177. The crown may waive its rights (s. 6). "Where any beneficial interest in the real estate of any deceased person, whether the estate or interest of such deceased person therein was legal or equitable, is owing to the failure of the objects of the devise, or other circumstances happening before or after the death of such person, in whole or in part not effectually disposed of, such person shall be deemed, for the purposes of this Act, to have died intestate in respect of such part of the said beneficial interest as is ineffectually disposed of" (s. 7).

If there is no other superior lord of freehold estates, they escheat to the crown (*Doe v. Redfern*, 12 Ea. 96); but this cannot happen in respect of copyhold and customary freehold estates, as there is always a lord of the manor. *Walker v. Denne*, 2 Ves. jun. 170; see *Weaver v. Maule*, 2 R. & My. 97; *Portland (D. of) v. Hill*, L. R., 2 Eq. 765.

The crown is entitled, when there are *no next of kin* and there is no widow, to the chattels, real and personal estate of an intestate, or testator, under whose will personal estate is undisposed of, and which does not go to his executors beneficially (see *Middleton v. Spicer*, 1 B. C. C. 201; *Elcock v. Mapp*, 2 Ph. 793; 3 H. L. C. 492; *Taylor v. Haygarth*, 14 Sim. 8); *Russell v. Clowes*, 2 Coll. 648; as to which case, however, see *Powell v. Merrett*, 1 Sm. & G. 381; and if the intestate or testator leaves a widow, the crown and the widow are entitled in equal moieties. *Dacre v. Patrickson*, 1 Dr. & Sm. 182. Under an ultimate trust in a marriage settlement for the wife's *next of kin* in the event of her dying without issue, the husband and not the crown will be entitled if the wife die without issue or next of kin and possessed of personal property. *Hawkins v. Hawkins*, 7 Sim. 173; *Anon.* 1 Giff. 392.

On the death of a mortgagor intestate and without an heir, the mortgage being in fee, the mortgagee was entitled formerly to hold discharged of the equity of redemption (*Beale v. Symonds*, 16 Bea. 406), but subject to payment of the debts of the mortgagor to the extent of the value of the equity of redemption. *Ib.* 415. But in such cases, if the mortgage was for a term, the lord or the crown was entitled to redeem. *Visc. Downe v. Morris*, 3 Ha. 394; see *Rogers v. Maule*, 1 Y. C. C. 4; and cons. *Beale v. Symonds*, 16 Bea. 406. And this would be so now, it is considered, under the Act of 1884 in respect of all mortgages of freehold estates. When a testator died without heirs or next of kin, having devised his real estate to trustees upon trust to sell and apply the proceeds to purposes which were contrary

to law, as in mortmain, or which failed, the trustees were entitled to the money as real estate, as against the crown (*Taylor v. Haygarth*, 14 Sim. 8); see *Henchman v. Att.-Gen.*, 3 M. & K. 485; and the crown, was not entitled to money directed to be laid out in land, where the testator dies leaving next of kin but no heir, and without having made an effectual devise of his real estate. *Walker v. Denne*, 2 Ves. jun. 170; see *Cradock v. Owen*, 2 Sm. & G. 241. But see now the Act of 1884.

Freehold estates, which escheat, are liable to the intestate's debts, charges and incumbrances. See *Burgess v. Wheate*, 1 Ed. 192; *Evans v. Brown*, 5 Bea. 114. As to copyholds, there might perhaps have been a question before the 3 & 4 Will. 4, c. 104, at all events where there was no notice of any charge or incumbrance on the Court Rolls. See *Weaver v. Maule*, 2 R. & My. 100. But this statute makes the lands themselves assets for payment of debts (*ante*, p. 31; *Evans v. Brown*, 5 Bea. 114), to which the lord's right would be subject. *Visc. Downe v. Morris*, 3 Ha. 398, 400. As trust money may be followed into land against a trustee purchasing the land with such money on his own account, so it may as against the lord claiming the estate so purchased, by escheat on the death of the purchaser intestate and without an heir. *Hughes v. Wells*, 9 Ha. 749.

By the 22 & 23 Vict. c. 21, the crown may re-enter on lands to enforce a right of re-entry without any inquisition being taken or office found (s. 25).

Propter delictum.] Formerly, when a person was attainted of (*i.e.*, sentenced to death for) treason, being seised of freehold lands for life or for any estate of inheritance in use or possession at the time of such attainder, or at any time after, such lands were forfeited to the crown (26 Hen. 8, c. 13, s. 5; see 33 Hen. 8, c. 20; Co. Litt. 372 b; *Dowtie's case*, 3 Rep. 10 a); and if they were mortgaged, the crown might have redeemed them. *Att.-Gen. v. Crofts*, 4 B. P. C. 136; *Hodge v. Att.-Gen.*, 3 Y. & C., Ex. 342. But if the attainder was for felony, the crown was entitled to the lands of which the criminal was seised at the time of the crime (Co. Litt. 13 a, 390 b; *Morewood v. Wilkes*, 6 C. & P. 144) for his life (17 Edw. 2, st. 1, c. 16), and after his death to his estates of inheritance for a year and day (25 Edw. 3, st. 5, c. 2; 34 Edw. 3, c. 12); after which, the inheritance of estates in fee escheated to the superior lord of whom they were held (Bac. Ab. Forf. A.), while the inheritance of estates tail descended upon the issue in tail. See *Dowtie's case*, 3 Rep. 10. Another consequence of attainder was, that descent could not be traced through a person who had been attainted. Co. Lit. 13 a.

By the 54 Geo. 3, c. 145, it was enacted, that no attainder for felony, except for treason, murder, or abetting, procuring or counselling the same, should extend to the disinheriting of any heir, nor to the prejudice of the right of any person other than the offender during his life. See 4 Byth. Conv., ed. Sw. 71. And by the 3 & 4 Will. 4, c. 106, it was enacted, that descent might be traced through a person who had been attainted (s. 10).

The estates of inheritance of a person dying *felo de se* did not escheat. 3 Bac. Ab., tit. "FELo DE SE;" *Norris v. Chambres*, 29 Bea. 246, 259; affirmed 7 Jur., N. S. 689.

It was held, also, that a contingent use or estate could not be forfeited. *Manning v. Andrews*, 1 Leon. 260.

Copyholds, being held at the will of the lord, did not escheat to the crown, even for treason; but *on attainder* for that crime and for felony they escheated to the lord, but not without attainder, unless there was a special custom to that effect. *Lord Cornwallis' case*, 2 Vent. 38; *The King v. Wiles*, 3 B. & Al. 510; see *Doe v. Evans*, 5 B. & C. 584. As to gavelkind lands, see Rob. Gavelkind, ed. Norwood, 141—2.

Equitable estates in fee did not escheat for ordinary felonies, but the trustees held discharged of the trusts. *Att.-Gen. v. Sands*, Hard. 488; see *Burgess v. Wheate*, 1 Ed. 176; *Cox v. Parker*, 22 Bea. 168. See, now, *ante*, p. 187.

Formerly, if a trustee or mortgagee committed felony, the trust or mortgage estate would have been liable to escheat. See Co. Litt. 13 a, n. 7. But this was remedied by the 13 & 14 Vict. c. 60, which enacted that no escheat or forfeiture of any lands, stock, or chose in action, vested in any trustee or mortgagee, should take place by reason of the attainder or conviction of such trustee or mortgagee (s. 46). There is an exception as to any *beneficial interest* vested in such trustee or mortgagee (s. 47). These two sections re-enacted the 3rd and 5th sections of the 4 & 5 Will. 4, c. 23. As to the appointment of a new trustee in place of one convicted, see 15 & 16 Vict. c. 55, s. 8, *post*, tit. "TRUSTS."

On *conviction* for treason or felony, personal estate belonging to the felon at that time, or accruing to him afterwards before the expiration of his sentence, was forfeited to the crown. *Bullock v. Dodds*, 2 B. & Al. 258; *Roberts v. Walker*, 1 R. & My. 752; *Re Church*, 16 Jur. 517; see *Re Harrop*, 3 Drew. 726.

A contingent interest in personalty was not forfeited while the contingency subsisted (*Stokes v. Holden*, 1 Ke. 145), but otherwise if the interest was vested, though not payable or coming into possession until the punishment had been undergone (*Re Thompson*, 22 Bea. 506), for that was equivalent to a pardon, and restored the felon to his civil rights. 9 Geo. 4, c. 32, s. 3.

An *attainder* (*R. v. Bridger*, 1 M. & W. 145) for treason or felony (*ante*) related back to the time of the *offence committed*, and any conveyance or charge on the attainted person's real estate between the crime and conviction was void. 1 Hale, P. C. 360; 2 *ib.* 179; Co. Lit. 13 a; *ib.* 390 b. Personal estate and chattels real, however, were forfeited only from the time of *conviction*, and all *bona fide* sales of or dealings with this kind of property, between the offence and conviction for it, were valid (*Perkins v. Bradley*, 1 Ha. 219; *Chowne v. Baylis*, 8 Jur., N. S. 1028; see *Barnett v. Blake*, 2 Dr. & S. 117), unless merely *colourable* or voluntary, to avoid forfeiture. 1 Ha. 227; *Saunders v. Watson*, 4 Giff. 179. The personal estate of a person

dying *felo de se* was forfeited to the crown. *Norris v. Chambres*, 29 Bea. 246; affirmed 7 Jur., N. S. 689. As to the operation of a pardon under the great seal or privy seal and sign manual, see *Bullock v. Dodds*, 2 B. & Al. 277. As to personal property vested in trustees or mortgagees, see *ante*, p. 189. *Re Church*, 16 Jur. 517; *Re Harrington*, 29 Bea. 24; *Gough v. Davies*, 2 K. & J. 623; and as to the course of dealing by the crown with forfeited or escheated property, see *Doe v. Redfern*, 12 Ea. 96; *Ex parte Webster*, 6 Ves. 809; *Moggridge v. Thackwell*, 7 Ves. 71; *Cumming v. Forrester*, 2 J. & W. 334. By the 39 & 40 Geo. 3, c. 88, s. 12, and 6 Geo. 4, c. 17, s. 1, the crown was enabled to grant any escheated lands and hereditaments either for the purpose of restoring them, or of rewarding persons discovering the escheat.

[33 & 34 Vict. c. 23.] In the preceding pages I have endeavoured to give a concise statement of the law existing at the time of the passing of the act next noticed. By this act, 33 & 34 Vict. c. 23 (4th July, 1870), a change has been made in the law relating to forfeiture for crime. The leading provisions of the act, so far as they relate to a convict's property, are in substance as follows:—

After the passing of the act, no confession, verdict, inquest, conviction or judgment of or for any treason or felony or *felo de se* shall cause any attainder or corruption of blood or any forfeiture or escheat, provided that nothing in the act shall affect the law of forfeiture consequent upon outlawry (s. 1).

The word "forfeiture" in the construction of the act does not include any fine or penalty imposed on any convict by virtue of his sentence (s. 5).

The expression "convict" is to be deemed to mean any person against whom, after the passing of the act, judgment of death or of penal servitude shall have been pronounced or recorded upon any charge of treason or felony (s. 6).

When any convict shall die or be made bankrupt, or shall have suffered any punishment to which sentence of death pronounced or recorded against him may be lawfully commuted, or shall have undergone his full term of penal servitude or such other punishment as may have been substituted for such full term, or shall have received her Majesty's pardon, he shall thenceforth, so far as relates to the provisions of the act, cease to be subject to its operation (s. 7).

No action or suit for the recovery of any property, debt or damages shall be brought by any convict against any person while he shall be subject to the operation of the act, and every convict shall be incapable during such time of alienating or charging any property or of making any contract save as thereafter provided (s. 8). This saving would seem to refer to s. 30, *post*, p. 191.

The crown may from time to time appoint administrators of a convict's property and revoke appointments, and, when necessary, appoint new administrators, and thereupon the powers and property

vested in the prior administrator shall devolve upon his successor, who shall be bound by the lawful acts of the former (s. 9).

Upon the appointment of any administrator, all the real and personal property, including choses in action, to which the convict named in such appointment was at the time of his conviction, or afterwards, while he continues subject to the operations of the act, becomes entitled, vests in such administrator for all the estate and interest of such convict therein (s. 10).

The administrator has absolute power to let, mortgage, sell, convey and transfer any part of such property (s. 12).

The administrators may pay the costs of prosecution and of executing the act (s. 13), the convict's debts (s. 14), and may make compensation out of property to persons defrauded (s. 15), and allowances to convict's family (s. 16).

The exercise of the administrator's power as to payments, contracts, mortgages, conveyances *bonâ fide* made, is not to be questioned (s. 17).

Subject to the powers and provisions of the act, all such property and the income thereof shall be preserved and held in trust by the administrator, and the income thereof may, if and when the administrator shall think proper, be invested and accumulated in such securities as he shall from time to time think fit, for the use and benefit of the convict and his heirs and legal personal representatives, or of such other persons as may be lawfully entitled thereto, according to the nature thereof; and the same shall *revest* in and be restored to the convict upon his ceasing to be subject to the act, or in his heirs or legal personal representatives. The powers of the administrator are then to cease, except so far as may be necessary for the care of the property or for obtaining payment out of it of any expenses under the act (s. 18).

Administrators are only to be liable for what they receive (s. 19); costs of (s. 20). If there is no administrator, an interim curator of the convict's property may be appointed by justices (ss. 21, 22), and removed by them or the court (s. 23). The powers of an interim curator are similar to those of an administrator; but he cannot sell or mortgage the convict's real property at all, and can only sell his personal property under the authority of justices or the court (ss. 24, 25). Proceedings by or against an interim curator are not to abate if administrator appointed (s. 26). The execution of judgments against the convict's property is provided for (s. 27). Proceedings may be taken to make the administrator or interim curator accountable before property reverts to convict (s. 28), and they are accountable to the convict (s. 29). Property of a convict acquired while he is lawfully at large is not to be subject to the operation of the act (s. 30). The act does not extend to Scotland (s. 33).

OF ESTATES AND INTERESTS IN PROPERTY.

CH. 1.—OF PROPERTY AND ESTATES AND INTERESTS IN PROPERTY
GENERALLY, p. 192.

SEC. 1.—REAL PROPERTY, p. 192.

SEC. 2.—CHATTELS REAL AND PERSONAL PROPERTY, p. 196.

SEC. 3.—OF LEGAL AND EQUITABLE ESTATES AND IN-
TERESTS, p. 197.

CH. 2.—FREEHOLD ESTATES, p. 198.

SEC. 1.—ESTATES IN FEE, p. 198.

SEC. 2.—ESTATES TAIL, p. 206.

SEC. 3.—ESTATES ARISING BY THE OPERATION OF THE
RULE IN SHELLEY'S CASE, p. 217.

SEC. 4.—ESTATES FOR LIFE, p. 221.

CH. 3.—COPYHOLD ESTATES, p. 227.

SEC. 1.—ESTATES IN FEE, p. 227.

SEC. 2.—ESTATES TAIL, p. 232.

SEC. 3.—ESTATES FOR LIFE, p. 233.

CH. 4.—LEASEHOLD ESTATES, p. 234.

SEC. 1.—RENEWABLE LEASEHOLDS, p. 234.

SEC. 2.—TERMS OF YEARS, p. 239.

CH. 5.—PERSONAL ESTATE, p. 243.



CHAPTER I.

OF PROPERTY IN WHICH ESTATES AND INTERESTS MAY BE HELD.

SEC. 1.—*Real Property.*

<i>Generally</i> 193 <i>Real Property—Personal Pro-</i> <i>perty</i> 193 <i>Lands—Tenements—Heredita-</i> <i>ments</i> 193 <i>Incorporeal Hereditaments</i> 193 <i>Advowsons — Next Presenta-</i> <i>tion</i> 194		<i>Incorporeal Hereditaments—contd.</i> <i>Tithe Rent-charge</i> 194 <i>Merger of</i> 194 <i>Commons</i> 195 <i>Inclosure Acts</i> 195 <i>Dignities</i> 195 <i>Ways</i> 196 <i>Rents</i> 196 <i>Offices Franchises.</i> 196
--	--	---

Generally.] Under this head I propose to consider, first, the nature of property in which estates may be held; secondly, the nature and incidents of the estates themselves. In parts of this title matters of a somewhat elementary nature have been referred to, but as concisely as possible. The plan of the work, however, required that they should not be altogether passed over (*a*).

The usual division of property is into two classes: 1. Real, or immovable; 2. Personal, or movable. 2 Bl. Com. 16; Co. Litt. 118 b. Chattels real partake of the character of both, being immovable, yet personal estate in law. Real property comprises—first, lands which include not only the soil but everything on it, as houses, water, wood, &c., and under it, as mines, minerals, &c. 2 Bl. Com. 17, 18; *Rowbotham v. Wilson*, 8 H. L. C. 348. Though of course the owner of the whole may sell the mines reserving the soil, or sell the soil reserving the mines. *Ib.*; see *Humphries v. Brogden*, 12 Q. B. 739; *Ewart v. Graham*, 7 H. L. C. 331. Secondly, tenements, or whatever can be *holden*. The word includes land, but comprises other things besides land, as an office, right of common, not comprehended under the word land. 2 Bl. Com. 17, 18. Thirdly, hereditaments, a still larger word; for hereditaments comprise lands and tenements and whatsoever besides can be *inherited*, including in some cases even mixed or personal property; for instance, an heir-loom (2 Bl. Com. 17), as it is capable of being inherited (*ib.*), though, strictly speaking, it is inaccurate to class personal property of any kind under the description of real property. As to what are heir-loom, see tit. “EXECUTORS.” Hereditaments are *corporeal* or *incorporeal*. As to corporeal hereditaments, though, as defined by Blackstone, they “consist of such as affect the senses, and may be seen and handled,” yet he subsequently *limits* this definition to whatever may be comprehended under the word *land*. Com. 17. But this would not include an heir-loom, though falling within the definition of a corporeal hereditament.

Incorporeal Hereditaments.] Incorporeal hereditaments are rights issuing out of a thing corporate (whether real or personal), or concerning or annexed to or exerciseable within the same. 2 Bl. Com. 20. There are several kinds of incorporeal hereditaments. They consist principally of advowsons; tithes, or rather, at the present day, tithe rent-charges; commons; titles; ways, and rents.

An *advowson* is the *perpetual right* of presenting a person to an ecclesiastical benefice on a vacancy (Co. Lit. 17 b), and is either *appendant* to a manor, passing with it by a grant of the manor only (Co. Lit. 121 b; *Rooper v. Harrison*, 2 K. & J. 86), or *in gross*, that is, where the right has been granted away, and exists separately from the manor. 2 Bl. Com. 22.

An advowson may be limited in fee, in tail, for life or years, and in remainder or reversion, and is subject to curtesy and dower (3 Cr. Dig.

(*a*) See the very interesting and instructive preliminary chapters in Mr. J. Williams's valuable work on Real Property.*

tit. 21, c. 1), and may be held in joint tenancy, coparcenary and in common. *Ib.* c. 2. Joint tenants and tenants in common must all join in presenting, as also should coparceners, but if coparceners cannot agree, they take their turn in presenting according to seniority. *Ib.* See further as to advowsons, 3 Cr. Dig. tit. 21; *Crompton v. Jarratt*, W. N. 1885, p. 167.

If the right to the *next presentation* be sold, such right is *personal property*, and if before presentation the purchaser dies, it devolves on his personal representatives. *Rennell v. Bp. of Lincoln*, 7 B. & C. 113; Wms. Exors. 8th ed. 677, 678. As to presentations, where advowsons are held by Roman Catholics (see 11 Geo. 2, c. 17, s. 5; 10 Geo. 4, c. 7, s. 16).

The sale of the next presentation, the incumbent being in extremis within the knowledge of both contracting parties, but without the privity, or with a view to the nomination of a particular clerk, is not void, on the ground of simony. *Fox v. Chester (Bp.)*, 3 Bli., N. S. 123. Nor is an agreement for the sale of an advowson containing a stipulation for the payment of interest by the vendor until the benefice should become vacant, the incumbent being a son of the vendor, but no party to the contract. *Sweet v. Meredith*, 3 Giff. 610.

As to resignation bonds and agreements, see 9 Geo. 4, c. 94.

And as to sales of livings, the right of presentation to which is vested in the lord chancellor, see 26 & 27 Vict. c. 120.

Tithes are the tenth part of the increase yearly arising from the profits of lands, stock upon lands, and the personal industry of the inhabitants. 2 Bl. Com. 24. Tithes were, and the tithe commutation rent-charge (*post*) is, payable to the actual incumbent of the parish, or frequently to lay impropriators. Estates and interests in tithes, or tithe rent-charges follow the same course of descent, and are subject to the same incidents as real estate, quite irrespective of the purposes to which tithes were originally applicable. See 27 Hen. 8, c. 20; 31 Hen. 8, c. 13; 32 Hen. 8, c. 7. An estate in tithes, however, is quite distinct from the land out of which they (formerly) issued, or in respect of which the rent-charge in lieu of them is now payable (*Chapman v. Gatcombe*, 2 B. N. C. 516), and whatever may be the tenure of the lands, for instance, if it be *gavelkind*, &c. (*post*), the tenure and mode of descent of the tithes or tithe rent-charge are according to the general law of the land. *Doe d. Lushington v. Bp. of Llandaff*, 2 Bos. & P., N. R. 491.

Many perplexing questions arose formerly upon the subject of tithes. Now, however, by the 6 & 7 Will. 4, c. 71, tithes are commuted for a *rent-charge* payable in money, and estimated according to the average price of corn (wheat, barley and oats), and ascertained for the period and in the manner provided by the act. Sect. 67. No one is *personally* liable to the payment of the rent-charge, which is a charge upon the land (*ib.*), recoverable by distress like poor rates. Sect. 70. This act (s. 71), and subsequent acts (1 & 2 Vict. c. 64, s. 1, and 9 & 10 Vict. c. 73, ss. 18, 19, 20), contain provisions enabling tenants in fee and in tail to merge the tithe rent-charge, but without prejudice to charges

or incumbrances existing thereon. 2 & 3 Vict. c. 62, s. 1. The person merging the rent-charge may apportion such charges or incumbrances on the lands in which the merger shall take effect, or part of them, or in other lands. *Ib.*, ss. 2, 4, 6; and see 23 & 24 Vict. c. 93, s. 20, and ss. 31 to 39.

A right of common is a profit which one man has in the land of another, and is of four kinds. Common of pasture, or the right to feed beasts on the land of another. This is, (1) *appendant* to lands within a manor, being the right of owners or occupiers of such lands to put beasts on certain waste and other lands within a manor. This right can only be claimed by prescription. See Co. Lit. 122a (n), 2, 4; see the Prescription Act, *ante*, p. 149. (2) *Appurtenant*, which may arise by prescription or grant. *Ib.* (3) *By reason of vicinage*, resting on prescription, where the cattle of inhabitants of adjoining townships escape into each other's lands until they are inclosed. Co. Lit. 122a. (4) *In gross*, which is a personal right founded on grant or prescription. *Ib.* The three other kinds of common are—common of *piscary*, the right of fishing; of *turbary*, of cutting turf; of *estovers*, of taking wood;—on another man's property. 2 Bl. Com. 34, 35.

These rights have become and are yearly becoming more restricted, owing to the inclosures of commons, which are now effected through the instrumentality of inclosure commissioners.

Inclosures were formerly effected under the general Inclosure Act, 41 Geo. 3, c. 109, and Private Acts. Now commissioners, styled the Inclosure Commissioners for England and Wales, are appointed under the 8 & 9 Vict. c. 118, and inclosures are made under their sanction, large powers having been given to them for this purpose by this and several subsequent acts. See, in particular, 20 & 21 Vict. c. 31; 22 & 23 Vict. c. 43.

Under the 8 & 9 Vict. c. 118, the commissioners are required to make annual reports to one of the secretaries of state of the several cases in which they have authorized or refused their consent to inclosures, and of the cases in which the direction of Parliament is required for proposed inclosures (s. 3). In cases of the latter description, acts are in general passed giving effect to the recommendation of the commissioners. See, as instances of this course of proceeding, 30 & 31 Vict. chapters 20 and 71. The inclosures of commons near the metropolis are regulated by the 29 & 30 Vict. c. 122; 32 & 33 Vict. c. 107.

Dignities, or *titles*, which, down to and including the dignity of baronet, are hereditary, are also incorporeal hereditaments, and for the most part descend in the same way as an estate tail male (see *post*), though sometimes the limitation includes heirs in tail female, and in some rare instances, that of Lord Brougham, for example, the title was permitted to devolve upon the *collateral* heir on failure of lineal descendants. The invariable presumption of law is, that a peerage descends to heirs male, not heirs general, but it may be rebutted by authoritative evidence to the contrary. *Herries Peerage*, L. R., H. L., 2 Sc. App. 258.

A right of way over another man's land is also an incorporeal hereditament. This rests also, in general, upon prescription or grant. See *ante*, tit. "EASEMENTS."

Rent, *reditus*, is a *return* in the nature of an acknowledgment for the possession of some corporeal hereditament. 2 Bl. Com. 41. It is a certain profit issuing out of lands or corporeal tenements. It need not be money, but may be corn or other produce; but not part of the *very land* or tenement or thing itself out of which it is reserved so long as it retains its character in law (2 Blac. 41); though rent may be part of the very thing demised after it has been severed and become a chattel; thus, part of the rent of a quarry or a coal mine may be a certain portion of stone or coal to be rendered after severance. See *Reg. v. Westbrook*, 10 Q. B. 205. The most usual kind of rent is rent reserved on lease. As to rent-charges, see *ante*, tit. "ANNUITIES."

When it is stated that rent is an incorporeal *hereditament*, this must be understood either of rent reserved out of *property* which is inheritable, the right to which is incident to and goes with the reversion to the property, or of a rent-charge which is expressly granted in fee (see *ante*, p. 11), or in some rare instances in tail (J. Wms. Real Property, 14th ed., 350), and which is consequently of a descendible nature. When the rent is reserved to a person who has merely a *chattel interest* it is not *inherited*, but goes, if not otherwise disposed of, to his personal representatives.

The foregoing form at the present day the principal incorporeal hereditaments. There are four others according to Blackstone, viz. offices, franchises, corodies or pensions, and annuities; as to the last see *ante*, tit. "ANNUITIES." Questions upon the others do not often arise. This classification of incorporeal hereditaments is that which is adopted by Blackstone and most writers who have followed him. It is proper, however, to mention that Mr. J. Williams, whose views and opinions are entitled to the greatest respect and consideration, classes not only hereditaments of the kind above mentioned, but also reversions, vested and contingent remainders, and executory interests, under the general head of incorporeal hereditaments, distinguishing the former, however, as hereditaments *purely incorporeal*. See Wms. R. P., Part 2.

SEC. 2.—*Chattels Real and Personal Property.*

Chattels Real—Interests in Land . 196 | *Shares in Companies—Personalty* . 197

Chattels real, though in one sense personal property, yet are interests in land properly so called. Co. Litt. 118 b. They comprise all leases and terms of years, whatever their duration may be.

What cannot be classed under some one of the heads of real property, and is not a chattel real, is personal property. There is not, usually, much difficulty in distinguishing between real estate descending to the heir, or passing under a devise of realty, and personal estate devolving on the executor or next of kin, the distinction between the two classes of property being, in general, sufficiently marked. The cases where

doubt might chiefly arise are those in which persons are interested as *shareholders* in companies possessing real property. Such shares, however, are, as an almost universal rule, made personal estate by statute, the chief exceptions being shares of tolls of light-houses (*Att.-Gen. v. Jones*, 1 Mac. & G. 574) and New River shares, which are real estate. *Drybutter v. Bartholomew*, 2 P. W. 127.

Personal property, strictly speaking, is the subject of *absolute ownership*, and cannot be held for any *estate*. J. Wms. Personal Property, 12th ed. 8. Practically, however, by means of *trusts*, estates and interests in personal property may be created which, to a great extent, correspond with similar interests in real estate (*ib.* 425); and constantly in wills personal property is given to one person *for life* with remainders over, to which bequests effect is duly given in equity. In some few rare cases personal estate, or that which is in its nature personal estate—for instance, some kinds of heirlooms—will go to the heir and not to the executor. As to this, see *post*, tit. “EXECUTORS.”

SEC. 3.—Of Legal and Equitable Estates and Interests.

Legal Estates at Law 197 | *Equitable Estates in Equity* 197

The legal estate is that which is, or perhaps since the Judicature Acts it would be more accurate to say *was formerly*, regarded in a court of law, the equitable estate in a court of equity. Where there is no equitable estate as distinct from the legal estate, both being equal and co-extensive and vested in the same person, no question can, of course, arise in consequence of their different nature, for there is a merger of the equitable in the legal interest. *Selby v. Alston*, 3 Ves. 339. Where both interests are subsisting in the same property in different persons, the legal interest is that which is vested in the trustee, the equitable in the *cestui que trust*. See tit. “TRUSTS.”

It is a fundamental principle of universal application that equitable estates, whether in fee, in tail, for life or for years, are in equity what legal estates are at law, and the ownership of the equitable estate is in equity considered as the real ownership, the legal estate being, as it has been termed, no more than the shadow which always follows the equitable estate, which is the substance, except where there is a purchase for value without notice and the purchaser has the legal estate. *Att.-Gen. v. Downing*, Wilm. 23; *Burgess v. Wheate*, 1 Ed. 223; *Mansell v. Mansell*, 2 P. W. 681; *Williams v. Owens*, 2 Ves. jun. 603.

The absolute owner of the equitable estate may deal with it in equity without the intervention or interference of the trustee having the legal estate (see *Brydges v. Brydges*, 3 Ves. 120); though, of course, where it is necessary that the legal estate should be conveyed, the trustee must join, and may be compelled to join for this purpose.

Equitable estates descend in the same way as legal estates, and as regards customary equitable estates the descent is according to the

custom. Gilb. Uses and Trusts, 19; *Trash v. Wood*, 4 M. & C. 324. But where there is an *executory trust* only, the common law heir takes. *Ib.*; *Roberts v. Dixwell*, 1 Atk. 609. As to the distinction between executory and executed trusts, see tit. "MARRIAGE SETTLEMENTS."

CHAPTER II.

FREEHOLD ESTATES.

SEC. 1.—*Estates in Fee.*

<i>Nature of, and how created</i>	198	<i>Descent of, &c.—continued.</i>	
<i>Greatest Estate in Law</i>	198	<i>Descendants of deceased Ancestor represent him</i>	203
<i>Customary Freeholds</i>	199	<i>Limitation by Settlor to himself</i>	203
<i>Such Freeholds originally</i>	199	<i>Limitation to Heirs</i>	203
<i>Copyholds</i>	199	<i>Descent from Brothers and Sisters</i>	203
<i>And retain most of incidents</i> ..	199	<i>Ancestor may be Heir to Issue.</i>	203
<i>Conveyance of Freeholds</i>	199	<i>Paternal and Maternal Ancestors</i>	203
<i>44 & 45 Vict. c. 41</i>	199	<i>Half blood—Possessio fratris</i> .	204
<i>Of customary Freeholds</i>	199	<i>Descent through attainted Person</i>	204
<i>Ancient Demesne — Frankalmoin</i>	199	<i>Presumptive Heir—Right to Rents</i>	204
<i>Creation of Estate in Fee</i>	199	<i>Gavelkind</i>	205
<i>Word "Heirs"</i>	199	<i>Curtsey—Dower</i>	205
<i>"Heir"—"Successors"</i>	200	<i>Borough English</i>	205
<i>Descent of, before and under 3 & 4 Will. 4, c. 106</i>	200	<i>Operation of Act on Customary Descent</i>	205
<i>Former Rule, Descent traced from Person last seized</i>	200	<i>Incidents of Estates in Fee</i>	206
<i>Definition of Words</i>	201	<i>Absolute Ownership</i>	206
<i>Present Rule</i>	202	<i>Restrictive Conditions void</i> ...	206
<i>Heir must be according to English Law</i>	202		
<i>Canons of Descent</i>	203		
<i>Males inherit before Females</i> ...	203		

Nature of, and how created.] An estate in fee or fee simple is the greatest estate known in our law. Lit. s. 11. It is, strictly speaking, an estate which is not absolute, but held of some superior lord; and if, as is generally the case as regards freehold property, there is no other lord, it is in law held of the sovereign. Originally, estates in fee were granted by the lords to their *freemen*, as distinguished from copyhold estates, which were granted to their villeins. See "Copyholds," *post*; 2 Blac. Com. 79, 92. Real estate alone can be held in fee, for personal estate is not the subject of tenure. A freehold estate, for whatever period, cannot at the common law be made to commence *in futuro* without some previous estate *in presenti*, though it may, by the operation of the Statute of Uses (2 Blac. Com.

166) and under wills. See tit. "WILLS." There are certain freehold estates called customary freeholds, which are of a somewhat anomalous nature. They appear to have been originally pure copyholds (*post*, "Copyholds") as distinguished from freeholds, which, in course of time, ceased to be held *at the will of the Lord* though they continued to be held according to the custom of the manor, and retained all or most of their other copyhold properties. See Co. Lit. 59 b, n. 1. Thus the *freehold* remained in the lord, giving him the right to mines and timber. *Doe v. Huntington*, 4 Ea. 271; *D. of Portland v. Hill*, L. R. 2 Eq. 765. See further as to customary freeholds, *Vaughan d. Atkins v. Atkins*, 5 Burr. 2764; *Burrell v. Dodd*, 3 B. & P. 378; *Doe v. Huntington*, 4 Ea. 271; *Brown v. Rawlins*, 7 Ea. 409; *Graham v. Jackson*, 6 Q. B. 811; *Thompson v. Hardinge*, 1 C. B. 940; *Busher v. Thompson*, 4 C. B. 48.

Estates in fee are now conveyed almost invariably either by appointment under a power or by a simple deed of grant (8 & 9 Vict. c. 106, s. 2, 1st October, 1845), though other and earlier modes of conveyance, as by lease and release, or feoffment, may be occasionally resorted to. The use of the word "grant" is not necessary. Conveyancing Act, 1881, 44 & 45 Vict. c. 41. This applies to conveyances made before or after the commencement of the Act (on 1 January, 1882), s. 49. A person may convey freehold land or a thing in action to himself jointly with another, as he might convey to another: so a husband may convey to his wife and she to him, alone or jointly with another, s. 50. In a limitation in fee it shall be sufficient to use the words *in fee* simple without the word heirs; and the words *in tail*, or in tail male or female, without the words *heirs of the body* or heirs male or female *of the body*. This only applies to deeds executed after the commencement of the Act, s. 51. Customary freeholds are conveyed according to the custom of the manor, but in some, if not many, cases are conveyed, like ordinary freeholds, by grant, and not, like copyholds, by surrender and admittance. *Passingham v. Pitty*, 17 C. B. 299; see *Bingham v. Woodgate*, 1 R. & My. 32, 750. When the tenants hold by gift or feoffment they are freeholders, when they hold by copy of court roll at all, then they do not hold otherwise than as copyholders (*D. of Portland v. Hill*, L. R., 2 Eq. 784); consider the very learned judgment in this case, and also the judgments, particularly that of Williams, J., in *Passingham v. Pitty*, *sup.*

As to lands in ancient demesne, and lands held by frankalmoign tenure, see 2 Blac. Com. 100, 101; J. Wms. R. Prop. 14th ed., 134, 136. And as to gavelkind and borough English tenure, see *post*.

An estate in fee simple is properly created by a limitation to a person and "*his heirs*." Lit. s. 1. The word "assigns" is usually added, but is not necessary. Unless the word "heirs," being the proper word of limitation, or in *fee simple* where the case is under the Judicature Act, 1881, *sup.*, be used, a life estate only, will, as an almost universal rule, be created under a deed. *Ib.*; *Holliday v. Overton*, 15 Bea. 480; *Tatham v. Vernon*, 29 Bea. 604. The word "heirs" may be in any part, *e.g.*, at the end of a sentence; thus a

limitation in a deed to all and every the child and children equally, and if but one child to such child, his or her heirs creates a fee in all the children. *Doe v. Martin*, 4 T. R. 39. See 44 & 45 Vict. c. 41, *sup.* In a will, however, a fee may be created by other words, and without words of limitation at all. See tit. "WILLS." Even where property is limited by deed to trustees and their heirs in trust for A. (without more), A. merely takes a life estate. *Marshall v. Peascod*, 2 J. & H. 73; *Smith v. Smith*, 11 C. B., N. S. 121. Under a limitation to A. or his heirs, or to A. (*an individual*) and his *successors*, A. will only take an estate for life. Co. Litt. 8 b. But in a release from one joint tenant or coparcener to another, or from a lord to a tenant, or a release of a bare right or grant of rent by a coparcener for equality of partition, the fee will pass without the word heirs. Co. Litt. 9 b. So formerly in recoveries and certain fines. *Ib.* It may be observed that a limitation, or gift of *personal estate* to A. and his heirs, gives the absolute interest, but the word heirs is superfluous, and in a legal sense improper. A limitation to A. and his *heir* (in the singular) does not, according to Ld. Coke, create an estate in fee. Co. Litt. 8 b; see, however, Mr. Hargrave's note (*ib.*), and comp. *Chambers v. Taylor*, 2 M. & C. 376.

In *Bayley v. Morris*, 4 Ves. 788, by a marriage settlement, an estate was conveyed to the use of trustees in trust, after life estates to the husband and wife, for the *heir* male of her body by him to be begotten, *and to his heirs*, and for want of such, for the daughters, and if there should be no issue of the marriage, for the right heirs of the husband. The remainder to the heir male was held a contingent remainder in fee in such person as should be heir male of the wife at her death. And see *Greaves v. Simpson*, 10 Jur., N. S. 609.

Under a limitation to A. for life, remainder to B. (his wife) for life, remainder to the "heir female" (in the singular) begotten and then living, or which might be begotten thereafter, with remainder to the heir male, with remainder to the right heirs of A., it was held that the daughters of A. took *life estates* as purchasers. *Chambers v. Taylor*, 2 M. & C. 376. In *Dubber v. Trollope*, Ambl. 457, Eyre, C.J. seems to have considered that a limitation by deed to A. and his "heir" male would give A. an estate tail male. See *Fuller v. Chamier*, L. R., 2 Eq. 682.

Where the fee is conveyed to a corporation, the proper word of limitation is "successors," though this is not necessary in the case of corporations aggregate. Co. Lit. 9 b; 94 b.

As to the operation of the Rule in *Shelley's Case*, see *post*, Sec. 3.

As to what words in wills create an estate in fee, see tit. "WILLS."

Descent before and under 3 & 4 Will. 4, c. 106.] On the death of the owner in fee intestate the devolution of his estate is determined by law. Before the stat. 3 & 4 Will. 4, c. 106, the rule was *seisina facit stipitem*, and "no one could properly be such an ancestor as that an inheritance of lands or hereditaments could be derived from him unless he had had actual seisin." 2 Blac. Com. 209. But this rule must be understood as subject to the qualification that *mere seisin* was not

sufficient to make an estate descendible to the *heirs general* of the person seised; for instance, if he was seised by descent *ex parte maternâ*, on his death without issue the heirs by the mother's side took in preference to those by the father's side. For the descent to be traced from him *generally*, as if he had been the *purchaser*, it was necessary that the descent should be broken, as it was termed, that is, that he should convey his old estate by descent and take a new one *by purchase*. See 2 Blac. Com. 236; *Swaine v. Burton*, 15 Ves. 371; *Nanson v. Barnes*, L. R., 7 Eq. 250. On the death of the ancestor the heir was seised at law.

Seisin in fact was either by the entry of the owner or of any person who was seised jointly or in common with him. Watk. Desc. 52. Seisin might also have been by receipt of rents. See Co. Lit. 15 a. *De Grey v. Richardson*, 3 Atk. 469. The seisin at law and in fact was defeated by the entry of a stranger (Watkins on Descents, 4th ed., p. 34, *et seq.*), and the heir was then not seised in fact or at law. The word has a technical meaning, and where there is no context to control it will be so construed in wills. *Leach v. Jay*, 9 Ch. D. 42.

The enjoyment of incorporeal property in the way in which from its nature it was capable of being enjoyed was, as a rule, equivalent to the seisin of corporeal property, as in the case of an advowson by presentation to the church. See Co. Lit. 15 b.

The statute of 3 & 4 Will. 4, c. 106, has made most important alterations in the law of descent, particularly with reference to the person from whom the descent is to be traced. The act was in a great degree based upon the Report of the Real Property Commissioners, which will be found in Shelford's Real Property Statutes, 7th ed., 449, *et seq.* By the act, (which does not apply to descents before 1st January, 1834, s. 11,) it is in substance enacted, that (except where the nature of the provision or the context of the act shall exclude such construction), "land" shall extend to manors, advowsons, messuages, and all other hereditaments, corporeal or incorporeal, freehold or copyhold, or of any other tenure, and whether descendible according to the common law, or according to the custom of gavelkind or borough English, or any other custom, and to money to be laid out in the purchase of land, and to chattels and other personal property transmissible to heirs, and also to any share of the same hereditaments and properties or any of them, and to any estate of inheritance, or estate for any life or lives, or other estate transmissible to heirs, and to any possibility, right or title of entry or action, and any other interest capable of being inherited, and whether the same estates, possibilities, rights, titles and interests, or any of them, shall be in possession, reversion, remainder, or contingency; "the purchaser" shall mean the person who last acquired the land otherwise than by descent, or than by any escheat, partition or inclosure, by the effect of which the land shall have become part of or descendible in the same manner as other land acquired by descent; "descent" shall mean the title to inherit land by reason of consanguinity, as well where the heir shall be an ancestor or collateral relation, as where he shall be a child or other issue;

“descendants” of any ancestor shall extend to all persons who must trace their descent through such ancestor; “the person last entitled to land” shall extend to the last person who had a right thereto, whether he did or did not obtain the possession or the receipt of the rents and profits thereof; “assurance” shall mean any deed or instrument (other than a will) by which any land shall be conveyed or transferred at law or in equity (s. 1).

In every case descent is to be traced from the *purchaser*, and to the intent that the pedigree may never be carried further back than the circumstances of the case and the nature of the title shall require, the person *last entitled* shall be considered to have been the purchaser, unless it shall be proved that he *inherited*, in which case the descent is to be traced (*not stopping at any person proved to have inherited*) until some person is reached who is *not proved* to have inherited, who will be the purchaser (s. 2). See *Ingilby v. Amcotts*, 2 Jur., N. S. 556; comp. *Muggleton v. Barnett*, 2 H. & N. 653, *post*, p. 206; and see *Ld. St. Leonards' R. P. St.* 2nd ed., 267, 269, and the observations of Mr. J. Williams on this case, *Real Property*, Appendix A, 14th ed., 521 *et seq.* Where the *legal estate* has descended to the person last entitled *ex parte maternâ* the descent is to be traced accordingly, although he may take the equitable estate *ex parte paternâ*. *Wood v. Douglas*, 28 Ch. D. 327. In *Cooper v. France*, 14 Jur. 214, it was held, that where one of two *coparceners* died seised and intestate leaving a son, her share descended upon her son, and that the descent should not be traced beyond the mother up to the ancestor from whom the estate descended upon the coparceners. See *Paterson v. Mills*, 15 Jur. 1; J. Wms. R. P., App. B., p. 527. It was held, also, on this section, that where land descended upon the son from his father, who was illegitimate, and the son died seised, intestate and without issue, his heirs *ex parte maternâ* were excluded, and the land escheated. *Doe v. Blackburn*, 1 Moo. & R. 547. The decision would have been the same under the common law. See the reporter's note, and 4 Jur., N. S., Pt. 2, 134, 180. But such a result is now prevented by the operation of the 22 & 23 Vict. c. 35, enacting that where there shall be a total failure of the heirs of the purchaser, or where any land shall be descendible as if an ancestor had been the purchaser thereof, and there shall be a total failure of the heirs of such ancestor, the descent shall be traced from the person *last entitled* to the land as if he had been the purchaser thereof (s. 19); and this section is to be read as part of the 3 & 4 Will. 4, c. 106 (s. 20).

The title to land in England being determined by English law, a person not born in wedlock, though legitimate by the law of the country where he is domiciled (Scotland, for example), by reason of the subsequent marriage of his parents, cannot inherit land in England as heir to his father (see *Doe v. Vardill*, 2 Cl. & Fin. 571); nor, in such cases, can the father inherit as heir to his son under s. 6, *post*. *Re Don*, 4 Drew. 194.

Where males and females are in equal degree in the line of descent, for instance, sons and daughters, and the land is not subject to any

special custom, as gavelkind or borough English, the sons are first entitled and successively in the order of birth, but the daughters are entitled together and equally. This was the rule before the act (2 Blac. Com. 212), and is not altered by it.

All the lineal descendants *in infinitum* represent their ancestor, and stand in the same position with regard to their right of inheritance as he would have done. Thus, on the death of a grandfather, his grandchildren, being the children of his *eldest son*, stand before their uncles and aunts, the grandfather's *younger children*. 2 Blac. Com. 216. This rule also is not affected by the act.

Formerly, if a person devised to his *heir*, or to the person who was his heir, the latter took by descent as the preferable title, and not by purchase. Co. Lit. 22 b. Now, the heir in such cases will take as a purchaser, and not by descent, under a devise by a testator dying after the 31st December, 1833 (s. 3). See *Davis v. Kirk*, 2 K. & J. 391; *Buchanan v. Harrison*, 1 J. & H. 662.

Formerly, under a limitation by the settlor to himself in fee he was in of his *old estate*, and if that was by descent, he was not such an ancestor from whom the descent could be traced generally. Thus, if he was in by descent *ex parte maternâ*, and died intestate, his heir *ex parte maternâ* was entitled. *Nanson v. Barnes*, L. R., 7 Eq. 250. Now, under a limitation contained in any assurance executed after 31st December, 1833, by the grantor to himself or his heirs, he will take a *new estate* as a purchaser, and is not in of his old estate (s. 3).

Formerly, under a limitation or devise by a person *not being the ancestor*, to the heirs or heirs of the body of another, such heirs or heirs of the body took by purchase. See *Fearne*, Con. Rem. 80; *Mandeville's Case*, Co. Lit. 26 b; *Wills v. Palmer*, 5 Burr. 2615; *Roe v. Quartley*, 1 T. R. 630; *Vernon v. Wright*, 7 H. L. C. 35. Now, under a similar limitation in assurances executed after the 31st December, 1833, and in wills of testators dying after that day, the descent is traced as if the *ancestor* named in such limitation had been the purchaser (s. 4). See (s. 12) *post*, p. 204.

Formerly brothers and sisters claimed immediately through each other. 2 Blac. Com. 226; *Kynnauld v. Leslie*, L. R., 1 C. P. 389. Now the descent is traced through the parent (s. 5).

Formerly, the inheritance might lineally descend but not ascend (Lit. 3; Co. Lit. 10 b), except in the collateral line (*ib.* 11 a), so that the father could not take as heir to his son. *Id.* Now, every lineal ancestor is capable of being heir to any of his issue following next in order after the issue of such issue, so that a father is preferred to a brother or sister, and a *more remote* lineal ancestor to any of his issue, unless such issue happens to be a *nearer* lineal ancestor or his issue (s. 6). See *Re Don*, 4 Drew. 194, *ante*, p. 202.

Ancestors by the father's side are preferred to those by the mother's side, and male paternal ancestors to female paternal ancestors, and male maternal ancestors to female maternal ancestors (s. 7). With respect to paternal and maternal ancestors, the mother of a *more remote* male ancestor and her descendants is preferred to the

mother of a less remote male ancestor and her descendants (s. 8). See 2 Blac. Com. 238.

Formerly, relations by the half blood could not succeed as heirs to *each other*, except in certain cases circuitously. See Lit. s. 8. Hence, where an eldest son and daughter by one wife, and a younger son by another wife, were living, and an estate in fee descended from the father on the eldest son, who died *seised*, his sister succeeded, for in such case the rule was *possessio fratris facit sororem esse hæredem*; but if the eldest son did not die *seised*, the descent was traced from *the father*, and the younger son was heir. *Ib.*; *Buchanan v. Harrison*, 1 J. & H. 662. Now persons are capable of inheriting from their relations by the half blood immediately after a relation in *the same degree* of the whole blood and the issue of such relation, where the common ancestor is a male, and next after such ancestor if a female (s. 9). See 1 Byth. Conv. by Sweet, 146, n. (a); J. Wms. R. P. 14th ed. 118.

As already mentioned, *ante*, p. 188, an attainder had the effect of preventing descent being traced through the attainted person; this is now altered (s. 10); but the act does not apply to descents taking place on the death of any person dying before the 1st January, 1834, (s. 11). *Kynnaïrd v. Leslie*, L. R., 1 C. P. 389.

Where any assurance, executed before the first day of January, 1834, or the will of any person who shall die before the same day, shall contain any limitation or gift to the heir or heirs of any person, under which the person or persons answering the description of heir shall be entitled to an estate by purchase, then the person or persons who would have answered such description of heir if the act had not been made, shall become entitled by virtue of such limitation or gift, whether the person named as ancestor shall or shall not be living on or after the said day (s. 12).

It will be observed, that the act has a twofold operation, first, in altering the *root of descent* from the person last *seised* to the person last entitled, who is not proved to have inherited; secondly, in altering, in some cases, the *rules of inheritance*, as, for instance, in the important case of making the father heir to the son in default of issue of the latter.

It sometimes happens that, on the death of a person, his presumptive heir (for instance, a brother) becomes entitled; whose estate, however, becomes divested on the birth of a nearer heir, as where the deceased brother leaves his widow *enceinte*, and a child is afterwards born. In such cases where there is no residuary devisee the presumptive or intermediate heir is entitled to the rents accruing between the time of such death and the birth of the nearer heir, whether such rents have actually been received or not. *Richards v. Richards*, Johns. 754. But not it would seem where the legal estate is vested in trustees. But in such cases a child *en ventre sa mère* is not considered as born. *Richards v. Richards*, *sup.*, judgment. *Goodale v. Gawthorne*, 2 Sm. & G. 375. Where there is a residuary devisee he will be entitled. *Re Moulem*, L. R., 18 Eq. 9. Where there was an executory

devise of realty and bequest of personalty to a son of A., failing such son to a son of B., and their respective heirs or heir of the body, and there was a son of B. living, but no son of A., it was held that the former was not entitled to the income, but, until it could be ascertained whether A. would have a son or not, the heir of the testator was entitled to the rents of the realty and the next of kin to the income of the personalty. *Wade Gery v. Handley*, 3 Ch. D. 374. The case of *Sidney v. Wilmer*, 4 D. J. & S. 84, is *contra*, but must now be considered as overruled. *Cons. E. Bective v. Hodgson*, 10 H. L. C. 656.

Lands of gavelkind tenure descend to all the sons equally; if there are no sons, to all the daughters equally. Lands of this tenure are rarely to be met with out of Kent, and *there* the presumption is, until the contrary is shown, that *all* lands are of this tenure. *Bac. Ab. Gavelk. B.*; *ib.*, Descent, D. The custom extends to collaterals. Thus, on the death of one brother, intestate, all his brothers will succeed; and if any brother is dead, his children will be entitled, *according to the custom*, as representing him and taking his share. *Clements v. Scudamore*, 1 P. W. 65; *Hook v. Hook*, 1 H. & M. 43. The husband is entitled to curtesy on the death of his wife, seised of gavelkind lands, whether he had issue or not; but only to a *moiety*; and this right ceases on his marrying again. And the wife of a husband dying seised is also entitled to dower of a moiety; but only so long as she continues unmarried and chaste. *Bac. Ab. Gavelk. A.*

When lands of this tenure are devised to the heir the heir at common law will be entitled as *persona designata*. *Co. Litt. 10 a. Thorp v. Owen*, 2 Sm. & G. 90; *Sladen v. Sladen*, 2 J. & H. 369; *Garland v. Beverley*, 9 Ch. D. 213. They may also be conveyed by a tenant in fee, by *jeoffment*, at the age of fifteen. 2 *Blac. Com.* 84; see 8 & 9 *Vict. c.* 106, s. 3.

Land held by borough English tenure descends on the youngest son (*Lit. s.* 165), or, if he be dead, to his youngest son, for the custom prevails in the case of lineal descendants. *Bac. Ab. Bor. Eng.* As to collaterals, see *Rider v. Wood*, 1 K. & J. 644. Where there is a custom of descent varying from the common law of descent, it will not be extended beyond the strict custom proved. Thus where the custom of a manor was stated to be that all copyholds descended to the youngest son or daughter, brother or sister, uncle or aunt, and a tenant died intestate seised of customary lands of the manor, leaving neither son, daughter, brother, sister, uncle, nor aunt; but leaving sons of deceased uncles; it was held that the youngest son of the youngest uncle was not entitled, and that the heir-at-law was entitled to the lands. *In re Smart*, 18 Ch. D. 165. The 3 & 4 *Will. 4, c.* 106, applies to lands of gavelkind or borough English tenure or other customary tenure (s. 1). The extent, however, to which the statute has altered the law of customary descent existing prior to the statute is a matter which does not appear to be very clearly settled. Possibly the intention of the act as to such lands was to lay down the rules by which the purchaser, or person from whom the descent was to

be traced, was to be ascertained, but that when once *he* was found, the descent was to be to his heir according to the custom, and that in the event of any conflict between the custom and rules of descent as existing before but modified by the act, the latter should prevail. For instance, in the case of borough English lands, that, in the event of an intestacy, the person last entitled, who was not proved to have inherited, should be found; that *when found*, his youngest son should inherit according to the custom. The validity of the custom to this extent, notwithstanding the act, is admitted, for the act has introduced no new rule at variance with the custom in this particular. In *Muggleton v. Barnett* (2 H. & N. 653), however, much greater effect was given to the custom, and the court held, that where by it the estate went to the heir of the person *last seised*, the custom should prevail to the fullest extent, and that the heir of the *last purchaser*, according to the letter of the act, should not take, as he was not the heir of the person last seised. See J. Wms. R. P. 14th ed. 105, and App. A, 521; Sug. R. P. St. 271.

Incidents of Estates in Fee.] Tenant in fee is practically *absolute* owner (though theoretically he holds of some lord or the crown), and can deal with the estate in any way he thinks fit, as by sale, mortgage, demise, devise, &c., though originally it could not be conveyed without the lord's consent (2 Bl. Com. 57); neither, as will be seen, could it be devised (*post*, tit. "WILLS.") Now, any condition attempting to fetter the power of disposition of a tenant in fee is simply void. *Bradley v. Peixoto*, 3 Ves. 324. See further, as to estates in fee, Sec. 3, *post*, p. 217, and tit. "WILLS."

SEC. 2.—*Estates Tail.*

<i>Estate Tail generally</i>	207	<i>Barring the Entail by Fine and</i>	
<i>Definition</i>	207	<i>Recovery</i> —continued.	
<i>What may be entailed</i>	207	<i>Statute de donis</i>	208, 209
<i>As to personalty</i>	207	<i>Taltarum's Case</i>	209
<i>Creation of Estate Tail</i>	207	<i>Fine—Recovery</i>	209
<i>Words "Heirs of the body"</i> ...	208	<i>Both founded on fictitious</i>	
<i>General—Special</i>	208	<i>Actions</i>	209
<i>Male—Female</i>	208	<i>Deeds leading and declaring</i>	
<i>After possibility of Issue</i>		<i>Uses</i>	209
<i>extinct</i>	208	<i>Fines and Recoveries Abolition Act,</i>	
<i>Ex provisione viri</i>	208	3 § 4 <i>Will. 4, c. 74</i>	210
<i>Children—Issue</i>	208	<i>Definition of Words</i>	210
<i>Descent of</i>	208	<i>Power to bar Entails</i>	210
<i>Follows Limitations</i>	208	<i>Tenants in Tail after possibility</i>	
<i>Dignities</i>	208	<i>of Issue extinct</i>	210
<i>Barring the Entail by Fine and</i>		<i>Tenant in Tail restrained by</i>	
<i>Recovery</i>	208	<i>Statute</i>	210
<i>Fee conditional at Common</i>		<i>Tenant in Tail ex provisione</i>	
<i>Law</i>	208	<i>vir</i>	211
		<i>Consent of Protector</i>	211, 212
		<i>Married Woman Protector</i> ...	212

Fines and Recoveries Abolition Act
—continued.

<i>Specially named</i>	212
<i>Protector—Lunatic, Traitor,</i>	
<i>Felon—Married Woman</i>	212
<i>Enrolment</i>	212, 214
<i>Base Fee</i>	213
<i>Protector uncontrolled</i>	213
<i>Voidable Estates</i>	213
<i>Base Fee united with Reversion</i>	213
<i>Form of Disposition</i>	213
<i>Will or Contract inoperative</i> ...	214
<i>How Tenant in Tail must execute</i>	214

Fines and Recoveries Abolition Act
—continued.

<i>Consent by Protector, how given</i>	214
<i>Not revocable</i>	214
<i>Jurisdiction of Equity excluded</i>	214
<i>Bankruptcy</i>	215, 216
<i>Lunacy</i>	215
<i>Incidents of Estates Tail</i>	216
<i>Restrictions on Alienation void</i>	216
<i>Unless under Special Grants by</i>	
<i>Crown or Parliament</i>	216
<i>Cannot be defeated in part only</i>	217
<i>Keeping down charges</i>	217

Estate Tail generally.] An estate tail, as distinguished from an estate in fee, is an estate limited to a person and the heirs of *his or her body*. In the strictest sense of the term “tenements,” that is, all corporeal and incorporeal hereditaments which savour of the realty, also dignities (Co. Lit. 19 b, 20 a), can alone be entailed; and this word alone is used with reference to entails in the statute *De donis*, cited hereafter, *post*, p. 208. But in its larger sense other, even personal, property may be made, to a certain extent, though not strictly, the subject of an entail. See *post*, Ch. V.

Creation of an Estate Tail.] An estate tail *general*, comprising the issue of a person, as A., by *any* marriage, is created by a limitation to A. and the heirs of his or her body. Lit. ss. 14, 15. An estate tail *special*, comprising the issue of A. by a particular marriage *only*, is created by a limitation to A. (where A. is a male) and the heirs of his body begotten upon B.; or to A. (where A. is a female) and the heirs of her body begotten by B.; or (where the limitation is to two) to A. and B. and the heirs of their bodies. See Lit. ss. 27, 28. Under these forms of limitation the estate is descendible first in the male line, failing that in the female line. The line of descent, however, may be restricted to males or females. Thus, under a limitation to A. and the heirs male of his body, male descendants alone can inherit. Lit. ss. 21, 24. Where the limitation is to A. and the heirs female of his body, female descendants alone can inherit. Lit. ss. 21, 22; Co. Lit. 24 b. See now Conveyancing Act, 1881, *ante*, p. 199.

The estate of a tenant in tail after possibility of issue extinct arises where a person is tenant in *special* tail, but there is no possibility of his having issue inheritable under the entail; as where an estate is limited to A. and the heirs of his body by a particular wife, and she dies without issue. In such cases A. could not formerly bar the entail by recovery (14 Eliz. c. 8), and, as will be seen (*post*, p. 211), cannot now, his estate being reduced practically to that of a tenant for life.

The estate of a tenant in tail *ex provisione viri* arose where a female was tenant in tail of lands of her husband or lands given by any of his ancestors. After her husband's death she could not bar the entail

without the consent of the heirs next entitled. 11 Hen. 7, c. 20; *see post*, p. 211.

The word "heirs" is material in a deed, and indicates an estate of *inheritance*, distinguished, however, from a fee by the addition of the words "of the body." See Co. Lit. 20 a. See now, *ante*, p. 199. Therefore a limitation *by deed* to A. and his *children* or *issue*, or the like, only creates an estate for life. *Ib.* 20 b. But a limitation in tail may be created by clear words of reference to another limitation in tail; as, to A. and the heirs of his body, remainder to B. *in manner aforesaid*. *Ib.* The words "*of the body*," or equivalent words, were however essential, though these *very* words need not be used. *Ib.*, See now *ante*, p. 199. Thus a limitation to A. and the heirs which he shall beget on his wife, creates an estate tail. *Ib.* Limitations in a deed to the heir or heir male (in the singular) are not very common. In *Dubber v. Trollope*, Amb. 457, Eyre, C.J., seems to have considered that a limitation by deed to A. and his heir male would give A. an estate tail male. See Co. Lit. 8 b, n. 4; *ib.* 20 b, 22 a; *Chambers v. Taylor*, 2 M. & C. 376; *Fuller v. Chamier*, L. R., 2 Eq. 682, on a will; and *ante*, p. 200. See also Rule in *Shelley's Case*, *post*, p. 217. As to what words create an estate tail in wills, see tit. "WILLS."

Descent of.] The descent of an estate tail differs from that of an estate in fee chiefly in this, that the *limitations*, whether in tail general, special, male or female, must be followed, and the estate cannot ascend nor go to the collateral heirs of the tenant in tail, who are not in the line of limitation. With these differences, the devolution of an estate tail is like that of an estate in fee, the first donee in tail being the purchaser from whom the descent is to be traced. Thus, under an ordinary limitation to A. and the heirs of his body, his eldest son and his issue take; failing that son and his issue, his second son and his issue, and so on; failing sons and their issue, his daughters take; and, if more than one, equally, and their issue. See J. Wms. R. P., 14th Ed., 108.

It may be observed, that the limitation of titles (down to and including that of a baronet) is for the most part the same as that of an estate tail male, see *ante*, p. 207.

Barring the Entail by Fine and Recovery.] At common law there was strictly speaking no estate tail but an estate *in fee, conditional* on the tenant in fee having an heir of the body capable of inheriting (Litt. s. 13); and as soon as such an heir was born, the condition was considered to be performed, and, by the common law, the estate became an estate *in fee absolute* to this extent, that it could be aliened. If, however, there was no issue on the death of the donee in tail, or such issue afterwards failed, the land reverted to the donor if it had not been aliened. See Co. Litt. 19 a. By the celebrated statute *De donis* (13 Edw. 1, c. 1), sometimes called the Statute of Westminster the Second, this interpretation of the common law was declared to be

contrary to the intention of the donor, and it was in effect enacted, that there should be *no such right of alienation* on the birth of issue, but that in such case the land should in due course descend to the issue, and in default or failure of issue should revert to the donor.

The judges, however, were opposed to the principle of perpetuities which would have been established had this statute remained in full force, and, as observed by Lord Coke, about the twelfth year of Edw. 4, the judges on consultation had among themselves resolved that an estate tail might be docked and barred by a common recovery, and that it was not within the restraint of the perpetuity made by the said act 13 of Edw. 1. *Mildmay's Case*, 6 Rep. 40, b., 1st resolution. In *Taltarum's Case* (Year Books, 12 Edw. 4, c. 19), which was one of the decisions on the subject of the effect of a recovery, it was held by the court, while recognizing the general rule (the result of the deliberation of the judges referred to by Lord Coke), as to the effect of a recovery suffered by a tenant in tail *in possession*, that a recovery by a tenant in tail *out of possession* had not the effect of barring the estate tail.

An estate tail might also have been barred by a *fine*, so far as regarded the *issue in tail* and the remainders over, in certain cases, but a recovery was more effectual, for as a general rule, it barred the reversions and the remainders over.

Fines and recoveries were both founded on *fictional actions*, the former being compromised, and the latter brought to a termination by arrangement between the parties. Both stood on the principle of *admission*, namely, of the right being in another, and were, in effect, *forms of assurance*, and were judicially noticed as such. The *uses* of fines and recoveries were declared either by a deed executed previously, which was called the deed *leading* the uses, or subsequently, which was called the deed *declaring* the uses. *Stapilton v. Stapilton*, 1 Atk. 17. As both have now been abolished upwards of fifty years by the statute presently noticed, it has been considered unnecessary in a work of this nature further to enter into a consideration of them. For the learning on the subject the reader is referred to a most valuable note by Mr. Hargrave, Co. Lit. 121 a, n. (1); 5 Cruise, Digest, 63 *et seq.*; *Ib.* 268 *et seq.*; Smith's Comp. of the Law of Real and Personal Property, 4th Ed., 911, *et seq.*, and the First Report of the Real Property Commissioners, cited Shelford, R. P. St., 7th Ed., 320. Of course questions on the validity or operation of fines or recoveries may still arise. See *Anderson v. Anderson*, 30 Bea. 209; *Life Association of Scotland v. Siddal*, 3 D., F. & J. 58; *Davies v. Lowndes*, 7 Sc. N. R. 141; *Doe d. Daniel v. Woodroffe*, 2 H. L. C. 811; and a few other cases decided since the act was passed, collected in Fisher's Com. Law Dig. tit. "Fine and Recovery." Cases upon the subject, however, are now very rare.

Fines and Recoveries Abolition Act.—The act for "the Abolition of Fines and Recoveries and for the Substitution of more simple Modes of Assurance," is the 3 & 4 Will. 4, c. 74, which does not extend to Ireland, except where expressly mentioned (s. 92). But an

act was subsequently passed for Ireland, the 4 & 5 Will. 4, c. 92 which in substance corresponds with the English act, with the exceptions principally that a few sections, for the most part relating to copyholds and lands in ancient demesne, are omitted.

By the interpretation clause, 3 & 4 Will. 4, c. 74, "lands" extends to manors, advowsons, rectories, messuages, lands, tenements, tithes, rents and hereditaments, corporeal or incorporeal, of any tenure except copyholds, and to them if accompanied by some expression denoting copyholds; "estate" extends to equitable as well as legal estates and any interest therein, and money subject to be invested in the purchase of lands; "base fee" means that estate into which an estate tail is converted, where the issue in tail are barred, but not those in remainder; "estate tail," in addition to its usual meaning, means a base fee into which an estate tail shall have been converted; "actual tenant in tail" means the tenant of an estate tail which shall not have been barred, and that although the estate tail may have been divested or turned to a right; "tenant in tail" means, not only an actual tenant in tail, but also a person whose estate tail has been converted into a base fee; "tenant in tail entitled to a base fee" means a person entitled to a base fee or to the ultimate beneficial interest in a base fee; "money subject to be invested in the purchase of lands," includes money, whether raised or to be raised, and whether the amount thereof be or be not ascertained, and securities for the same, and the lands to be so purchased shall extend to copyholds and lands of any tenure in Ireland or elsewhere, if within the scope of the trust directing or authorizing the purchase; "person" extends to a body politic, corporate or collegiate, and includes females; "settlement" comprises every assurance made or to be made, whether by deed, will, private act of parliament or otherwise; and appointments in exercise of powers in settlements shall be considered as part of such settlements; and settlements made by will shall be considered as made at the death of the testators (s. 1). The statute next enacts, that no fine shall be levied or recovery suffered after the 31st December, 1833, with certain now immaterial exceptions (s. 2). Then, after several preliminary sections (3 to 15), providing principally for the remedying and making good in various particulars defects in existing fines and recoveries, it is enacted, "that after the 31st December, 1833, *every actual tenant in tail, whether in possession, remainder, contingency or otherwise, shall have full power to dispose of for an estate in fee simple absolute, or for any less estate, the lands entailed as against all persons claiming the lands entailed by force of any estate tail which shall be vested in or might be claimed by, or which but for some previous act would have been vested in or might have been claimed by, the person making the disposition, at the time of his making the same, and also as against all persons, including the king, his heirs and successors, whose estates are to take effect after the determination or in defeasance of any such estate tail; saving always the rights of all persons in respect of estates prior to the estate tail in respect of which such disposition shall be made, and the rights of all other persons, except those against whom*

such disposition is by this act authorized to be made" (s. 15). A disentailing deed by a tenant for life has no operation under the act. *Slater v. Dangerfield*, 15 M. & W. 263. But if a person be in fact tenant in tail, and executes for value as *tenant for life* a deed operative as a disentailing deed, the entail will be barred. *Evans v. Jones, Kay*, 29.

The power of disposition by a woman tenant in tail *ex provisione viri*, under settlements made before the act, is not to be exercised by her, except with such assent as, under the 11 Hen. 7, c. 20, would have rendered valid a fine or recovery by her (s. 16) (*ante*, p. 208); and (except as to lands comprised in such settlements) the act of 11 Hen. 7, c. 20, is repealed (s. 17). See *Curtis v. Price*, 12 Ves. 97; *Watkins v. Lewis*, 1 R. & My. 390; *Rochfort v. Fitzmaurice*, 2 Dr. & War. 19.

The act does not authorize a disposition by tenants in tail after possibility of issue extinct, or by tenants in tail restrained from barring their estates tail by the 34 & 35 Hen. 8, c. 20, or by any other act (s. 18). The act of Hen. 8 referred to extended only to estates tail granted by the crown for *services*. *Perkins v. Sewell*, 1 W. Blac. 654; see *D. of Grafton v. Lon. & Bir. R. Co.*, 5 B. N. C. 27. Persons who would have been actual tenants in tail of estates if they had not been converted into *base fees* (*post*, p. 213), may dispose of such lands so as to convert them into fees simple absolute, but not as against estates prior to their own (s. 19).

Issue inheritable in tail are not to bar their expectancies (s. 20). By the 8 & 9 Vict. c. 106, s. 6, contingent, executory and future interests may be disposed of, but not so as by force of that act only to defeat or enlarge an estate tail. The 21st section of 3 & 4 Will. 4, c. 74, relates to dispositions by tenants in tail by way of mortgage. See tit. "MORTGAGE."

The statute then provides for the consent of the protector being given. When there shall be a tenant in tail and there shall be subsisting *in the same lands under the same settlement* any estate for years determinable on the dropping of a life or lives, or any greater estate (not being an estate for years) prior to the estate tail, then such owner of the prior estate, or the first of such estates if more than one, shall be the protector of the settlement; and estates by the curtesy or by way of resulting use or trust are within this section (s. 22). "As the old tenant to the *præcipe* could not be preserved under the new plan, the act creates a protector of every settlement whose concurrence is required in barring estates in tail in remainder, in order to preserve under certain modifications the control of the tenant for life over the remainderman." Sug. Ven. & Pur. 14th ed. p. 466. If there is a tenant in tail in possession and a tenant in tail in reversion, the former is protector. *Re Blewitt*, 6 D., M. & G. 187. Where two or more persons shall be owners under a settlement of a prior estate, each of them shall be the sole protector as to his share (s. 23). Where the trustees of real estate under a will were appointed also protectors of the estates tail created by the will, and they all died, and new trustees

of the real estate were appointed by the court, it was held that the tenant for life had become protector of the settlement, and that he and the first tenant in tail could convey. *Clarke v. Chamberlin*, 16 Ch. D. 176. Where trustees are not appointed protectors, the *cestui que trust* tenant for life is protector. *In re Dudson's Contract*, 8 Ch. D. 628.

Where a married woman would, if single, be the protector in respect of a prior estate, which is not settled to her separate use, she and her husband shall in respect of such estate be the protector; but if such prior estate shall have been settled to her separate use, then she alone shall be the protector (s. 24), and can consent without her husband. *Keer v. Brown*, Johns. 138. Section 25 relates to estates confirmed or restored by settlement, and to the protectorship in such cases. A lease at a rent created or confirmed by a settlement does not confer a protectorship (s. 26). No woman in respect of her dower, and no bare trustee, heir, executor, administrator or assign shall be the protector (s. 27), with the exception in certain cases of a bare trustee under then existing settlements (s. 31). See *Buttanshaw v. Martin*, Johns. 89.

When a person is excluded from being protector by the operation of sects. 26 or 27, the person (if any) who would be protector if the excluded estate did not exist is to be protector (s. 28). Sects. 29 and 30 provide who shall be the protector in the cases of estates under settlements, and of remainders and reversions having been disposed of at the time of the passing of the act or being disposed of on or before the 31st December, 1833.

Any settlor entailing lands may appoint by the settlement any number of persons in esse, not exceeding three, and not being aliens, to be protector of the settlement in lieu of the person who would have been the protector if this clause had not been inserted, and either for the whole or any part of the period for which such person might have continued protector, and by means of a power to be inserted in such settlement to perpetuate, during the whole or any part of such period, the protectorship of the settlement in any one person or number of persons in esse, and not being an alien or aliens, whom the donee of the power shall think proper by deed to appoint, not exceeding three. Every deed of appointment and relinquishment of office shall be void unless inrolled in Chancery within six calendar months after the execution thereof. The person who but for this clause would have been sole protector may be one of the persons to be appointed protector, and shall act as sole protector in certain cases (s. 32). When two persons are appointed protectors, on the death of one the office survives to the other. *Bell v. Holby*, L. R., 15 Eq. 178.

If any protector shall be lunatic, idiot, or of unsound mind, whether found such by inquisition or not, the Lord Chancellor of Great Britain shall be the protector; or if any protector shall be convicted of treason or felony, or if any person not being the owner of a prior estate under a settlement, shall be protector of such settlement, and shall be an infant, or if it shall be uncertain whether such last-mentioned person be living or dead, then the Court of Chancery shall be the protector;

or if any settlor entailing the lands shall in the settlement declare that the person who as owner of a prior estate under such settlement would be entitled to be protector of the settlement, shall not be such protector, and shall not appoint any person to be protector in his stead, then the Court of Chancery shall be the protector; or if in any other case where there shall be subsisting under a settlement an estate prior to an estate tail under the same settlement, and such prior estate shall be sufficient to qualify the owner thereof to be protector of the settlement, and there shall happen at any time to be no protector of the settlement as to the lands in which the prior estate shall be subsisting, the said Court of Chancery shall, while there shall be no such protector, and the prior estate shall be subsisting, be the protector of the settlement (s. 33). See *Re Blewitt*, 6 D., M. & G. 187, as to lunatics; *Re Wainewright*, 1 Ph. 261, as to felons.

Where there is a protector of a settlement, his consent is requisite to enable even an *actual* tenant in tail to create a larger estate than a base fee (s. 34). By the protector being a consenting, not a conveying, party, there is no risk of the incumbrances of the tenant in tail being let in to the prejudice of a life estate. See 1 Real Pr. Rep., cited Shelf. R. P. St. 8th ed. 338.

Where an estate tail shall have been converted into a base fee, the consent of the protector shall be requisite to enable the owner to acquire the fee under the act (s. 35).

The protector, in exercising his power of consent, is to be under no control whatever, and is not to be deemed a trustee in respect of his power to consent (s. 36); and the rules of equity in relation to transactions between donees and objects of a power (see tit. "POWERS") shall not apply as between the protector and tenant in tail (s. 37). See *Bankes v. Le Despencer*, 11 Sim. 508, 527.

A voidable estate created by a tenant in tail in favour of a purchaser for value will be confirmed by a subsequent disposition (other than a lease not requiring enrolment) of the tenant in tail under the act, with the consent of the protector (if any), but not as against a purchaser, without notice. Where there is a protector who does not consent, the confirmation operates as far as it can without such consent (s. 38). It is observed by Mr. Hayes (Intro. Conv. 160, 5th ed.), that a conveyance by tenant in tail to his *own use* is a disposition within this section; and see *Doe v. Whichelo*, 8 T. R. 211; *Lloyd v. Lloyd*, 4 Dr. & War. 374, as to the operation of a fine in confirming prior voidable assurances.

Where a base fee is united with the immediate reversion, it will not be merged, but enlarged to as great an estate as the tenant in tail could have created with the consent of the protector (if any) if the remainder or reversion had been vested in another (s. 39). Where formerly tenant in tail with the immediate reversion in fee levied a fine, the estate tail was merged and the reversion became an estate in possession. *E. Shelburne v. Biddulph*, 6 B. P. C. 356. The object of sect. 39 is to prevent the operation of this rule, which would let in charges attaching to the remainder or reversion,

and compel a title to be made to such remainder or reversion. 1 Real Prop. Rep. 28, cited Shelf. R. P. St. 8th ed. 342.

Every disposition of lands under the act by a tenant in tail thereof shall be effected by some one of the assurances (not being a will) by which such tenant in tail could have made the disposition if his estate were an estate at law in fee simple absolute: provided that no disposition by a tenant in tail shall be of any force either at law or in equity, under this act, unless made or evidenced by deed; and that no disposition by a tenant in tail resting only *in contract* either express or implied, or otherwise, and whether supported by a valuable or meritorious consideration or not, shall be of any force at law or in equity under this act, notwithstanding such disposition shall be made or evidenced by deed; and if the tenant in tail making the disposition shall be a married woman, the concurrence of her husband shall be necessary to give effect to the same; and any deed which may be executed by her for effecting the disposition shall be acknowledged by her as thereafter directed (s. 40). A husband who becomes bankrupt and obtains his discharge is not precluded from concurring in his wife's disentailing deed. *Cooper v. Macdonald*, 7 Ch. D. 288. See *Re Jakeman's Trusts*, 23 Ch. D. 344. The Court of Chancery may compel the execution of disentailing deeds by a tenant in tail as part of or necessary to the performance of a contract. Sug. Stat. 197; see *Att.-Gen. v. Day*, 1 Ves. sen. 224; *Lewis v. Duncombe*, 20 Bea. 398. No assurance under the act (except leases not exceeding twenty-one years at rack-rent or five-sixths of a rack-rent) will have any operation unless inrolled in Chancery within six calendar months after execution (s. 41). A deed not inrolled gives no rights as against the issue in tail if the claims of such issue are prosecuted with the period allowed by the Statute of Limitations. *Morgan v. Morgan*, L. R., 10 Eq. 99. Inrolment will not of *itself* render a disentailing deed effectual to bar the entail, if the deed itself be not an apt and proper deed for that purpose. Where a tenant in tail executed a disentailing deed purporting to be a grant of the estate to A. and his heirs free from all estates tail of the grantor, *to the use of A. and his heirs* in trust for the grantor, and the deed was inrolled but not executed by A., who subsequently *disclaimed*, it was held that the disentailing deed operated as a grant and not by the Statute of Uses, that it was rendered inoperative by the subsequent disclaimer by the grantee and that the estate tail was not barred. *Peacock v. Eastland*, L. R., 10 Eq. 17.

The consent of the protector may be given by the same assurance, or by a distinct deed, to be executed on or before the same day (and inrolled at or before the same *time*, s. 46) as the assurance (ss. 42, 43). The consent cannot be revoked (s. 44). A feme covert protector may consent as if she were sole (s. 45).

The jurisdiction of equity is excluded both with reference to dispositions by tenants in tail and consents by protectors (s. 47; and see s. 36, *ante*; and *Petre v. Duncombe*, 7 Ha. 24). Having regard to sects. 40 and 47, the court has no jurisdiction to rectify, on the ground

of mistake, a deed which has been inrolled as a disentailing assurance under the act, although the rectification asked is not in the disentailing part of the deed, but in a resettlement added to it, which might have been effected by a separate uninrolled deed. *Hall-Dare v. Hall-Dare*, 29 Ch. D. 133.

Sections 50—54 relate to copyholds, and will be referred to in Chapter III. Sections 56—69, and also sections 70—73 in part, relate to the estates tail of bankrupts, and will be presently referred to. Sections 70—72 relate to the disposition of entailed money; section 70 repeals the 7 Geo. 4, c. 45, by which formerly money held in trust, to be invested in lands to be entailed, might be discharged from the trust; by section 71 money, also money to arise from the sale of lands (including leaseholds), which is to be invested in the purchase of lands, so that a person, if the lands were purchased, would have an estate tail therein, is to be treated and considered as subject to the same estates as the lands would have been if purchased, and the previous provisions are made applicable, with the proviso that where a disposition is to be made of leaseholds “so circumstanced as aforesaid, or of money so circumstanced as aforesaid, such leasehold lands or money” shall be treated as *personal estate*; and in the case of bankruptcy, the disposition of such leaseholds or money shall be by deed inrolled in Chancery within six months (s. 71). See *Fordham v. Fordham*, 34 Bea. 59. The proceeds of sale of a settled estate sold under the Leases and Sales of Settled Estates Act will not be paid out to a tenant in tail under the settlement unless he has executed a disentailing deed. *In re Broadwood's Settled Estates*, 1 Ch. D. 438.

The court, under its lunacy jurisdiction, has power to bar the estate tail of a lunatic tenant in tail; but it is the duty of the court so to exercise it as not to affect the rights of the persons entitled in remainder to the estate. *In re Pares*, 12 Ch. D. 333. In this case the court allowed the committee of the lunatic to join in a sale of the estate, the proceeds to be subject to the same uses as the estate was subject to before the sale. See a case under the same name, 2 Ch. D. 61. Where the court allowed the committee of the lunatic to mortgage for raising charges on the estate, the mortgage stating that the remainders over were barred “for the purpose of giving effect to this security, but not further or otherwise.”

Any *rule or practice* requiring deeds to be acknowledged before the inrolment shall not apply to any deed by this act required to be inrolled in the Court of Chancery in England or Ireland (s. 73).

Every deed required to be inrolled in the Court of Chancery in England or Ireland, by which lands, or money subject to be invested in the purchase of lands, shall be disposed of under this act shall, when inrolled as required by this act, operate and take effect in the same manner as it would have done if the inrolment thereof had not been required, except that every such deed shall be void against any person claiming the lands or money thereby disposed of, or any part hereof, for valuable consideration, under any subsequent deed duly

inrolled under this act, if such subsequent deed shall be first inrolled (s. 74).

To return to the consideration of the clauses particularly relating to bankrupts. The principal clauses of the 3 & 4 Will. 4, c. 74, affecting them, were the 56 to 73, both inclusive, and their effect was, stated shortly, to enable the commissioner, under the bankruptcy acts then in force, to do everything for the benefit of the creditors, by barring the estate tail of the bankrupt, which he but for his bankruptcy could have done, and by creating the same estates in lieu of the estate tail as he could have done. And all acts of a bankrupt tenant in tail were made void against any disposition under the act by the commissioner (s. 63).

By the 25th section of "The Bankruptcy Act, 1869," 32 & 33 Vict. c. 71, which is the same as the 56 sec. (5) of the Act of 1883, 46 & 47 Vict. c. 52, "the trustee" has power (amongst other things)—(4) To deal with any property to which the bankrupt is beneficially entitled as tenant in tail in the same manner as the bankrupt might have dealt with the same, and sections fifty-six to seventy-three (both inclusive) of the 3 & 4 Will. 4, c. 74, shall extend to proceedings in bankruptcy under the act as if those sections were re-enacted in the above cited Bankruptcy Acts, and made applicable in terms to such proceedings.

The other sections of the 3 & 4 Will. 4, c. 74, relating to copyholds, will be noticed *post*, Chap. III., and those relating to deeds by married women will be noticed *post*, tit. "HUSBAND AND WIFE."

Incidents of Estates Tail.] A tenant in tail cannot, any more than a tenant in fee, be restrained by any condition (*Bradley v. Peixoto*, 3 Ves. 324), proviso, limitation or otherwise (*Mary Portington's Case*, 10 Rep. 35; *Foy v. Hynde*, Cro. Jac. 697; *Collins v. Plummer*, 1 P. W. 104; *Mainwaring v. Baxter*, 5 Ves. 458; *Dawkins v. Ld. Penrhyn*, 4 App. Ca. 51), from exercising his right of alienation, unless in those cases in which estates have been granted by the crown to particular families in tail as a reward *for services* under the 34 & 35 Hen. 8, c. 20, *ante*, p. 211, or by *the country* by special acts of parliament, as in the cases of the Duke of Marlborough (5 Anne, cc. 3, 4) and Duke of Wellington (41 Geo. 3, c. 59, s. 6; 54 Geo. 3, c. 161, s. 28). In the case of entails under the statute of Henry, they cannot be barred so long as the reversion is in the crown. See 1 Pres. Conv. 19. In the case of grants by special acts the estates cannot be barred at all, unless of course by some special act passed for that purpose. Where an insurance of property settled in strict settlement is kept up out of the rents, receivable by an infant tenant in tail, and the property is burnt down, and it is inexpedient to rebuild it, the insurance money belongs to the tenant in tail as his personal estate, and is not to be treated as real estate for the benefit of all persons interested in the settled estates. *Seymour v. Vernon*, 16 Jur. 189; *Warwicker v. Bretnall*, 23 Ch. D. 188. See *Rook v. Warth*,

1 Ves. sen. 460; *Norris v. Harrison*, 2 Madd. 268; *Parry v. Ashley*, 3 Sim. 97.

An estate tail cannot be defeated in part only, and a condition to that effect is repugnant and void; it must defeat the *whole* estate, or it will be inoperative. *Corbet's Case*, 1 Rep. 83; *Mildmay's Case*, ib. 174; *Seymour v. Vernon*, 10 Jur., N. S. 487. Where the estate is incumbered and the tenant in tail is an infant, the rents and profits of the estate ought to be applied in keeping down the interest of the charges. *Bertie v. E. Abingdon*, 3 Mer. 560; see *Burges v. Mawbey*, T. & R. 167; *Sergison v. Sealey*, 2 Atk. 416, corrected in T. & R. 176. An adult tenant in tail, however, is not bound as against those in remainder to keep down charges (*Burges v. Mawbey*, T. & R. 167); but if he has done so, after his death his personal representatives will not be allowed what he has paid out of the estate. *Redington v. Redington*, 1 Ba. & Be. 143. As to tenant in tail paying off charges, see *post*, tit. "MERGER." As to leases by tenant in tail, see tit. "LEASES."

SEC. 3.—*Estates arising by the Operation of the Rule in Shelley's Case.*

<i>What the Rule is</i>	217	<i>Must both be legal or both equitable</i>	219
<i>Does not affect intervening Interests</i>	218	<i>Prior Estate expressly or impliedly</i>	219
<i>Applies to Copyholds and Personal Estate</i>	218	<i>limited to Life Estate</i>	219
<i>As to Limitation being by way of Remainder only, not shifting Use nor executory Devise</i>	219	<i>Limitations and Remainders to two or more</i>	219, 220
<i>Estate of Freehold</i>	219	<i>Superadded words of Limitation</i> ...	220
<i>Limitations by same Instrument</i> ...	219	<i>Limitation to Trustees to preserve Contingent Remainders</i>	220
<i>Will—Codicil</i>	219	<i>Limitation to Heirs as Tenants in Common</i>	220
<i>Power—Appointment</i>	219	<i>Heirs of the Body, meaning Sons or Children</i>	221
<i>Applies to legal and equitable Estates</i>	219	<i>Conveyancing Act, 1881</i>	221

It will be convenient to treat of the well-known Rule in *Shelley's Case* in this title as the question whether a person takes under a deed or will an estate for life, in tail, or in fee, frequently depends upon its application. It has also been discussed here in a separate section, being of a special character, although an estate in fee or in tail, when once created by the effect of the rule, does not in any way differ from an ordinary estate in fee or in tail created in any other way.

The rule of law, commonly known as the Rule in *Shelley's Case*, 1 Rep. 93, because it was particularly referred to in that case, although it is of much earlier date (see a learned note, 7 M. & Gr. 941 n. (c)), is, that where in the *same instrument* there is a limitation to the ancestor of an estate of freehold, and also *mediately or immediately* a limitation to his heirs; or a limitation to the heirs of his body (or other words operative to create an estate tail), the word heirs is a word of limitation and not purchase, and the ancestor takes an estate in fee in the first case, and in tail in the second. See *Perrin v. Blake*,

4 Burr. 2579. His estate, however, is subject to the *intervening estates* (if any), whether vested or contingent, limited to others. See Fea. Con. R. 33; *Pickersgill v. Grey*, 30 Bea. 352. The rule is the same where the limitation in remainder is to the "heir" (in the singular). *Fuller v. Chanier*, L. R., 2 Eq. 682. The rule applies to copyholds (*Busby v. Greenslate*, 1 Str. 445), estates *pur autre vie* (*Forster v. Forster*, 2 Atk. 259) and personal estate (*Butterfield v. Butterfield*, 1 Ves. sen. 133; *Garth v. Baldwin*, 2 Ves. sen. 646; *Robinson v. Fitzherbert*, 2 B. C. C. 127; *Kinch v. Ward*, 2 S. & S. 409; *Douglas v. Congreve*, 1 Bea. 59); and with regard to leaseholds (*Stevenson v. Mayor of Liverpool*, L. R., 10 Q. B. 81; *Baker v. White*, L. R., 20 Eq. 166); and personal estate, if the limitation be to A. for life, remainder to his executors, the effect will be the same, A. will take absolutely. Co. Lit. 54 b; see *Holloway v. Clarkson*, 2 Ha. 521; *Morris v. Howes*, 4 Ha. 599; *Att.-Gen. v. Malkin*, 2 Ph. 64; *Mackenzie v. Mackenzie*, 3 Mac. & G. 559. The principles governing the application of the rule in *Shelley's Case* are the same in the case of wills as in the case of deeds. *In re White and Hindle's Contract*, 7 Ch. D. 201; *Cooper v. Kynock*, L. R., 7 Ch. 398; *Crofts v. Middleton*, 2 K. & J. 194. See Conveyancing Act, *ante*, p. 199.

In *Herrick v. Franklin*, L. R., 6 Eq. 593, Giffard, V.-C., observed, that "there is no authority for holding that because the rule in *Shelley's Case* applies to real estate it is to be applied to personal estate also" (p. 596). This, it is conceived, must be understood as meaning that it is not *in every case* in which the rule applies to real estate, it must necessarily apply to personal estate as well. The case of *Re Wynch*, 5 D., M. & G. 188, which the V.-C. cited as qualifying or overruling *Dunk v. Fennner*, 2 R. & My. 557, and restoring the rule laid down in *Knight v. Ellis*, 2 B. C. C. 570, turned simply upon the construction of the word "issue," deciding only that this word is construed differently in limitations of real and personal estate, and that although in the former case, following a life estate, it might create an estate tail, in the latter it would not or might not. Where a testator, by will made in 1820, devised and bequeathed freeholds and leaseholds together, to his daughter A. for life, remainder to her first and other sons successively in tail, remainder to her daughters as tenants in common in tail, and "in case of default of issue" of A., to "the right heirs" of A. "for ever," and A. married and died a widow, without having had a child, it was held that she took an absolute interest in the leaseholds. *Comfort v. Brown*, 10 Ch. D. 146; explaining *Herrick v. Franklin*, L. R., 6 Eq. 593, 596. See also *Jackson v. Calvert*, 1 J. & H. 235; and for other instances of words being held to create an estate tail in realty, but only a life interest in personalty, see tit. "WILLS." The doctrine, however, that the Rule in *Shelley's Case*, as a rule, applies to personal estate is settled. See *Butterfield v. Butterfield*, and other cases, *supra*. See 2 Jarm. Wills, 4th Ed., p. 334, 563. Where the words "heirs of the body" are used in some special sense, as they frequently are in wills, for instance, as indicating children, the rule does not apply. See *post*, tit. "WILLS."

In settlements, also, the context may clearly show that the words "heirs of the body" are to be understood in the sense of *children*, in which case the rule will not apply, and the parent will only take an estate for life. *North v. Martin*, 6 Sim. 266. On the other hand, it does apply to real estate, though the words "heirs of the body" may not be used, but words which are in some cases held to be synonymous, as *issue*, *heirs male*, &c. *Griffiths v. Evan*, 5 Bea. 241; *Doe v. Rucastle*, 8 C. B. 876; and see also *ante*, p. 199. As to personal estate, see *supra*. So the rule applies where the estate arises by implication; for instance, before the 1 Vict. c. 26, under a gift to A. for life, and if he die without heirs of his body, over. In such cases the rule operates on the principle that there is an implied gift to the heirs of the body, and the limitation is read, to A. for life, *remainder to the heirs of his body*, and if he die without such heirs, over. See 2 Jarm. Wills, 4th Ed., 339; see now 1 Vict. c. 26, s. 29. The word limitation in the statement of the rule must, it would seem, be understood in its ordinary sense by way of *remainder*, and not by way of *executory devise* or *shifting use*. *Fea. C. R.* 276; *Coape v. Arnold*, 4 D., M. & G. 574. See, however, a very able argument *contra*, 11 Jur., N. S., Part 2, p. 427. The estate of freehold may be *pur autre vie*, as well as for the life of the grantee or devisee himself (see *Low v. Burron*, 3 P. W. 262), and may even be determinable upon a contingency, as an estate during widowhood (*Curtis v. Price*, 12 Ves. 89; *Griffiths v. Evan*, 5 Bea. 241), and may arise by a *necessary implication* of law. *Pybus v. Mitford*, 1 Vent. 372. The rule requires the limitations to be by the *same instrument*. *Moore v. Parker*, Ld. Ray. 37; *Doe v. Fonnereau*, Doug. 478. A will and codicil, however, would be considered as one and the same instrument. 2 Jar. Wills, 4th Ed., 334. Whether this would be the case as regards deeds or instruments *creating* and *executing* powers, must be considered as still unsettled. See Sug. Pow. 472; *Fea. C. R.* 75; comp. Co. Lit. 299 b; n. by But. 1 Pres. Estates, 324. The rule applies to equitable as well as legal estates (*Spence v. Spence*, 12 C. B., N. S. 199); but the limitations to the ancestor and to his heirs or the heirs of his body must either be *both legal* or *both equitable*. *Ib. Douglas v. Congreve*, 1 Bea. 59; *Reynell v. Reynell*, 10 Bea. 21; *Nash v. Coates*, 3 B. & Ad. 839; *Haddelsey v. Adams*, 22 Bea. 266.

Words *expressly* confining the estate of the ancestor to a life estate will not prevent the application of the rule (*Robinson v. Robinson*, 2 Ves. sen. 225; *Thong v. Bedford*, 1 B. C. C. 313; *Anderson v. Anderson*, 30 Bea. 209), nor a declaration that the estate for life shall be without impeachment of waste (*Papillon v. Voice*, 2 P. W. 471; *Jones v. Morgan*, 1 B. C. C. 206), or for the separate use of a married woman. *Roberts v. Dixwell*, 1 Atk. 607.

Under a limitation to two or more for their lives, with remainder to the heir or heirs of the body of one, he will take an estate in fee or in tail (as the case may be) subject to the other life estates. Thus, under a devise to A., B. and C. in equal shares for their natural lives, with remainder to the next lawful heir of A., they are joint tenants for

their lives, with remainder to A. in fee. *Fuller v. Chamier*, L. R., 2 Eq. 682. Under a limitation to A. and B., persons of the same sex, or of different sexes, but so related as not to be capable of contracting marriage with each other, with remainder to the heirs of their bodies, they are joint tenants for life, with several inheritances in tail. Lit. s. 283; *Ex parte Tanner*, 20 Bea. 374. But the same limitation to husband and wife makes them tenants in tail by entireties, and if the limitation be to persons who are capable of marrying, they are joint tenants in tail. 2 Jarm. Wills, 4th Ed., 358; see Co. Lit. 187 b.

Where a term is limited to the husband for life, with remainder to the wife for life, with remainder to the heirs of the bodies of the husband and wife, the term vests in the husband absolutely. *Webb v. Webb*, 1 P. W. 132; *Bartlett v. Green*, 13 Sim. 218; see *Hunt v. Baker*, Fr. Ch. 62. But *Peacock v. Spooner*, Fr. Ch. 114, and *Dafforne v. Bolt and Goodman*, ib. 231, are *contra*, but these may be considered as overruled, or as of no authority except in cases precisely similar. 2 Ves. sen. 660, *Bartlett v. Green*, *sup.*

If the limitation be such as to give an estate tail, *subsequent* words of limitation will not vary the effect, as if it be to A. for life, with remainder to the heirs male, or the heirs of the body of A., "*and the heirs male of such issue male.*" The superadded words of limitation are considered as a mere repetition of the antecedent limitation. *Burnet v. Coby*, 1 Bar. K. B. 367. So if in such a case, after the limitation to the heirs male or heirs of the body, there is a superadded limitation to "*heirs*" (*general*), or "*heirs and assigns,*" or the like, A. will still take an estate tail. *Goodright v. Pullyn*, 2 Ld. Ray. 1437; *Wright v. Pearson*, 1 Ed. 119; *Nash v. Coates*, 3 B. & Ad. 839; *Marshall v. Grime*, 28 Bea. 375; *Mills v. Seward*, 1 J. & H. 733; *Toller v. Attwood*, 15 Q. B. 929. It will not affect the application of the rule, that after a life estate there is a limitation to trustees to preserve contingent remainders. *Coulson v. Coulson*, 2 Str. 1125; *Measure v. Gee*, 5 B. & Al. 910. Neither will the effect of the limitation to the heirs of the body, which *primâ facie* gives an estate tail, be rendered nugatory by words indicating tenancy in common in the heirs of the body, unless the intent of the testator appear to the contrary *plainly*. See *Poole v. Poole*, 3 B. & P. 627; *Fetherston v. Fetherston*, 3 Cl. & F. 67, 77. Thus a limitation to A. for life and the heirs of his body as *tenants in common* (*Doe v. Harvey*, 4 B. & C. 610; *Bennett v. E. Tankerville*, 19 Ves. 170; *Grimson v. Downing*, 4 Drew. 125; *Anderson v. Anderson*, 30 Bea. 209), or *in such shares* as A. shall appoint (*Doe v. Goldsmith*, 7 Taun. 209; *Jesson v. Wright*, 2 Bli. 1; see *Jordan v. Adams*, 9 C. B., N. S. 483), and for want or in default of such heirs or issue over will give A. an estate tail. But in *such cases*, if the word *issue* be used instead of heirs of the body, it would seem that A. will not, at all events, as a general rule, take an estate tail. See *Doe v. Elvey*, 4 Ea. 313. But see *post*, tit. "*WILLS,*" Ch. 27, where the cases are collected. The cases of *Doe v. Laming*, 2 Burr. 1100; *Doe v. Goff*, 11 Ea. 668; *Gretton v. Haward*, 6 Taun. 94; *Crump v. Norwood*, 7 Taun. 362, are scarcely reconcilable with

Jesson v. Wright, 2 Bli. 1, *sup.*, and are considered by Mr. Jarman as either overruled or questionable (2 Jar. Wills, 4th ed., 375), and see particularly *Ld. Eldon's* judgment in the last cited case and *Fetherston v. Fetherston*, 3 Cl. & F. 67. In *Montgomery v. Montgomery*, 3 Jo. & Lat. 52—4, however, *Doe v. Goff* and *Doe v. Laming* seem to have been considered as law by *Ld. St. Leonards*. A declaration that the limitations are to be *in strict settlement*, will not prevent the application of the rule. *Douglas v. Congreve*, 1 Bea. 59.

The words "heirs of the body" are, however, susceptible of a more limited meaning if an intention to that effect be *clearly expressed*, as where the testator himself, so to speak, interprets the words in another sense. Thus, in a devise to A. and his heirs of the body, "that is to say his first, &c., and every other son," the words heirs of the body being used in the sense of sons, A. will take only an estate for life. *Lowe v. Davies*, 2 *Ld. Ray.* 1561; *Goodtitle v. Herring*, 1 *Ea.* 264; *Green v. Green*, 3 *De G. & S.* 480; *Fetherston v. Fetherston*, 3 Cl. & F. 67. So if heirs of the body are afterwards referred to as *children*. *North v. Martin*, 6 *Sim.* 266; *Gummoe v. Howes*, 23 *Bea.* 184; *Jordan v. Adams*, 9 *C. B.*, *N. S.* 483; comp. *Roddy v. Fitzgerald*, 6 *H. L. C.* 823. And where the trusts are executory or directory, not complete and final, but leaving some further act to be done, equity will mould them so as to give effect to the intention, and will direct a life estate to be limited to the first taker, with remainders in fee or in tail (as the case may be). This subject will be considered hereafter. See tit. "MARRIAGE SETTLEMENTS;" *Douglas v. Congreve*, 1 *Bea.* 59. In the index to *Fearne* on Contingent Remainders, under "Rule in *Shelley's Case*," will be found a very carefully prepared table, showing, under a variety of limitations, in what cases the rule does and does not apply. And see now 40 & 41 *Vict. c. 33*, stated *post*, tit. "WILLS," *Ch. 33*. See also *ante*, p. 199, as to what words now create an estate tail under the Conveyancing Act, 1881.

SEC. 4.—*Estates for Life.*

<i>Nature and incidents of, generally.</i>	221	<i>Powers, Rights and Duties of</i>	
<i>Express, or by operation of Law</i>	222	<i>Tenant for Life—continued.</i>	
<i>How created</i>	222	<i>Tenancy determining by Death</i>	
<i>Pur Autre Vie</i>	222	<i>of Tenant for Life</i>	224
<i>Order to produce cestui que vie</i>	222	<i>Estovers—Fines</i>	224
<i>General Occupant</i>	222	<i>Heriots</i>	224
<i>Special Occupant</i>	222	<i>Fixtures—Title Deeds</i>	225
<i>General Occupancy abolished</i>	223		
<i>Wills Act, 1 Vict. c. 26</i>	223	<i>Charges on Estate</i>	225
<i>Entail of—Barring</i>	223	<i>Tenant for Life must keep down</i>	
<i>Powers, Rights and Duties of</i>		<i>Charges</i>	225
<i>Tenant for Life</i>	223	<i>Repairs</i>	225
<i>Improvements by</i>	223	<i>Tenant by the Curtesy—</i>	
<i>Sales by</i>	224	<i>Dowress</i>	226
<i>Leases by—Emblements</i>	224	<i>Redeemable Annuity</i>	226
		<i>Arrears</i>	226

Nature and Incidents of, generally.] Estates for life, which are the lowest estates of freehold, arise either by express grant or by

operation of law. Of the latter class are the wife's dower estate, the husband's estate by the curtesy (*post*, tit. "HUSBAND AND WIFE"), and the estate of tenant in tail after possibility of issue extinct (*ante*, p. 207). An estate for a person's own life may be either absolute or determinable; for instance, to a widow for life determinable on her marrying again. *Curtis v. Price*, 12 Ves. 89. An estate for life is properly created in a deed by a limitation to a person and his assigns for his life, with or without impeachment of waste. See tit. "WASTE." As already mentioned, however, an estate for life under a deed is created by a simple limitation to A. without adding *for his life*. *Ante*, p. 199. Where the estate is for the life of another person, it is limited to the grantee and his assigns for the life of such other person, who is termed the *cestui que vie*. The question whether a particular limitation creates an estate for life or some greater estate rarely arises on the construction of deeds, but it not unfrequently does on the construction of wills. See Rule in *Shelley's Case*, *ante*, p. 217, and tit. "WILLS."

Pur autre Vie.] An estate *pur autre vie*, or for the life of another, is the lowest estate for life, and ceases at the death of the *cestui que vie*. To obviate the fraud of a tenant *pur autre vie* continuing in possession after the death of the *cestui que vie*, it is enacted by the 6 Ann. c. 18, that upon the application of any person having any claim in remainder or expectancy after the death of the *cestui qui vie*, the Lord Chancellor may order the *cestui que vie* to be produced; and, if not produced, the *cestui que vie* shall be taken to be dead. *Ex parte Grant*, 6 Ves. 512; *Ex parte Whalley*, 4 Russ. 561; *Re Isaac*, 4 M. & C. 11; *Re Dennis*, 7 Jur., N. S. 230; *Re Owen*, 10 Ch. D. 166. Formerly, where the estate *pur autre vie*, being a corporeal hereditament, was limited to a person *without words of inheritance*, and he died in the lifetime of the *cestui que vie*, as neither his heir (not being named) could take, nor his personal representatives (it being an estate of freehold), the *first person* who entered, though without any claim of right, was entitled to hold as *general occupant*. Co. Lit. 41 b. But as there could be no entry upon incorporeal hereditaments, as rents or rent-charges lying in grant, there could be no general occupant of them (Co. Lit. 46 b); but by the 12th section of the Statute of Frauds, 29 Car. 2, c. 3 (which section is now repealed, see *post*, p. 223), the rent or rent-charge went to the executors or administrators of the tenant for life, though they were not named. *Raulinson v. Dss. Montague*, 3 P. W. 264 (n.); *Bearpark v. Hutchinson*, 7 Bing. 178.

Under a limitation, however, of the estate, whether corporeal or incorporeal, to a person and his *heirs*, or his *heirs, executors and administrators*, his heir took and will still take as *special occupant*, there being no devisee (*Atkinson v. Baker*, 4 T. R. 229; *Doe v. Luxton*, 6 T. R. 292; *Carpenter v. Dunsmure*, 3 E. & B. 918), although the estate be equitable (*Reynolds v. Wright*, 2 D., F. & J. 590; see as to incorporeal hereditaments, *Hassell v. Gowthwaite*,

Willes, 505); and under a limitation to a person, his *executors or administrators*, whether of corporeal or, as it would seem, incorporeal hereditaments, the executor will be special occupant. *Northen v. Carnegie*, 4 Drew. 587, 592.

General occupancy was abolished by the Statute of Frauds, 29 Car. 2, c. 3; and a tenant *pur autre vie* was enabled to devise his estate, and if he did not do so, and it went to his heir as special occupant, it was assets by descent; and if there was no special occupant, it went to his executors or heirs, and was assets in their hands for payment of debts (s. 12), the surplus being by the 14 Geo. 2, c. 20, s. 9, distributable among the next of kin as personal estate. Now, by the 1 Vict. c. 26 (repealing by s. 2 the 29 Car. 2, c. 3, s. 12, and the 14 Geo. 2, c. 20, s. 9), estates *pur autre vie* may be disposed of by will whether there be any special occupant or not and of whatever tenure, and whether corporeal or incorporeal (s. 3). Where there is no devise of an estate *pur autre vie* of a freehold nature, it is chargeable in the hands of the heir, if it comes to him by reason of special occupancy as assets by descent, as in the case of a fee; and in case there shall be no special occupant of an estate *pur autre vie*, whether freehold, customary freehold, copyhold or any other tenure, and whether corporeal or incorporeal, it shall go to the executor or administrator of the person who had the estate by virtue of the grant, and such executor or administrator, whether as special occupant or under the act, is to administer it like the other personal estate. *Ib.* s. 6; see *Reynolds v. Wright*, 2 D., F. & J. 590.

An estate *pur autre vie* may be entailed. This is usually termed a *quasi entail*. But a remainder limited after such an estate (see *Wastney v. Chappell*, 3 B. P. C. 50), may be barred by an ordinary surrender or conveyance. Thus, a quasi tenant in tail may by surrendering an old lease and taking a renewal to himself, bar the remainders over. *Blake v. Blake*, 1 Cox, 266; *Blake v. Luxton*, Coop. 178. So he may by an ordinary release (*Moody v. Walters*, 16 Ves. 313) or conveyance (Fearne, Con. Rem. 495; *Ex parte Sterne*, 6 Ves. 158), but not where he is tenant in quasi tail *in remainder*, without the concurrence of the tenant for life. *Allen v. Allen*, 2 Dr. & War. 307; *Edwards v. Champion*, 3 D., M. & G. 202.

Powers, Rights and Duties of Tenant for Life.] Tenants for life may, with the sanction of the Court of Chancery, charge the inheritance with money laid out for draining purposes, the principal being paid off by annual instalments (8 & 9 Vict. c. 56, repealed in part by Stat. Law Rev. Act, 1875, and several other statutes. See 19 & 20 Vict. c. 9, in which the previous acts are recited). And by the Improvement of Land Act, 1864 (27 & 28 Vict. c. 114), facilities are given for the advancement of money for the *improvement of land* in which there is a subsisting life estate, the money being in this case also repayable by instalments. By the 34 & 35 Vict. c. 84, the provisions of the last cited act are extended to *building or improving a mansion-house, &c.* But unless under these acts or some private act,

all improvements of or expenditure upon property by a tenant for life of it are at his own expense; *Nairn v. Majoribanks*, 3 Russ. 582; *Caldecott v. Brown*, 2 Ha. 144; *Stanhope v. Stanhope*, 3 Bea. 547; except in a few rare cases, as where he completes a building commenced by his testator, or pays money to prevent a forfeiture; see *Hibbert v. Cooke*, 1 S. & S. 552; *Dent v. Dent*, 30 Bea. 363, or in similar very exceptional cases; and if the tenant for life purchase the property, he will not be entitled to deduct from the purchase-money sums expended for interest on incumbrances and improvements. *Dixon v. Peacock*, 3 Drew. 288. Neither can the tenant for life be considered in general as a trustee for those in remainder so as to entitle him, in the absence of a special power, to charge against the estate sums expended by him in making improvements. See per Mellish, L.J., *Re Earl of Berkeley's Will*, L. R., 10 Ch. 56, 59. In this case a tenant for life opposed, but unsuccessfully, the passing of a canal bill. The Lands Clauses Act was incorporated with the act when passed. After its passing, the company took part of the settled estate and paid the money into court. It was held that the tenant for life was entitled to be paid out of the fund all costs properly incurred by him in relation to the purchase since the passing of the act, but not any costs of opposing the bill in Parliament. Tenants for life may sell the fee to railway companies (8 Vict. c. 18, s. 7), which statute also provides for the application of the purchase-money. And see now, tit. "SETTLED LAND ACT," *post*, by which the powers of a tenant for life are greatly increased.

As to leases by tenants for life, see tit. "LEASES."

On the death of a tenant for life his personal representatives will be entitled to emblements. See tit. "EXECUTORS." The lessee of a tenant for life has the same right to emblements as his lessor: and now, by the 14 & 15 Vict. c. 25, repealed as to Ireland, 23 & 24 Vict. c. 154, s. 104, where the tenancy of any lands held by a tenant at rack-rent determines by the death or cesser of the estate of any landlord entitled for life, or other uncertain interest, instead of claiming emblements the tenant shall continue to occupy until the end of the current year of his tenancy, and then quit without notice, the tenant and the successor of the landlord being respectively placed up to that time in the same position towards each other in which the original landlord had his estate continued, and the tenant, would have stood (s. 1). The rights of the tenant for life and his representatives under the apportionment acts have already been considered, *ante*, tit. "APPORTIONMENT."

A tenant for life is entitled to reasonable estovers or botes or wood for fuel, and for the purposes of making and repairing agricultural implements and repairing fences and houses. Co. Lit. 41 b; 2 Blac. Com. 35. He may also cut underwood in due course. Bac. Ab. "Waste," C. 2; *Phillipps v. Smith*, 14 M. & W. 589; see *Bagot v. Bagot*, 32 Bea. 509; *Legge v. Legge*, *ib.* As to the right to cut timber, see *post*, tit. "WASTE."

Fines and heriots are, as a rule, casual profits payable to the tenant

for life, and his rights are not affected by powers of management, leasing, &c., the best rent to be reserved without fine or premium. *Brigstocke v. Brigstocke*, 8 Ch. D. 357.

"An estate for life without impeachment of waste shall not confer or be deemed to have conferred upon the tenant for life any legal right to commit waste, unless an intention to confer such right shall expressly appear by the instrument creating such estate." Judicature Act, 36 & 37 Vict. c. 66, s. 25 (3).

The representatives of a tenant for life are entitled to fixtures erected for the purposes of manufacture and trade. *Lawton v. Lawton*, 3 Atk. 13; *Wms. Exors.* 8th ed. 747—749; and see tit. "EXECUTORS."

The tenant for life is *prima facie* entitled to the custody of the title deeds of the estate (*Webb v. Webb*, 1 Ed. 8; *Ford v. Peering*, 1 Ves. jun. 76); but should he improperly part with them they will be ordered to be lodged in court. See *Smith v. Cooke*, 3 Atk. 382; *Pyncent v. Pyncent*, *ib.* 571; *Jenner v. Morris*, L. R., 1 Ch. 603; *Sug. Ven. and Pur.*, 14th ed., 445. And if there is a pending suit as to trust estates, the court will direct the title deeds to remain in court if they are there. *Stanford v. Roberts*, L. R., 6 Ch. 310. But the opinion expressed in *Warren v. Rudall*, 1 J. & H. 1, 13, that although the court will not interfere with the possession of the deeds where a father is tenant for life and his son the remainderman, it will where the reversioner and tenant for life are *strangers*, is, according to Jessel, M.R., not well founded. *Leathes v. Leathes*, 5 Ch. D. 221, 223. The title deeds of land, of which a wife is legal tenant for life, ought not to be delivered to the trustee on the bankruptcy of her husband, but ought to be retained in court. *Ex parte Rogers*, 26 Ch. D. 31. *Qu. per Cotton, L.J.*: Whether, under ordinary circumstances, an assignee from a husband of his right to receive during the coverture the rents of land of which his wife is legal tenant for life, is entitled as a matter of course to the custody of the title deeds. *Ib.*

Charges on Estate.] A tenant for life must keep down the interest of incumbrances on the property, and, if necessary, apply the whole rental of it for this purpose. *Revel v. Watkinson*, 1 Ves. sen. 93; *Dixon v. Peacock*, 3 Drew. 288; *Caulfield v. Maguire*, 2 J. & L. 141; *Makings v. Makings*, 1 D., F. & J. 358. The rule applies as well during the first as every subsequent year after the testator's death. *Marshall v. Crowther*, 2 Ch. D. 199; *Greisley v. E. Chesterfield*, 13 Bea. 288, *contra*, is not followed. But this liability exists only as between him and the remainderman, not as between him and the incumbrancers. *Morley v. Saunders*, L. R., 8 Eq. 594. If he make good out of his own funds any deficiency beyond the incumbrances which he is bound to keep down, his representatives have no equity to be recouped by the remainderman. *Kensington v. Bouverie*, 7 H. L. C. 557; see *Shore v. Shore*, 4 Drew. 501. If rents and profits are directed by a testator to be applied towards repairs, even buildings which are in bad condition at his death must be repaired, though thereby the income of the tenant for life is diminished. *Cooke v.*

Cholmondeley, 4 Drew. 244. If the rents of real estate devised in strict settlement are directed to be accumulated during the minority of any person who should become tenant for life, and the accumulated fund and interest thereon are from time to time to be invested in the purchase of other lands to be settled to the same uses, no part of such accumulated fund can be applied, at the instance of a tenant for life, in necessary repairs and improvements on the estate. *Brunskill v. Caird*, L. R., 16 Eq. 493. *In re Ld. Hotham's Trusts*, L. R., 12 Eq. 76, is *contra*, but not followed. If the income of leaseholds after deducting ordinary outgoings is given to A. for life, he must bear the cost of drainage work required to be done to one of the houses by the vestry under the Metropolis Local Management Act, 1855, s. 73. *Acton v. Crawley*, 28 Ch. D. 431. Where a testator directed that the rents and profits of estates should be received by trustees and applied in liquidation of debts until the whole, including a sum of 8000*l.*, should be paid, and that no person to whom any estate for life or in tail was limited should be entitled to the rents and profits until the estates were totally clear of debts, and the whole of the debts had been paid excepting the 8000*l.*, and there was an accumulation fund in court sufficient to pay that, it was held that the tenant for life should be let into possession of the estates. *Tewart v. Lawson*, L. R., 18 Eq. 490. Where a first tenant for life omitted to repair, then a second entered but only lived a short time, and the trustees of the third brought an action against the executors of the first under the 3 & 4 W. 4, c. 42, s. 2, within six months after probate of the will of the first, the executors of the first were held liable for his omission to repair. *Andrew v. Williams*, W. N. 1884, p. 242; aff. W. N. 1885, p. 158; see *Gregg v. Coates*, 23 Bea. 33.

A tenant by the curtesy must keep down charges like any other tenant for life. *Casborne v. Scarfe*, 1 Atk. 606. So a dowress in respect of her one-third. *Squire v. Compton*, 2 Eq. Ca. Ab. 387. Where the incumbrance is a redeemable annuity, the tenant for life is only liable to keep down interest on the *estimated value* of the annuity. *Bulwer v. Astley*, 1 Ph. 422. When it happens that the interest of charges has not been kept down by the tenant for life, an incumbrancer may claim the arrears against the estate, if they have not been occasioned by collusion with the tenant for life. *Loftus v. Swift*, 2 Sch. & L. 642. The remainderman, however, has an equity to be recouped out of the estate and interest of the tenant for life; for the rule is, that a tenant for life is bound, and those claiming under him are bound, to discharge to the extent of the entire income, arrears accruing in his own time. See *Caulfield v. Maguire*, 2 J. & L. 141; *Sharshaw v. Gibbs*, Kay, 333, and cases there cited. But a tenant for life is not in general bound to discharge out of rents and profits the arrears of a prior tenant for life. *Revel v. Watkinson*, 1 Ves. sen. p. 94; *Sharshaw v. Gibbs*, *sup.*, observing on *Ld. Penrhyn v. Hughes*, 5 Ves. p. 106. Though if there be a charge, *e.g.* a jointure rent-charge, by one settlement, and the estate on which it is charged is settled by another settlement on A. for life, with remainders over, and

during part of A.'s term the rents are not sufficient to pay the jointure, on the death of the jointress the future rents during A.'s term are liable to make good the arrears. *Revel v. Watkinson*, *sup.* If, in consequence of the existence of the incumbrance, the estate has to be sold, the tenant for life is entitled to the interest of the surplus after the incumbrance is paid off. *Tracy v. Ly. Hereford*, 2 B. C. C. 138-9.

CHAPTER III.

COPYHOLD ESTATES.

SEC. 1.—*Estates in Fee.*

<i>Nature of Copyhold Estates in general</i>	227	<i>Nature of Copyhold Estates in general—continued.</i>	
<i>Held by Copy of Court Roll</i> ...	227	<i>Rule in Shelley's Case</i>	229
<i>Originally Estates at Will of Lord</i>	227	<i>Surrenders and Admissions</i>	229
<i>Customs of Manors</i>	228	<i>Trustees or Executors</i>	230
<i>Who may hold</i>	228	<i>Death of Tenant—Seizure by Lord</i>	230
<i>Distinctions between Copyholds and Freeholds</i>	228	<i>Fines on Admission</i>	230
<i>Lord's Rights—Timber—Mines—Leases</i>	228	<i>Must not be arbitrary</i>	230
<i>Fines and Services</i>	228	<i>Joint Tenants—Trustees</i>	231
<i>Commutation of</i>	229	<i>Enfranchisement—Extinguishment of Tenure</i>	231
<i>Forfeiture</i>	229	<i>Effect of</i>	231
<i>Same Estates in Copyholds as Freeholds—Derisability</i>	229	<i>Lord's Compensation</i>	231
		<i>Purchase by Lord</i>	232

Nature of Copyhold Estates in general.] Copyhold estates are held of the lord by copy of court roll at the will of the lord according to the custom of the manor, and subject to the services to be paid or rendered to the lord in respect of such estate. Litt. s. 73. Copyholds were in early times granted by the lord to his villeins, as the freehold lands were granted to his freemen. The freehold of copyhold lands, however, remained, as it still does, in the lord, though the copyholder is *seised* and the *legal estate* is in him, just as a freeholder is *seised* of, and has the legal estate in, freehold lands.

In course of time, the estate of the copyholder, which appears to have been originally little if anything more than an estate at the will of the lord, became a permanent interest. In some instances the copyholds became changed into customary freeholds (*ante*, p. 199). In other and by far the greater number of cases, they remained copyholds, subject *only* to the will of the lord according to the custom

of the manor, according to which custom at the present day copyhold estates are held. 1 Watk. Cop., 4th ed., 44.

The customs of manors must be immemorial, reasonable and certain. 1 Scriv. Cop., 4th ed., 22. Thus a custom for a *feme covert* to convey her estate, without a fine or surrender and examination, is bad. *George v. Jew*, Amb. 629. So a custom that the equitable owner of a copyhold estate shall not dispose of his property by will. *Lewis v. Lane*, 2 M. & K. 449. A custom for copyholders to carry away the entire soil of their tenements may be good. *Hanmer v. Chance*, 11 Jur., N. S. 397. So a custom to dig for clay without stint to make bricks to sell off the land (*Marq. Salisbury v. Gladstone*, 9 H. L. Cas. 692), or to fell timber. *Blewett v. Jenkins*, 12 C. B., N. S. 16; see further as to the customs of manors, Scriv. Cop. 22 *et seq.*

There is, as a general rule, no difference between copyhold and freehold lands in respect of the capacity to hold them. A corporation, however, cannot hold copyholds, as it can freeholds (*Att.-Gen. v. Lewin*, 8 Sim. 366), but only by means of a trustee. *Dimes v. Gr. Junc. Can. Co.*, 3 H. L. Cas. 794. Although the copyholder may have an estate in fee in his property, there are some very marked and important distinctions between freehold and copyhold estates in fee. Thus, unless there is a custom to the contrary, the lord has the right to all timber growing on the tenant's land (*Whitechurch v. Holworthy*, 19 Ves. 214), and to all mines and minerals under it (1 Scriv. Cop., 4th ed., 427; see *Bowser v. Maclean*, 2 D., F. & J. 415; *Keyse v. Powell*, 2 E. & B. 132). In an ordinary copyhold manor the estate of the copyholder is in the soil throughout, except as regards trees, mines, and minerals, the property in which remains in the lord. When the lord has removed minerals the space left belongs to the copyholder. The right of the lord is not like that of a vendor of freeholds who has reserved mines and remains the owner of the vacant space from which minerals have been removed. *Eardley v. Granville*, 3 Ch. D. 826. The lord cannot enter on the land to make his rights available without the copyholder's consent (*Grey v. D. of Northumberland*, 17 Ves. 282; *Whitechurch v. Holworthy*, 4 M. & S. 340), unless by custom (*Whitechurch v. Holworthy*, 19 Ves. 213), and the tenant may, by custom, have the right to the timber. *Ib.* If the lord for a long period has permitted the tenants to work mines, he has no remedy in equity to restrain them from continuing to do so. *Parrott v. Palmer*, 3 M. & K. 632. A copyholder cannot grant a lease of his land for a longer period than a year without the lord's consent, unless by virtue of a custom to that effect. 1 Scriv. 456; *Doe v. Bousfield*, 6 Q. B. 492. On change of ownership, whether by alienation or death, *fin*es are usually payable to the lord on the admission of the new copyholder, and in some manors heriots are due and may be seized on the death of a tenant. 1 Scriv. 369 *et seq.* Small quit rents and reliefs are also sometimes payable. *Ib.* 368. A lord, who is entitled by the custom of the manor to a reasonable fine upon admission to a copyhold tenement, may demand and recover such fine by the description of the improved annual value for a certain number of years of the tene-

ment to which the admittance relates, and without stating in money the precise amount of the fine. *Fraser v. Mason*, 11 Q. B. D. 574.

Now by various acts of parliament provision has been made for the commutation of the lord's rights to fines, heriots, services and right to timber; and also, if expressly agreed upon, his rights to mines and minerals. See 4 & 5 Vict. c. 35, the principal act; 15 & 16 Vict. c. 51; and 21 & 22 Vict. c. 94.

A court of equity has jurisdiction to relieve against forfeitures inequitably declared by the lord. *Andrews v. Hulse*, 4 K. & J. 392. Forfeiture only operates on the interest of the tenant; therefore, if prior to the forfeiture he has granted a lease with the lord's sanction, the lease remains unaffected by the forfeiture. *Clarke v. Arden*, 16 C. B. 227. The same estates and interests may be held in copyhold as in freehold property, whether in fee, in tail, or for life (Litt. s. 73), and surrenders are construed in the same manner as conveyances at law. *Lovell v. Lovell*, 3 Atk. 11. As previously stated, the rule in *Shelley's Case* applies also to copyholds, *ante*, p. 218. The owner can at his own will and pleasure sell or devise them, a devise being effected formerly by means of a surrender to the use of the will on which the will operated. Such a surrender was rendered unnecessary by the 55 Geo. 3, c. 192. This act is now repealed by the 1 Vict. c. 26, s. 2, as to wills made on or after 1st January, 1838, s. 34, and copyholds are placed on the same footing as to their devisability as freeholds. If not devised the estate will devolve on the customary heir (*Trash v. Wood*, 4 M. & C. 324); that is, for the most part, in the same course of descent as freehold lands. The mode of conveyance is by surrender into the hands of the lord or his steward to the use of the purchaser or other grantee and his heirs in fee, or for any other estate it is desired to create, to hold at the will of the lord and according to the custom of the manor and at the accustomed fines and services. Litt. s. 74.

Surrender and Admission.] The surrender is evidenced by a writing signed by the grantor, which also is commonly termed the surrender, but more accurately the memorandum of surrender. Upon this surrender the purchaser or grantee is admitted either at the time of the surrender or at some future time. Minutes of the transaction are entered on the court rolls, a book usually kept by the steward; and, after the admission, a copy of it, as entered on the court rolls, is delivered to the person admitted. These proceedings formerly took place in the lord's court, before him or his steward. Now, surrenders may be made and admissions granted out of the court and out of the manor. 4 & 5 Vict. c. 35, ss. 87—90. These copies of surrenders and admissions are the title-deeds of a copyholder.

A surrenderee (though for a valuable consideration) who is not admitted can confer no legal title on his *devisee*, though the latter may be admitted (*Matthew v. Osborne*, 13 C. B. 919), though in equity he would probably have a right to call for a surrender from the person

having the legal estate, on which he could be duly admitted. *Id.* See observations of Cresswell, J., *ib.*, 943.

Where under a settlement or will there is a limitation to one person for life, with remainders over, the admission of the tenant for life is that of all in remainder (*Ld. Kensington v. Mansell*, 13 Ves. 254), and the admission of the first devisee in fee under a will is that of the executory devisee over. *Randfield v. Randfield*, 1 Dr. & Sm. 310. An admission enures according to the title. Thus the admission of A., who is tenant in tail, as tenant in fee, operates as the admission of A., as tenant in tail only. *Church v. Mundy*, 12 Ves. 426. The person in whom the legal estate is vested is the person to be admitted, so that trustees, who take the legal estate, must be admitted. Sometimes, however, the necessity of an admission on the part of a trustee may be avoided by the mode of limiting or devising the estate. Thus a devise to such uses as A. (a trustee) shall appoint, with a power of sale, enables A. to make a good title to a purchaser without being admitted, as by exercising the power he may vest the legal estate at once in the purchaser. *Glass v. Richardson*, 2 D., M. & G. 658. A surrender to similar uses is equally operative if accepted, but it seems the lord is not bound to accept such a surrender. *Flack v. Downing College*, 13 C. B. 945; see *Weaver v. Maule*, 2 R. & My. 97; *Eddleston v. Collins*, 3 D., M. & G. 1.

A direction in a will that executors shall sell gives them a power but no estate, and a purchaser from them is entitled to be admitted without any previous admission of the executors. *Reg. v. Wilson*, 3 B. & S. 201.

The question as to the necessity for the admission of trustees is often a very important one when the fine payable on admission is large, *infra*.

On the death of a copyholder, if no person comes to be admitted as heir or devisee, the lord, after proclamation at three consecutive courts, may seize the lands, in some manors *absolutely*, but in most *quousque*, that is, *until* some person comes to be admitted. *Clayton v. Cookes*, 2 Atk. 449. But with respect to infants, married women, and lunatics, provisions have been made for their protection, by reason of their inability to appear. See 11 Geo. 4 & 1 Will. 4, c. 65, s. 9, and 16 & 17 Vict. c. 70, ss. 108, *et seq.*, as to the admission of committees of lunatics and payments of fines in such cases.

One incident, and often not the least important one, of copyhold tenure is, that on alienation or death and the admission of the parties who then become entitled, a fine usually becomes payable to the lord. The amount of the fine is different in different manors, and depends upon the custom. Fines, however, must be reasonable (*Co. Litt.* 60 a; *ib. n.* (1)), and are not payable before admission. *Visct. Wellesley v. Withers*, 4 E. & B. 750. Arbitrary fines, without reference to the number of years' value of the property, are bad. *Douglas v. E. Dysart*, 10 C. B., N. S. 688; see *Fraser v. Mason*, 11 Q. B. D. 574, *ante*, pp. 228, 229.

The lord may apportion the fine as between the tenant for life and

remainderman, but cannot remit the whole of it to the former, and throw it upon the latter. *Ld. Kensington v. Mansell*, 13 Ves. 246. When trustees who are joint tenants are admitted, as a rule the fine to be reasonable is to be assessed, where not otherwise fixed by the custom of the manor, on the principle of two years' value for the first life, half that for the second named, and for the third one-half of the sum taken for the second, and so on in that proportion. *Wilson v. Hoare*, 2 B. & Ad. 350.

On a devise to two or more trustees any one is entitled to be admitted, without prejudice to the question whether the lord is entitled to a fine as upon the admission of all. *Reg. v. Wellesley*, 2 E. & B. 924; see *S. C.*, *infra*, as finally decided, *nom. Ld. Wellesley v. Withers*.

If all the trustees act, a subsequent disclaimer by one will not save the payment of his fine. *Bence v. Gilpin*, L. R., 3 Ex. 76. But a trustee who is also an executor may join his co-trustees and executors in taking out probate, and act with regard to the personal estate and disclaim the copyhold estates, provided he has never *acted* with regard to them, and no fine will be payable on his account on the admission of the others. *Ld. Wellesley v. Withers*, 4 E. & B. 750.

On the admission of an heir whose ancestor was seised, but never admitted, two fines are payable: one for the ancestor; one for the heir. *Ld. Londesborough v. Foster*, 3 B. & S. 805.

Enfranchisement.] By several acts of parliament provisions were made for the enfranchisement of copyholds, which, however, under these acts, was not compulsory at the instance either of the lord or the tenant (4 & 5 Vict. c. 35; 6 & 7 Vict. c. 23; 7 & 8 Vict. c. 55), though by later acts it has been made so. 15 & 16 Vict. c. 51; 21 & 22 Vict. c. 94. An enfranchisement under these acts is not to affect the commonable rights of the tenant, nor, unless with consent in writing, the estate or rights of either lord or tenant in any mines or minerals. 15 & 16 Vict. c. 51, s. 48; 21 & 22 Vict. c. 94, s. 14; see *Upperton v. Nickolson*, L. R., 6 Ch. 436. Enfranchisement discharges conditions which had been annexed to the grant of part of the waste by the lord. *Brabant v. Wilson*, L. R., 1 Q. B. 44. If a copyhold tenant dies after proceedings instituted by him for a compulsory enfranchisement under the 21 & 22 Vict. c. 94, and before the confirmation of the award by the commissioners, the lord is entitled to have a new tenant on the roll, and to a fine on his admittance, but the proceedings do not abate by the death of the first tenant. *Myers v. Hodgson*, 1 C. P. D. 609. The court on sanctioning proceedings for carrying into effect the enfranchisement of a copyhold estate belonging to a lunatic, the rules of descent as to which were different from those as to the descent of freeholds, made a declaration that in the event of his dying intestate as to the enfranchised property, his heir-at-law would stand seised thereof in trust for the persons who would have been entitled thereto as his heirs according to the custom of the manor if it had not been enfranchised. *In re H. D. Ryder*, 20 Ch. D. 514.

As to the purchase-money of copyholds taken compulsorily by a

railway company, or other company or authority similarly empowered, see *Re Wilson*, 2 J. & H. 619. The lord is entitled to compensation in respect of loss of his privileges and consequent removal of the disabilities of the tenants, the amount being a question for the valuer. *Lingwood v. Gyde*, L. R., 2 C. P. 72. A purchase by the lord of his tenant's copyhold property and admittance of the lord extinguishes the copyhold tenure of the property purchased. See *Cattley v. Arnold*, 4 K. & J. 595.

But grants of copyhold lands by the lord to himself are void, as no one can be copyholder to himself. *Dean of Christchurch (Oxford) v. D. of Buckingham*, 17 C. B., N. S. 391.

SEC. 2.—*Estates Tail.*

<i>By Custom</i>	232	<i>Under the Act</i>	232
<i>Where no Custom</i>	232	<i>Consent of Protector</i>	232
<i>How barred before 3 & 4 Will. 4,</i>		<i>Equitable Tenants in Tail</i>	233
<i>c. 74</i>	232	<i>Entry on Court Rolls</i>	233

Copyholds can only be entailed where there is a custom to that effect. In the absence of such a custom the effect of an attempted entail of them is to give the donee an estate *in fee conditional* on the birth of issue. On that event happening he may alien, but not before; and no remainder over can be limited upon such an estate. *Rowden v. Malster*, Cro. Car. 44; Bac. Abr. Copyhold, C.; see *Doe v. Clark*, 5 B. & Al. 458; *Doe v. Simpson*, 4 B. N. C. 333; *Hardcastle v. Dennison*, 10 C. B., N. S. 606; J. Wms. Real Property, 14th ed., 374, 378. This is precisely what the ancient estate tail in freeholds was before the statute *de donis*. *Ante*, p. 208.

In those manors in which a custom to entail was established, various methods were adopted and sanctioned for barring the entail. In some, a simple surrender was sufficient, and *prima facie* it was so, unless proved to be insufficient. *Otway v. Hudson*, 2 Ver. 585; *Gould v. White*, Kay, 683. In others, a customary recovery was suffered. See Co. Litt. 60 b, n. (1). Now, by the 3 & 4 Will. 4, c. 74, the provisions of that act relating to freeholds, for the most part apply to copyholds also, except that a disposition of copyholds, when the owner is *legal* tenant in tail, must be made by surrender; when he is *equitable* tenant in tail, by surrender or deed (as mentioned in sec. 53, *post*, p. 233) (s. 50).

If the consent of the protector be given by deed, it shall, either at or before the time when the surrender shall be made, be executed by such protector, and produced to the lord or steward, and the consent of such protector shall be void unless such deed shall be so executed and produced; an acknowledgment of production is to be indorsed on it, and it is to be entered on the court rolls and a memorandum of such entry indorsed on it (s. 51).

If the consent of the protector shall not be given by deed, it shall

be given to the person taking the surrender by which the disposition shall be effected; and if the surrender be made out of court, it shall be stated in the memorandum of such surrender that such consent had been given, and such memorandum shall be signed by the protector; and the lord or steward shall cause the memorandum, with such statement therein as to the consent, to be entered on the court rolls of the manor; if the surrender be made in court, the lord or steward shall cause an entry of such surrender, containing a statement that such consent had been given, to be made on the court rolls; such entries on the court rolls, or copies of them, shall be as available for the purposes of evidence as any other entries on the court rolls or copies thereof (s. 52).

Power is given to *equitable tenants* in tail of copyholds to dispose of their lands by deed, as if they had been freeholds, and the deed is to be entered on the court rolls. Where there is a protector he must give his consent, and if by a distinct deed it must be executed *on or before* the day on which the disentailing deed is *executed*, and must be entered on the court rolls. Deeds of disposition under this clause must be entered on the court rolls *before subsequent assurances* for value, which, if entered thereon before the deed of disposition, have priority over it (s. 53). Dispositions of copyholds need not be inrolled in chancery, but must be *entered on* the court rolls (s. 54) within six months. *Honeywood v. Foster*, 30 Bea. 1; *Gibbons v. Snape*, 1 D., J. & S. 621. An endorsement by the steward on the disentailing deed or assurance is insufficient *Boyd v. Pawle*, 14 W. R. 1009.

SEC. 3.—*Estates for Life.*

Renewable Estates 233 | *Fines—Apportionment* 233

Copyhold, like freehold, estates, may be held for life or lives, with remainders over, and the various incidents affecting and appertaining to life estates in freehold lands are for the most part applicable to similar estates in copyholds, with this difference in matters relating to waste, that regard must be had to the rights which the lord has in respect of copyhold property. *Ante*, p. 228. Copyhold estates may also be held for lives renewable from time to time. Some manors indeed admit of no other tenure. See 1 Watk. 51, n. (1). The rules stated with reference to renewable freehold interests for lives (*post*, Ch. 4) are in principle applicable to copyholds for lives, and the fines and expenses on admission are borne by the tenant for life and those in remainder according to their respective interests. *Carter v. Sebright*, 26 Bea. 374; see *Playters v. Abbott*, 2 M. & K. 97; *Bull v. Birkbeck*, 2 Y. C. C. 447. For further information on the subject of copyholds for lives the reader is referred to a learned and useful note by Mr. Coventry in his (4th) edition of Watkins on Copyholds, p. 51, n. (1).

CHAPTER IV.

LEASEHOLD ESTATES.

SEC. 1.—*Renewable Leaseholds for Lives or Years.*

<i>Generally</i>	234	<i>Expenses of Renewal—continued.</i>	
<i>Nature of Interest</i>	234	<i>Proportions of</i>	237
<i>Covenant for perpetual Renewal</i>	234	<i>Former Rule—Present Rule</i> ...	237
<i>Obligation to renew</i>	235	<i>Payment by Tenant for Life</i> ...	237
<i>Where no Direction, is discretionary</i>	235	<i>Tenant for Life cestui que vie</i>	237
<i>Direction to renew</i>	235	<i>Laches</i>	238
<i>Sum fixed</i>	235	<i>Remainderman renewing</i>	238
<i>Omission to renew</i>	235	<i>Infants—Married Woman</i>	238
<i>Implied trust to renew</i>	235	<i>To whose Benefit it enures</i>	238
<i>Statutory Provisions</i>	235, 236	<i>Enures to Benefit of all interested</i>	238
<i>Expenses of Renewal</i>	236	<i>One of several renewing</i>	239
<i>Renewal out of Income</i>	236	<i>Sale of Benefit of Renewal</i>	239
<i>By Sale or Mortgage</i>	236	<i>Tenant for Life with General Power</i>	239
<i>No Renewal Fund specified</i> ...	237	<i>Renewal impracticable</i>	239

Generally.] Leases are frequently granted for lives, or for years, renewable at fixed periods, on payment of certain fines. As the matters treated of in this section for the most part relate to leaseholds for lives, as well as to leaseholds for years, they have for convenience been considered together, although in strictness perhaps the former should have come under the head of “estates for life.” Sometimes the right to a renewal arises under a covenant for *perpetual renewal*, but such a covenant must be clearly expressed. *Baynham v. Guy’s Hospital*, 3 Ves. 295; *Browne v. Tighe*, 2 Cl. & F. 396; *Smyth v. Nangle*, 7 Cl. & F. 405; *Clark v. Smith*, 9 Cl. & F. 126; *Chambers v. Gaussen*, 2 J. & L. 99; *Wallace v. Patton*, 12 Cl. & F. 491; *Hare v. Burges*, 4 K. & J. 45; *Swinburne v. Milburn*, 9 App. C. 844. When an agreement to renew contains no stipulation as to the duration of the new lease, it is implied, that it shall be for the same term as the old lease. *Price v. Assheton*, 1 Y. & C. 82. But a covenant to renew under or with all covenants, as in the original lease, is *exclusive* of the covenant of renewal. *Tritton v. Footc*, 2 B. C. C. 636; *Iggulden v. May*, 9 Ves. 325. These renewable leaseholds are often made the subject of settlement, by deed and will, life interests being given, with remainders over. In all matters connected with renewals, it is obviously of importance to adjust the equities between the several persons interested, so as not to impose a greater burthen of expense

on one more than another, having regard to their interests in the property.

Obligation to renew.] If renewable leaseholds for lives or years are settled on one person for life, with remainders over, and there is no direction to renew, there is no obligation to do so. *Nightingale v. Lawson*, 1 B. C. C. 443; *White v. White*, 9 Ves. 554; *Harvey v. Harvey*, 5 Bea. 134. The rule is the same even where the gift to the tenant for life is subject to the payment of all fines and rents as they become due yearly. *Capel v. Wood*, 4 Russ. 500; see *O'Ferrall v. O'Ferrall*, Ll. & G. t. Plunk. 79.

Under a direction that it shall be lawful to renew as occasion may require, there is a discretionary power of renewal when most for the benefit of the *cestui que trust*. *Ld. Milsington v. E. Mulgrave*, 3 Mad. 491; 5 Mad. 471; see *Mortimer v. Watts*, 14 Bea. 616. But in executory articles for a marriage settlement of renewable leaseholds, it will be considered that a renewal was intended, and the articles will be construed accordingly (*Graham v. Ld. Londonderry*, cited 2 B. C. C. 246; see *Pickering v. Vowles*, 1 B. C. C. 197); and under an express direction to renew, a renewal, if practicable, must be effected. *Montfort v. Ld. Cadogan*, 19 Ves. 635; *Bennett v. Colley*, 2 M. & K. 225; see *Playters v. Abbott*, *ib.* 97; *E. Shaftesbury v. D. Marlborough*, *ib.* 111.

If a sum be authorized to be raised for renewal, the tenant for life is not bound to renew if the renewal cannot be effected for the sum specified; but he may be required to do so by the remainderman if the latter will bear the extra expense. *White v. White*, 9 Ves. 554, 562.

Trustees who have omitted to take a renewal, being directed and able to do so, will be compelled to renew at their own expense. *Ld. Milsington v. E. Mulgrave*, 5 Mad. 471. And if in such a case the remainderman has renewed, they must recoup him his proper expenses (*Montfort v. Cadogan*, 2 Mer. 3; *Colegrave v. Manby*, 2 Russ. 238); and the tenant for life or successive tenants for life are bound to contribute. *Montfort v. Cadogan*, *sup.*; see *post*, p. 236. If trustees in the receipt of rents, applicable for renewal purposes, misappropriate the rents, the loss, if not made good by the trustees, falls on the tenant for life. *Solley v. Wood*, 29 Bea. 482. Although there may be no direct express trust for renewal, there may be an implied one, as by a direction to trustees to apply a competent part of the rents and profits towards the renewal. *Ld. Montfort v. Ld. Cadogan*, *supra*.

By the 23 & 24 Vict. c. 145, trustees of leaseholds were empowered to obtain a renewal lease in certain cases, ss. 8, 9; but these sections were repealed by the Settled Land Act, 1882, 44 & 45 Vict. c. 38, s. 64.

By the 23 & 24 Vict. c. 124, s. 20, where any ecclesiastical leases or grants as mentioned in that section are vested in any trustees, with power to raise money for the purposes of renewal, and in every other

case in which a power is vested in any persons for that purpose, they may raise money for the purpose of *purchasing the reversion of* or otherwise *enfranchising the property* comprised in such lease or grant, and apply the same accordingly, in the same manner and subject to the same conditions *mutatis mutandis*, so far as the same may be applicable to the case, as they might by virtue of such power have raised money for renewal purposes and have applied the same accordingly.

Upon the construction of this act it has been held, that although trustees with power to renew are authorized to purchase the reversion if vested in ecclesiastical corporations, aggregate or sole, under the act, they cannot do so *against the wish* of the *tenant for life*, whose income would be reduced by their doing so; and the court will not in such a case sanction an agreement for purchase. *Hayward v. Pile*, L. R., 5 Ch. 214. The act applies to the estates of corporations, both aggregate and sole. *Ib.*

Of the Expenses of Renewal.] The leaseholds of which a renewal lease is to be taken may be either for years or lives, and the expenses may or may not be expressly provided for. It has been held, that a direction to renew *out of rents and profits* authorizes a mortgage or sale of part of the property (*Allan v. Backhouse*, 2 V. & B. 65; aff. Jac. 631), the effect of which would be to throw part of the expenses on the remainderman. This was contrary to the prior case of *Stone v. Theed*, 2 B. C. C. 243, which was followed in *E. of Shaftesbury v. D. of Marlborough*, 2 M. & K. 111, where it was held, that under such a direction the successive tenants for life must bear the expenses of the renewal becoming necessary during the period of their respective enjoyments, the renewal fund being raisable out of the annual rents and profits; and this would now seem to be the rule of the court. In *Solley v. Wood*, 29 Bea. 482, it was held, that if the renewal fines are to be raised out of rents or profits, and they are misapplied by the trustee, the loss falls on the tenant for life, and not on the remainderman. And see *Bradford v. Brownjohn*, L. R., 3 Ch. p. 715, *per* Selwyn, L.J.; *Isaac v. Wall*, 6 Ch. D. 706. A direction to renew out of rents and profits, *or by mortgage*, would seem now to give the trustees a discretion as to the mode of raising the fund for renewal. If this discretion be not exercised, the court will apportion the burthen upon the parties according to their enjoyment of the property. *Jones v. Jones*, 5 Ha. 440; *Greenwood v. Evans*, 4 Bea. 44; *Ainslie v. Harcourt*, 28 Bea. 313; cons. *Marquess of Bute v. Ryder*, 27 Ch. D. 196; see the earlier case of *Ld Milsington v. E. Portmore*, 5 Mad. 471, *contra*. If a provision for renewal has been made by the testator or settlor for the expense of renewal by sale or mortgage of the estate itself, the tenant for life loses the rents of the part sold in case of a sale, and keeps down the interest in the case of a mortgage. See *per* Selwyn, L.J., *Bradford v. Brownjohn*, L. R., 3 Ch. 715; *Ainslie v. Harcourt*, 28 Bea. 313. When the same provision is made by means

of the sale or mortgage of another estate, the tenant for life of that estate is in a similar position. *Ib.*

It is to be observed that when the leaseholds are for years, the amount of rents and profits annually required to form the renewal fund is more easy of ascertainment than where the leaseholds are for lives. For it is of course uncertain when any particular life will drop, but certain when a lease for years will expire. This difficulty may be met by insuring the life of the *cestui que vie* out of the annual rents and profits, so that when the time for renewal comes, the proceeds of the policy will be available for that purpose. See *E. Shaftesbury v. D. Marlborough*, 2 M. & K. 124; *Greenwood v. Evans*, 4 Bea. 44; and consider the observations, *Lewin Trusts*, 7th ed., 336, *Browne v. Browne*, 2 Giff. 304.

Where there is a direction to renew, but no renewal fund is expressly specified, and neither the tenant for life nor remainderman will advance what is necessary, the practice is to raise the fund by means of a mortgage, in the first instance (see *Jones v. Jones*, 5 Ha. 440), and the parties beneficially interested afterwards contribute according to their interests. Formerly, where no renewal fund was provided and there was either a direction to renew or the tenant for life renewed, he paid one-third of the fines and expenses of the renewal, the remaining two-thirds being borne by those in remainder. *Verney v. Verney*, Amb. 88. This rule, however, was afterwards abandoned, and the more equitable one established that the proportion, whether of principal or interest, to be borne by the tenant for life should depend upon the actual benefit which he had derived from the renewal (and which was to be determined after his death). And this is now considered to be the settled rule of the court. *Nightingale v. Lawson*, 1 B. C. C. 440; *Stone v. Theed*, 2 B. C. C. 248; *White v. White*, 9 Ves. 554; *Allan v. Backhouse*, 2 Ves. & B. 65; aff. Jac. 631; *E. Shaftesbury v. D. Marlborough*, 2 M. & K. 111, 119; *Colegrave v. Manby*, 6 Madd. 72; aff. 2 Russ. 238; see *Jones v. Jones*, 5 Ha. 465; *Hudleston v. Whelpdale*, 9 Ha. 775. And there is no difference in principle between cases of renewals for lives and those of renewals for years. See *Jones v. Jones*, 5 Ha. 440; acc. *Bradford v. Brownjohn*, L. R., 3 Ch. 711, 714.

A tenant for life paying the renewal fines has a lien on the estate for whatever ought to be paid by the remainderman. *Jones v. Jones*, *sup.* And the representatives of a tenant for life, who renews but derives no benefit from the renewal in consequence of his death in the lifetime of the original life or lives, will be entitled to be recouped the whole sum paid by him. *Harris v. Harris*, 32 Bea. 333—a case of copyholds. So if the tenant for life being *cestui que vie*, and as such not bound to renew, has nevertheless renewed, the fines and expenses of such renewal will be a charge in his favour on the renewed lease against the remainderman (*Lawrence v. Maggs*, 1 Ed. 453; *Adderley v. Clevering*, 2 B. C. C. 658); for the tenant for life cannot be supposed to renew for his own benefit—as, being *cestui que vie*, the lease and his own interest are co-extensive. *Verney v. Verney*, Amb. 87.

In *Bradford v. Brownjohn*, L. R., 3 Ch. 711, the tenant for life had paid the necessary fines for obtaining a renewal of copyholds for years, determinable on lives, and it was held that the remainderman was bound to pay a sum equivalent to or representing the benefit he derived from the renewal as ascertained at the time of the death of the tenant for life, with compound interest at four per cent. from the time of the renewal and simple interest at the same rate on such principal and compound interest from his death. The principle applicable to cases of this description is very clearly explained in the judgments of the Lords Justices. See *Isaac v. Wall*, 6 Ch. D. 706.

The representatives of a deceased tenant for life who has renewed must not delay making their claim in respect of the renewal fines. *Ainslie v. Harcourt*, 28 Bea. 313.

On a renewal by a remainderman the tenant for life must give security for the benefit he derives from the renewal, so that his estate may make good his proportion of the capital to the remainderman. *Jones v. Jones*, 5 Ha. 465; *Hudleston v. Whelpdale*, 9 Ha. 786. There is no doubt a difficulty as to this; for the tenant for life may become insolvent. See *per* Lord Eldon, *White v. White*, 9 Ves. 558; and *Jones v. Jones, sup.* Where a sum is directed to be set apart out of rents for renewal, and the tenant for life omits to renew, and after his death the remainderman renews, the latter is entitled as against the estate of the deceased tenant for life to a proportionate part in respect of his interest of what would have been a fair renewal fine in his lifetime. *Colegrave v. Manby*, 2 Russ. 238; *Bennett v. Colley*, 2 M. & K. 225. The application of the principle may sometimes be a matter of difficulty. See Lewin on Trusts, 4th ed., 338; cons. *Bradford v. Brownjohn*, L. R., 3 Ch. 711, the principle of which would seem equally applicable in the case of a remainderman advancing the fine as well as the tenant for life.

An infant who is jointly interested with another who renews is not bound by the renewal unless he agree to it, but if he do so he must contribute his proportion of the expenses of renewal. *Exp. Grace*, 1 B. & P. 376. In cases where infants and married women are under obligations to renew, the renewal may be made under the direction of the Court of Chancery. 11 Geo. 4 & 1 Will. 4, c. 65, ss. 16, 17.

To whose Benefit it enures.] A renewal by whomsoever effected enures to the benefit of all interested in the property, as well as of the party renewing. *Raue v. Chichester*, Amb. 715, in which the earlier cases are cited; *Owen v. Williams*, *Ib.* 734; *Tanner v. Elworthy*, 4 Bea. 487; *Clegg v. Fishwick*, 1 Mac. & G. 294. The rule is the same if the original lease has expired, and then a fresh lease is obtained. *Pickering v. Vowles*, 1 B. C. C. 197. So where during the continuance of the original lease a reversionary lease is obtained. *Taster v. Marriott*, Amb. 668; *Rakestraw v. Brewer*, 2 P. W. 511; or the fee or reversion purchased. *Leigh v. Burnett*, 29 Ch. D. 231; *Phillips v. Phillips*, *Ib.* 673. So a renewal by one of several in his own name enures for the benefit of all. *Palmer v. Young*, 1 Ver. 276; see

Jackson v. Welsh, Ll. & G., t. Plunk. 346. And, as a general rule, a renewed lease is subject to all the equities affecting the old lease (*Edwards v. Lewis*, 3 Atk. 538), and these equities will be enforced against purchasers with notice. *Parker v. Brookes*, 9 Ves. 583. And the assignee of a tenant for life of renewable leaseholds settled by will, who purchases the reversion, holds upon the trusts of the will, subject to his right to be recouped what he has paid for the reversion. *In re Ld. Ranelagh's Will*, 26 Ch. D. 590. In *Re Morgan*, 18 Ch. D. 93, an executor surrendered a lease belonging to the testator, and took a renewed lease, including additional property and at an increased rent, in his own name. He afterwards deposited the lease as security for money advanced to him, which he applied to his own purposes. The renewed lease contained no mention of the surrender, and the mortgagee did not know that the borrower was an executor, or that he was not the beneficial owner of the lease. He did not, however, make any inquiry into the title. It was held that the lease was in equity part of the testator's estate, and that the equity of the estate being prior to the equity of the mortgagee, must prevail against it.

The rule equally applies where the tenant for life is an under-lessee, and purchases the interest of his immediate lessor, and then obtains a renewal from the superior landlord. *Giddings v. Giddings*, 3 Russ. 241; see *Randall v. Russell*, 3 Mer. 190; *Hardman v. Johnson*, *ib.* 347; see *Trumper v. Trumper*, L. R., 8 Ch. 870. On a sale by the tenant for life of the right to a renewal, the purchase-money is subject to the same equities as the lease if renewed would have been. *Owen v. Williams*, Amb. 734. If a tenant for life with a general power of appointment renews, but does not exercise his power or the appointment does not take effect, the renewal enures for the benefit of those in remainder. *Brookman v. Hales*, 2 V. & B. 45.

It has already been mentioned, that if a renewal be impracticable, and there is a fund reserved for the renewal, it has been held to belong absolutely to the tenant for life, if it has been set apart out of his income. *Morres v. Hodges*, 27 Bea. 625; but see *ante*, p. 122.

SEC. 2.—Terms of Years.

<i>Long Terms</i>	239	45 & 46 Vict. c. 39	242
<i>Satisfied Terms</i>	240	<i>Freehold or Leasehold</i>	242
<i>Long beneficial Terms</i>	240	<i>Ordinary Leases</i>	242
44 & 45 Vict. c. 41	240	<i>Limitations in Fee or Tail</i>	242

Terms are of two kinds, viz., long terms, for instance, for 500 or 1,000 years, and terms which rarely exceed 99 years, and are created by lease. A term of years may be made to commence *in futuro*, and is in this respect unlike a freehold estate. 2 Blac. Com. 143. With regard to long terms, they are in general created for the purpose of enabling trustees or others to raise (usually by way of mortgage) portions or other monies when required for the purposes for which

the terms were created, or to secure the payment of jointures, rent-charges or the like ; and there is, in general, a proviso for cesser of the term when the purposes for which it was created have been accomplished.

Formerly, when a term had thus become satisfied, it was nevertheless *existing*, and was capable of being assigned. On conveyances of freehold property it was constantly the practice to assign such terms to a trustee for the purchaser, for the protection they afforded against incumbrances *mesne* between the creation of the term and the assignment of it. Now, by the 8 & 9 Vict. c. 112, it is enacted that every satisfied term which by express declaration or construction of law shall on the 31st December, 1845, be attendant on the inheritance shall cease, but, nevertheless, every term so attendant by *express declaration* shall afford the same protection against incumbrances, &c., as if it had continued but had not been assigned, and for the *purposes of such protection* shall be considered as subsisting (s. 1). See *Doe v. Langdon*, 12 Q. B. 711 ; *Doe v. Price*, 16 M. & W. 603 ; *Doe v. Mouldsdales*, *Ib.* 689 ; *Plant v. Taylor*, 7 H. & N. 211.

By sec. 2, every term subsisting at the time of the passing of the act (8th August, 1845), or afterwards created and becoming satisfied *after* the 31st December, 1845, and which shall either by express declaration or construction of law after that day become attendant on the inheritance or reversion of any lands, shall cease. See *Doe v. Jones*, 13 Q. B. 774 ; consider, however, as to this case, *Sug. R. P. St.* 280 ; see *Freer v. Hesse*, 4 D., M. & G. 495 ; *Shaw v. Johnson*, 1 Dr. & S. 412 ; *Owen v. Owen*, 3 H. & C. 88. *Doe v. Jones* is approved and followed in *Anderson v. Pignet*, L. R., 8 Ch. 180. In this case, James, L.J., observed that a term does not become satisfied within the meaning of the act, except the beneficial interest in the whole charge secured by the term, and the beneficial interest in the whole estate, are united and merged in one person. *Ib.* p. 189.

Long terms of years are also not unfrequently met with, which, from the length of the term and the absence of any save nominal covenants, are practically, except in respect of their mode of devolution or descent, equivalent, or nearly so, to freehold estates, and are not uncommonly conveyed or disposed of as freehold estates. A question occasionally arises with regard to lands of this description, which have been dealt with sometimes as leasehold and sometimes as freehold property, whether they are to be considered as of one kind or the other. When the leasehold origin is once shown, it would seem that the evidence of its being subsequently dealt with as freehold property ought at the least to be for a very long period unbroken by any intervals during which it has been treated and dealt with as leasehold. See *Pickett v. Packham*, L. R., 4 Ch. 190 ; consider *Jeffreys v. Machu*, 29 Bea. 344.

By the Conveyancing, &c., Act, 1881, 44 & 45 Vict. c. 41, s. 65 (1), "where a residue unexpired of not less than *two hundred years* of a term, which, as originally created, was for not less than *three hundred years*, is subsisting in land, whether being the whole land originally

comprised in the term, or part only thereof, without any trust or right of redemption affecting the term in favour of the freeholder, or other person entitled in reversion expectant on the term, and without any rent, or with merely a peppercorn rent or other rent having no money value, incident to the reversion, or having had a rent, not being merely a peppercorn rent or other rent having no money value, originally so incident, which subsequently has been released, or has become barred by lapse of time, or has in any other way ceased to be payable, then the term may be enlarged into a fee simple in the manner, and subject to the restrictions, in this section provided.

“(2.) Each of the following persons (namely):

“(i.) Any person beneficially entitled in right of the term, whether subject to any incumbrance or not, to possession of any land comprised in the term; but, in case of a married woman, with the concurrence of her husband, unless she is entitled for her separate use, whether with restraint on anticipation or not, and then without his concurrence;

“(ii.) Any person being in receipt of income as trustee, in right of the term, or having the term vested in him in trust for sale, whether subject to any incumbrance or not;

“(iii.) Any person in whom, as personal representative of any deceased person, the term is vested, whether subject to any incumbrance or not;

shall, as far as regards the land to which he is entitled, or in which he is interested, in right of the term, in any such character as aforesaid, have power by deed to declare to the effect that, from and after the execution of the deed, the term shall be enlarged into a fee simple.

“(3.) Thereupon, by virtue of the deed and of this act, the term shall become and be enlarged accordingly, and the person in whom the term was previously vested shall acquire and have in the land a fee simple instead of the term.

“(4.) The estate in fee simple so acquired by enlargement shall be subject to all the same trusts, powers, executory limitations over, rights, and equities, and to all the same covenants and provisions relating to user and enjoyment, and to all the same obligations of every kind, as the term would have been subject to if it had not been so enlarged.

“(5.) But where any land so held for the residue of a term has been settled in trust by reference to other land, being freehold land, so as to go along with that other land as far as the law permits, and, at the time of enlargement, the ultimate beneficial interest in the term, whether subject to any subsisting particular estate or not, has not become absolutely and indefeasibly vested in any person, then the estate in fee simple acquired as aforesaid shall, without prejudice to any conveyance for value previously made by a person having a contingent or defeasible interest in the term, be liable to be, and shall be, conveyed and settled in like manner as the other land, being freehold

land, aforesaid, and until so conveyed and settled shall devolve beneficially as if it had been so conveyed and settled.

“(6.) The estate in fee simple so acquired shall, whether the term was originally created without impeachment of waste or not, include the fee simple in all mines and minerals which at the time of enlargement have not been severed in right, or in fact, or have not been severed or reserved by an inclosure act or award.

“(7.) This section applies to every such term as aforesaid subsisting at or after the commencement of this act.”

By the 45 & 46 Vict. c. 39, s. 11, “section sixty-five of the Conveyancing Act of 1881 shall apply to and include, and shall be deemed to have always applied to and included, every such term as in that section mentioned, whether having as the immediate reversion thereon the freehold or not; but not—

“(i.) Any term liable to be determined by re-entry for condition broken; or

“(ii.) Any term created by sub-demise out of a superior term itself incapable of being enlarged into a fee simple.”

It has been held on this section (1) that “a yearly rent of one penny if demanded” has no money value. *In re Chapman and Hobbs*, 29 Ch. D. 1007.

In long terms the ordinary relation of landlord and tenant does not exist; this relation is only created where there is a demise at a rent. The subject of ordinary leases will hereafter be considered, tit. “LANDLORD AND TENANT—LEASE.”

Estates cannot be created in chattels real or personal property as in real property, and a limitation or gift which would confer an estate in fee or in tail in realty will in general give the absolute interest in personalty. See *Browncker v. Bagot*, 19 Ves. 574; 1 Mer. 271; *Douglas v. Congreve*, 1 Bea. 59. So in general a bequest, in terms which would create an estate tail if applied to realty, gives the absolute interest in personalty. *Garth v. Baldwin*, 2 Ves. sen. 646; *Campbell v. Harding*, 2 R. & My. 390; *Re Andrews' Will*, 27 Bea. 608. The exceptions to this general rule will be noticed in title “WILLS.” It is no objection to the application of the rule that by the effect of it real and personal estate given by the same words will devolve upon different persons. *Jackson v. Calvert*, 1 J. & H. 235. As to limitations of chattels real or personal estate corresponding with limitations of real estate, see Chapter V.

CHAPTER V.

INTERESTS IN PERSONAL ESTATE.

<i>Generally</i>	243	<i>Limitations, &c.—continued.</i>	
<i>What it comprises</i>	243	<i>Proviso restraining absolute</i>	
<i>Delivery—Assignment</i>	243	<i>vesting before Twenty-one</i> ...	244
<i>Separate Right to Deeds</i>	243	<i>To go with a Title</i>	244
		<i>Words “By Purchase”</i>	245
<i>Limitations of Personality to devolve</i>		<i>Life Estates</i>	246
<i>with settled Realty in Tail</i>	243	<i>Limitations at Law</i>	246
<i>Trusts executory and executed</i> .	243	<i>Executory Trust</i>	246
<i>As far as Rules of Law and</i>		<i>Fraudulent Disposition of</i>	246
<i>Equity permit</i>	243, 244	<i>Inventory</i>	247

Generally.] Personal property, in the more restricted sense of the expression, comprises every species of property which does not come within the description of real estate or chattels real, though the term, in its larger sense, comprises chattels real also. Personal property capable of delivery, for instance, movable chattels and effects, may be assigned *by deed* (2 Saund. 47 a, n. (d); *Bourne v. Fosbrooke*, 18 C. B., N. S. 515; see *Sharr v. Pilck*, 4 Ex. 478), or by actual delivery. Even in the case of documents of title, or instruments which are the evidence of title to property, the right to the actual documents or instruments may pass at law, by delivery, though given without consideration, notwithstanding they may not be available of themselves to give any further right to the property represented by them. *Barton v. Gainer*, 3 H. & N. 387. As to the right in equity of a person claiming as a volunteer under an incomplete or imperfect gift, see tit. “FRAUDULENT AND VOLUNTARY CONVEYANCES.”

Limitations of Personality to devolve with settled Realty in Tail.] Although an estate tail cannot be created in chattels real and personal property, they may be given or settled so as to devolve for a certain period, in the same manner as settled real estate. Thus, personality is sometimes limited by deed or will to devolve with and go in the same manner as an estate which is limited in strict settlement. In such cases the trusts may be *executory* or *executed*. If the trusts are executory and the personal estate is to be settled in tail in the same manner as real estate, *as far as the rules of law and equity will permit*, the court, it has been said, will limit the personal estate to the persons who, as they come into existence, will become tenants in tail of the real estate, with limitations over in the event of their dying *under the age of twenty-one years* and without inheritable issue. *Boydell v. Golightly*, 14 Sim. 327, 346; see *Lincoln v. D. New-*

castle, 12 Ves. 217. But this cannot, perhaps, be considered as a settled rule. At all events the words "as far or as long as the rules of law and equity will permit," will not alone create an executory trust of gifts or limitations of this description. See *Ld. Scarsdale v. Curzon*, 1 J. & H. 40. The judgment in this case contains a most elaborate and instructive review of all the previous decisions. In *Shelley v. Shelley*, L. R., 6 Eq. 540, personalty (consisting of family jewels only) was directed to be held as heir-looms by A., and at his decease by his eldest son (B.), and to descend to the eldest son of such eldest son and so on, as far as the rules of law or equity would permit. There was no reference to any limitation of real estate, and this was held to be unnecessary in the case of jewels settled as heir-looms. It was held, further, that a valid executory trust was created for A. for life, with remainder to B. (who was born in the lifetime of the testator) for his life, and upon the death of B. in trust for B.'s eldest son, to be a vested interest in him when he should attain twenty-one; but if he should die in B.'s lifetime or after B.'s death without having attained twenty-one, leaving an eldest son born before B.'s death, in trust for such last-mentioned eldest son, to be a vested interest when he should attain twenty-one. Subject to these limitations, it was held that the jewels vested in A. absolutely. A bequest of plate and a leasehold house to A. (an earl) "to be enjoyed with and go with the title," is not sufficient to create an executory trust or to cut down the interest to a life estate. *Cockerell v. E. Essex*, 26 Ch. D. 538. In the same case it was held that a gift to trustees of the whole contents of a house upon trust to "select and set aside a collection of the best paintings, statuary, and china, for an earl and his successors, to be held and settled as heirlooms, and to go with the title" is a clear direction to settle and create an executory trust, and a settlement was directed giving a life interest to the earl with remainder to the next heir to the earldom for his life.

If the trusts are *executed*, and there is a mere direction as to chattels personal, that they shall go as the real estate for so long a time as the rules of law and equity will permit, they will vest in the first tenant in tail who comes *in esse*, irrespective of age, and will not be divested by his dying under age or in the lifetime of the tenant for life: *Foley v. Burnell*, 1 B. C. C. 274; *Vaughan v. Burslem*, 3 B. C. C. 101; *Carr v. Ld. Errol*, 14 Ves. 478; see *Ld. Lincoln v. D. Newcastle*, 12 Ves. 217; *Rowland v. Morgan*, 2 Ph. 764; *Scarsdale v. Curzon*, 1 J. & H. 40; *Re Johnson's Trusts*, L. R., 2 Eq. 716. The decisions, *contra*, of *Gower v. Grosvenor*, Barn. Ch. C. 54; *S. C.*, cited 5 Mad. 337; *Trafford v. Trafford*, 3 Atk. 347, are overruled; and see the judgment of Ld. Ch. Sugden in *Potts v. Potts*, 9 Ir. Eq. Rep. 577, aff. 1 H. L. Ca. 671; *Doncaster v. Doncaster*, 3 K. & J. 26; *Hogg v. Jones*, 32 Bea. 45.

In *Ibbetson v. Ibbetson*, 5 M. & C. 26, a testator bequeathed chattels to trustees upon trust to permit them to be used by the person and persons who for the time being should be entitled to the

possession of his mansion-house under his marriage settlement or his will, *until* a tenant in tail of the age of twenty-one years should be in possession of his mansion-house, and then the chattels were to belong to such tenant in tail. At the testator's death his brother was entitled to the possession of the mansion-house for his life, with remainder to his eldest son in tail. On the brother's death his eldest son was of age. It was held that he was not entitled to the chattels, the limitation over of them being too remote. In *Ld. Dungannon v. Smith*, 12 Cl. & F. 546, there was a bequest of leaseholds in trust as to the rents for such person as would take by descent as heir male of the testator's grandson A. until some such person should attain twenty-one, and then in trust for him absolutely with a gift over; it was held, upon the authority of *Ibbetson v. Ibbetson*, *supra*, that the bequest to the heir male of the grandson was void for remoteness. Where a testator bequeathed a collection of books, manuscripts, and pictures to his executors to hold as heirlooms, and suffer the same to be used and enjoyed by the person who for the time being under the limitations of "a certain deed of entail bearing date the day of shall be entitled to the possession of" M. House, and at the testator's death there was no such deed of entail as described in the will in existence, and the testator was entitled to the house absolutely in fee simple, it was held that the collection belonged to the heir-at-law of the testator, as the person entitled in the possession to M. House. *Marquis of Bute v. Ryder*, 27 Ch. D. 196.

But, although the trusts may be executed, the vesting of personal estate will be postponed if it be limited upon trust for the person entitled to the freeholds for the time being, with a proviso that it shall not *vest absolutely* in any tenant in tail *by purchase* unless he shall attain twenty-one, but on his death, under that age, shall devolve with the freeholds of inheritance. *Potts v. Potts*, *sup.*; see *Tollemache v. Coventry*, 2 Cl. & F. 611; *Ld. Dungannon v. Smith*, 12 Cl. & F. 546; Sug. Prop. H. of Lords, 330 *et seq.* The effect of the words "by purchase" in such a limitation is to prevent the application of the rule against perpetuities, for if the limitation were to tenants in tail taking *by descent* as well as by purchase, there might be a series of such tenants in tail taking by descent who might die under age and the vesting might be protracted indefinitely.

But the words "by purchase" are not necessary where the proviso as to vesting indicates that the gift of the personalty is *only* to those who take the realty by purchase and not by descent. In *Christie v. Gosling*, L. R., 1 H. L. 279, the testator directed his trustees to stand possessed of his estate for the use of his nephew for life, with remainder to the first and other sons of such nephew in tail, and bequeathed his personal property on the same trusts as were directed concerning his real estate, "*or as near thereto as the rules of law and equity will permit.*" He added a proviso, that the personal estate should not vest absolutely in any tenant in tail unless such person should attain twenty-one. The nephew died leaving a son, who

became first tenant in tail by purchase of the real estates. It was held, that the bequest not being executory, the qualifying words (in italics) did not affect its construction, and (*Ld. St. Leonards, diss.*) that the gift of the personalty was not void for remoteness as a gift to such tenant in tail (generally) who should live to attain twenty-one, but was a gift to tenants in tail *by purchase* only (although those words were not in the limitation), and that the first person who bore the character of tenant in tail of the real estate by purchase who attained twenty-one took an absolute interest in the personalty.

In the later case of *Harrington v. Harrington*, L. R., 5 H. L. 87, the limitations of the personal estate were similar to those in *Christie v. Gosling*, except that the reference was to a settlement which contained the limitations of the realty, and the proviso as to vesting was, that the personalty should not vest absolutely in any person who under the settlement should become seised of the estates for an estate of inheritance unless such person should attain the age of twenty-one years, or, dying under that age, should leave issue inheritable under the limitations of the settlement. The first tenant in tail in possession under the settlement died without issue before he attained the age of twenty-one years. It was held, that this event having happened, there were no words which carried over the chattels to any other tenant for life or tenant in tail, and that the chattels passed by the residuary clause in the will. When a trust is created to secure the devolution of chattels as heirlooms, any limitations which are to take effect by way of *postponement or defeazance* of an absolute interest are subject to all the rules which govern the validity of conditions subsequent. Such limitations, therefore, must be certain, not only in expression, but also in operation, and it is essential to their validity that it should be capable of ascertainment at any given moment of time whether the limitation has or has not taken effect. *In re Viscount Exmouth*, 23 Ch. D. 158. See also *Martelli v. Holloway*, L. R., 5 H. L. 532.

Life Estate.] Strictly speaking, life estates in personalty with remainders over cannot be limited at law. But such limitations in a will, or by way of executory trust, are good. *Fearne*, C. R. 402. But there can be no limitation of personal property upon an indefinite failure of the issue of a person, for this is too remote and would infringe the rule against perpetuities (*Chandless v. Price*, 3 Ves. 99; *Kirkpatrick v. Kilpatrick*, 13 Ves. 483); but otherwise where issue means issue living at the death of such person. *Southey v. Ld. Somerville*, 13 Ves. 486; and see 1 Vict. c. 26, s. 29, and tit. "WILLS."

The tenant for life of chattels personal cannot dispose of or otherwise deal with them except for his own life. If, for example, they are pledged by him, the remainderman may, after his death, maintain an action for them even against a person lending money upon them, without notice of the settlement. *Hoare v. Parker*, 2 T. R. 376; see

Hartop v. Hoare, 3 Atk. 44. A tenant for life of personal chattels is not in general obliged to give security, but, if required, must sign an inventory of them. *Leeke v. Bennett*, 1 Atk. 471; see *Bill v. Kinaston*, 2 Atk. 82; *E. Macclesfield v. Davis*, 3 V. & B. 16; *Conduitt v. Soane*, 1 Coll. 285; *Clive v. Carew*, 1 J. & H. 199.

Other matters connected with personal estate will be hereafter considered under different titles of this work.

EXECUTORS AND ADMINISTRATORS.

- CH. 1.—NATURE OF OFFICE GENERALLY, AND WHO MAY BE, p. 248.
 CH. 2.—OF THE ESTATE OF AN EXECUTOR OR ADMINISTRATOR, p. 254.
 CH. 3.—PAYMENT OF DEBTS AND PERFORMANCE OF COVENANTS, p. 257.
 CH. 4.—OF A DEVASTAVIT, p. 267.
 CH. 5.—ADMINISTRATION OF, AND DEALING WITH, THE ASSETS, p. 274.
 CH. 6.—OF THE EXECUTOR'S RIGHT TO THE UNDISPOSED-OF RESIDUE,
 p. 280.
 CH. 7.—DISTRIBUTION OF THE PERSONAL ESTATE OF INTESTATES,
 p. 282.

CHAPTER I.

NATURE OF OFFICE GENERALLY, AND WHO MAY BE.

<i>Nature of Office</i>	248	<i>Renunciation</i>	252
<i>Executor—Administrator</i>	249	<i>Executor acting</i>	252
<i>Limited Executorship</i>	249	<i>What may be done before Probate or</i>	
<i>Executor de son tort</i>	249	<i>Administration</i>	252
<i>Executor according to tenor</i> ...	249	<i>Acting without Probate or</i>	
<i>Administrator de son tort</i>	250	<i>Letters of Administration</i> ...	252
<i>Where Appointment void for</i>		<i>Acts of Executor valid</i>	252
<i>uncertainty</i>	250	<i>Will of Realty only</i>	253
<i>Who may be</i>	250	<i>Authority of Administrator is</i>	
<i>Generally</i>	250	<i>from Grant—of Executor is</i>	
<i>Infant</i>	250	<i>from Will</i>	253
<i>Married Woman</i>	250, 251	<i>Effect of Probate generally</i>	253
<i>Husband's assent</i>	251	<i>Liability for acting without</i>	
<i>Felons</i>	251	<i>Probate or Letters of Admin-</i>	
<i>Bankrupts</i>	251	<i>istration</i>	253
<i>Lunatics</i>	251	<i>Probate is conclusive as to</i>	
<i>Devolution of Office</i>	251	<i>Validity of Will</i>	253
<i>Executor of Executor</i>	251	<i>Equity has Jurisdiction as to</i>	
<i>Administrator of Executor</i>	252	<i>Construction</i>	254
<i>Administration de bonis non</i> ...	252	<i>Revocation of Probate</i>	254

Nature of Office.] An executor is a person to whom the execution of a last will and testament of personal estate is confided by the

testator's appointment. 2 Blac. Com. 503 ; see *Farrington v. Knightly*, 1 P. W. 548.

An administrator is a person to whom the Court of Probate (since the 20 & 21 Vict. c. 77, s. 3) has given authority to administer the personal estate of a deceased person dying intestate, and, in certain cases, of persons dying testate. Before this statute, the power of granting administration to the personal estate of a deceased person was vested in the ordinary. 31 Edw. 3, st. 1, c. 11. Although administration is usually granted in respect of the personal estate of intestates, it will also be granted to the effects of a person who dies testate, but without having appointed an executor, or having appointed one, he predeceases the testator, or, if he survives, renounces, or is, or becomes, incapable of acting, or dies intestate before he has wholly administered the estate. In these cases, the grant of the administration is with the will annexed. See Wms. Exors., 8th Ed., 468. After the grant, the office and power of an executor and administrator are for the most part the same. Touchst. 474 ; see *Blackborough v. Davis*, 1 P. W. 43. One person may be appointed executor for part of the property or for a limited time, and another person for another part or for another period. See Wms. Exors. 8th Ed., 387. As to administration during the residence of executors or administrators out of the jurisdiction, see 38 Geo. 3, c. 87, s. 1 ; 20 & 21 Vict. c. 77, s. 74 ; 21 & 22 Vict. c. 95, s. 18.

An executor *de son tort* is one who takes upon himself the office without being appointed by the deceased, or substituted by the Ecclesiastical Court. See Wms. Exors. 261, n. (a) ; and see 43 Eliz. c. 8 ; 4 & 5 Will. & M. c. 24, s. 12. Very slight acts of intermeddling with the property of the deceased will suffice to constitute a person executor *de son tort*. *Edwards v. Harben*, 2 T. R. 587 ; see *Padget v. Priest*, *ib.* 97 ; *Beavan v. Ld. Hastings*, 2 K. & J. 724. When it is established that he has acted in this capacity, he is liable to be sued by creditors or legatees of the deceased. Bac. Ab. Exors. (B. 3), 3 ; *Meyrick v. Anderson*, 14 Q. B. 719. But he is only liable to the extent of what has come to his hands. *Yardley v. Arnold*, 10 M. & W. 141.

An executor, according to the tenor, is where an executor is not expressly nominated as such, but the charge and office are impliedly committed to him. Where a testatrix executed a will, which contained a clause to the effect, "I appoint my sister, A. B., my executrix, only requesting that my nephews, C. D. and E. F., will kindly act for and with her." It was held that C. D. and E. F. were executors according to the tenor of the will. *In the goods of Brown*, 2 P. D. 110 ; see *In the goods of Stewart*, L. R., 3 P. & M. 244. To constitute one an executor according to the tenor it must appear, on a reasonable construction thereof, that the testator intended that he should collect his assets, pay his debts and funeral expenses, and discharge the legacies contained in the will. *Goods of Adamson*, L. R., 3 P. & M. 253.

An executor *de son tort* is subject to all the liabilities, but entitled to none of the privileges, of an ordinary executor. *Carmichael v. Car-*

michael, 2 Ph. 101. But if he act *bonâ fide* as executor, doing only what an executor or administrator would be bound to do, his acts are in general valid as against the rightful executor. *Parker v. Kett*, 1 Ld. Raym. 661; *Thomson v. Harding*, 2 E. & B. 630; *Buckley v. Barber*, 6 Ex. 164; see *Hill v. Curtis*, L. R., 1 Eq. 90. Where a person possesses himself of the assets of a testator or of an intestate without having administered, an action for an account, to the extent of the specific assets he has received, will lie against him as executor *de son tort*, though there is no legal personal representative. *Rayner v. Koehler*, L. R., 14 Eq. 262; *Coote v. Whittington*, L. R., 16 Eq. 534; *Cary v. Hills*, L. R., 15 Eq. 79, is *contra*; see *Ambler v. Lindsay*, 3 Ch. D. 198. An agent of an executor *de son tort* may himself be liable as executor *de son tort*, if he receive money knowing that his principal is not the rightful executor, though he pay it over to his principal. *Sharland v. Mildon*, 5 Ha. 469; *Sykes v. Sykes*, 5 Q. B. 113; see *Paull v. Simpson*, 9 Q. B. 365. There cannot be an administrator *de son tort*. Wms. Exors., 8th Ed., 270, n. (y), citing Godolph. pt. 2, c. 8, s. 2. Where a testator, by his will, appointed one of his sisters sole executrix, and he had three sisters living at that time, but two died in his lifetime, it was held that the appointment was void from uncertainty. *In the goods of Blackwell*, 2 P. D. 72. But where a testator, by his will, appointed certain executors, and amongst others, "Percival — of Brighton, the father." The court admitted evidence of the circumstances under which the deceased made his will, and of the persons about him, in order to satisfy itself who was meant by the imperfect description of the executor contained therein. *In the goods of De Rosaz*, 2 P. D. 66. Where a testator gave all his property to A. for life, and then "the whole" . . . to his "legal heirs and theirs for ever;" the court held that both his realty and personalty were given to his co-heiresses, and therefore made the grant to one of the co-heiresses, as one of the residuary legatees. *In the goods of Dixon*, 4 P. D. 81.

Who may be.] As a general rule, any person may be an executor. An infant may be; but if there are other executors, as they can act, administration will not be granted to him until his majority. *Pigot v. Gascoin*, Brownl. 46. If he be sole executor, administration is granted to his guardian or such person as the Probate Court (Spiritual Court formerly) may think proper. 38 Geo. 3, c. 87, ss. 6, 7.

In cases of intestacy, if the person who would be entitled to a grant of letters of administration if he were of age, be an infant, that is, under seven, or minor, that is, between seven and twenty-one, a grant of a similar kind is made to his guardian by the Probate Court. Wms. Exors. 8th Ed., 488.

Where the administration is limited, the administrator represents the intestate's estate to the extent of the authority granted. *Faulkner v. Daniel*, 3 Ha. 199; *Davis v. Chanter*, 2 Ph. 545.

A married woman may be appointed executrix, but she cannot accept the office without the consent of her husband. *Thrustout v.*

Coppin, 2 W. B. 801; Wms. Exors. 8th Ed., 223. The husband cannot compel his wife to accept the office, but he may administer in her right. See *Adair v. Shaw*, 1 Sch. & Lef. 258, n. (b). Where a married woman having been appointed sole executrix of a will and universal legatee, and her husband objected to her taking probate, the court, under s. 73 of 20 & 21 Vict. c. 77, made the grant to her attorney. *Clerke v. Clerke*, 6 P. D. 103. *Quære*, whether a husband has an absolute right to object to his wife's taking probate of a will of which she is executrix. *Ib.* A married woman may be administratrix (Com. Dig. Admr. (B.) 6) with her husband's assent. *Bubbers v. Harby*, 3 Curt. 50; see *Thrustout v. Coppin*, 2 W. B. 801. And it has been held, that administration may be granted to a married woman although her husband refuses to assist in obtaining the grant and to execute the bond. *Goods of Sutherland*, 31 L. J., P. & M. 126.

Where a married woman has, with her husband's assent, become executrix or administratrix, she cannot, in general, act without his concurrence in matters which may entail liability upon him. Thus, she cannot alone execute a release (*Russel's case*, 5 Rep. 27 a), or an assignment of assets, or the like. *Derbshire v. Home*, 3 D., M. & G. 80. But it has been held, that payment of money or delivery of chattels to an executrix, as such, is good if made without knowledge of the husband's dissent, though probate had been refused to her on the ground of his objecting to it. *Pemberton v. Chapman*, E., B. & E. 1056. But, in general, for the act of the wife, as executrix or administratrix, to be binding, the husband must concur in it; but he may act alone in her right. Thus, he may grant or release a term of years (*Thrustout v. Coppin*, 2 W. B. 801), or, it would seem, any part of the personal estate of the testator (see *Re Wood*, 3 D., F. & J. 125), or release debts due to him. *Russel's Case*, 5 Rep. 27 a.

Felons are not disqualified from being executors, the office being *in autre droit*. *Smethurst v. Tomlin*, 2 S. & T. 143. As to their being administrators, consider this case and see Wms. Exors., 8th Ed., 455.

Neither are bankrupts nor persons in insolvent circumstances disqualified from being executors; but the court will in such cases sometimes appoint a receiver. *Langley v. Hawk*, 5 Mad. 46; see, however, Com. Dig. Administrators, B. 1. Nor, it would seem, are they disqualified from being administrators, though if there is another entitled in the same degree to the grant, it would probably be made to the latter. See *Bell v. Timiswood*, 2 Phillim. 22.

Lunatics and idiots, it is scarcely necessary to observe, are incapable of acting as executors or administrators. Wms. Exors. 8th Ed. 242.

Devolution of Office.] The executor of an executor who has proved, represents the first testator, and cannot prove his own testator's will, and refuse to administer the estate of the first testator. *Brooke v. Haymes*, L. R., 6 Eq. 25. This principle applies to executors of executors, however long the series, provided the chain of *executorship* is kept up; and it makes no difference that one in the series is a

married woman. *Barr v. Carter*, 2 Cox, 429. But where B., the executor of A., proves his will in India, and C., the executor of B., proves B.'s will in England, C. is not the executor of A. *Twyford v. Trail*, 7 Sim. 92. A grant to the attorney of an executor does not break the chain of representation, as a will proved by the attorney of an executor is the same thing as if actually proved by the executor. *In the goods of Donna Murgina, Deceased*, 9 P. D. 236. The administrator of an executor does not represent the testator, and where the chain of executorship is broken by an intestacy, no one can do so without taking out letters of administration *de bonis non* to his estate. See *Wms. Exors.* 258. And if B., the administrator of A., dies testate, B.'s executor does not represent A., but fresh letters of administration *de bonis non* must be taken out to A. See *Savage v. Blythe*, 2 Hagg. App. 150. The administrator *de bonis non* is entitled to all the personal estate remaining in specie and not administered by the first executor or administrator. *Wankford v. Wankford*, 1 Salk. 306. To entitle an executor to transmit his executorship, he must have proved the will; otherwise administration *cum testamento annexo* must be granted. *Ib.*

Renunciation.] An executor who renounces (20 & 21 Vict. c. 77, s. 79), or dies without having taken probate, or does not appear when cited (21 & 22 Vict. c. 95, s. 16), is to be considered as not having been appointed executor. But an executor who neither proves nor renounces is entitled, after the death of a co-executor, to accept the office (*Cummins v. Cummins*, 3 Jo. & L. 64), unless under the above-mentioned act he has been cited and has failed to appear.

An executor who has not proved is not liable merely because he assists, or acts as agent for, the acting executor in getting in the assets (*Orr v. Newton*, 2 Cox, 274; *Dove v. Everard*, 1 R. & My. 231; *Stacey v. Elph*, 1 M. & K. 195), but he must not act as executor, *e.g.*, by personally getting in the assets, though he afterwards renounces (*Rogers v. Frank*, 1 Y. & J. 409; *Cummins v. Cummins*, 3 Jo. & L. 64), and if he proves (*Re Veiga*, 3 S. & T. 13), or acts (*Doyle v. Blake*, 2 Sch. & L. 237), he cannot afterwards renounce and act in a character different from that of executor. *Graham v. Keble*, 2 Dow, H. L. C. 17; see *Balchen v. Scott*, 2 Ves. jun. 678; *Underwood v. Stevens*, 1 Mer. 712.

What may be done before Probate or Administration.] The estate of an executor flows from the will, and an executor may, before probate, act as effectually in almost everything as if probate had been granted; and when granted it has relation back to the death of the testator. *Rogers v. James*, 7 Taun. 147. If the executor die before it is granted this will not affect or avoid what he has done if the will be afterwards proved. *Brazier v. Hudson*, 8 Sim. 67. In matters relating to title, however, for instance, an assignment of property by him, it is necessary to show subsequent letters of administration with the will annexed. See *Johnson v. Warwick*, 17 C. B. 516. On a

sale before probate, also, a purchaser is not bound to pay his purchase-money until the probate has been obtained. *Newton v. Metrop. Ry. Co.*, 1 Dr. & S. 588. Where the will relates *solely* to real estate it has been held that it ought not to be proved in the Probate Court (*Habergham v. Vincent*, 2 Ves. jun. 230; *In the goods of Drummond*, 2 S. & T. 8), though it contains the appointment of an executor to whom real estate is given with directions to convert it. *Goods of Burden*, L. R., 1 P. & M. 325. But in the later case of *Goods of Elizabeth Jordan*, *ib.* 555, it was held that a will of realty only, containing the appointment of an executor, was entitled to probate. Consider *Weddall v. Nixon*, 17 Bea. 160, and the observations there.

The authority of the administrator is derived from the *grant* of the letters of administration, and in this respect is not, like that of an executor, which is derived, not from the probate, but from the will itself. See *Perry v. Jenkins*, 1 M. & C. 118. It follows from this distinction that, as a general rule, acts done by a person as administrator *before* the grant of letters of administration, are not binding, for instance, a release. *Middleton's Case*, 5 Co. 28 b. For the exceptions to this rule and the cases at law in which the right of an administrator has been held to have relation back from the grant of administration to the intestate's death, see Wms. Exors., 8th Ed., 638, *et seq.* For the purposes of the 3 & 4 Will. 4, c. 27, also (tit. "STATUTE OF LIMITATIONS," *post*), an administrator shall be deemed to claim as if there had been no interval between the death and grant of letters of administration (s. 6).

Effect of Probate or Letters of Administration generally.] By the 28 & 29 Vict. c. 104, any person who takes possession of and in any manner administers any part of the personal estate of any person deceased without obtaining probate of his will or letters of administration of his estate within six months after his decease or within two months after the termination of any suit or dispute respecting the will or the right to letters of administration, if there is any such suit or dispute that is not ended within four months after the death, is liable to proceedings, at the instance of the Commissioners of Inland Revenue, for an account of the estate of the deceased and of its value, and to pay such duty as would have been payable if probate or administration had been obtained (s. 57). A grant of letters of administration obtained by suppressing a will containing no appointment of executors is not void *ab initio*, and accordingly a sale of leaseholds by an administratrix who had obtained a grant of administration under such circumstances to a purchaser who was ignorant of the suppression of the will, was upheld by the Court, although the grant was revoked after the sale (*Boxall v. Boxall*, 27 Ch. D. 220), but otherwise it has been held where the will appoints executors. *Abram v. Cunningham*, 2 Lev. 182.

As a very general rule, the probate is conclusive at law (*Noell v. Wells*, 1 Lev. 235) and in equity (*Jones v. Jones*, 3 Mer. 161) as to the appointment of executor, and the contents of the will and its

validity as a will of *personal* estate. See *Barrs v. Jackson*, 1 Ph. 582. Even where a will, or bequest in it, has been obtained by *fraud* on the testator it cannot be set aside in a *court of equity* (*Allen v. Macpherson*, 1 H. L. C. 191), and in general all matters connected with the probate of a will, as, for instance, granting or recalling it must be dealt with by the Probate Court. *Meluish v. Milton*, 3 Ch. D. 27; *Pinney v. Hunt*, 6 Ch. D. 98; *Bradford v. Young*, 26 Ch. D. 656. A Court of Equity, however, has jurisdiction in all cases of *construction*. *Walsh v. Gladstone*, 1 Ph. 294. All payments *bond fide* made to any executor or administrator before probate or administration is revoked, are valid. 20 & 21 Vict. c. 77, ss. 77, 78.

Although the law of a testator's domicile governs the foreign personal assets of his estate for the purpose of succession and enjoyment, yet those assets are, for the purpose of legal representation, of collection and of administration, as distinguished from distribution among the successors, governed by the law of their own locality and not by that of the testator's domicile. *Blackwood v. The Queen*, 8 App. C. 82. Where an intestate's whole estate does not exceed 100*l.* his widow or children, if residing more than three miles from the registry of the Probate Court having jurisdiction, may apply to the registrar of the County Court of the district where the intestate had his fixed place of abode at the time of his death for the purpose of obtaining a grant of letters of administration. 36 & 37 Vict. c. 52. This act is extended to the children of poor intestate widows by the 38 & 39 Vict. c. 27.

CHAPTER II.

OF THE ESTATE OF AN EXECUTOR OR ADMINISTRATOR.

<i>Property vesting in Executor or Administrator</i>	254	<i>Several Executors or Administrators</i>	256
<i>Whole general Personal Estate</i>	254	<i>In Law as one Person</i>	256
<i>Exceptions</i>	255	<i>What each or any may do</i>	256
<i>Fish—Deer</i>	255	<i>Release by one</i>	256
<i>Trees—Heir-looms</i>	255	<i>Receipts of one</i>	256
<i>Pictures—Emblements</i>	256	<i>Joining in Receipts</i>	256
		<i>Office survives</i>	257

Property vesting in Executor or Administrator.] The general personal estate of a testator or intestate (including chattels real) vests in his executor or administrator. Co. Lit. 388 a. All leases and terms of years, however short or long, being for some definite time, as distinguished from estates of inheritance, vest in the executor; and if a lessee for years grant out of his interest an estate *for life*, it is nevertheless not a freehold but a chattel interest. *Butt's Case*, 7 Rep. 23 a; *Saffery v. Elgood*, 1 A. & E. 191. With respect to terms which are

attendant upon the inheritance, they did not, as a rule, even before the Satisfied Terms Act, (8 & 9 Vict. c. 112, *ante*, p. 240), vest in the executor, and were not in general assets for the payment of debts. See *Tiffin v. Tiffin*, 1 Ver. 1; *Dowse v. Percival*, *ib.* 104. This, however, is now of no importance, as the estates on which they are attendant are, under the 3 & 4 Will. 4, c. 104 (*ante*, tit. "ASSETS"), in all cases liable for this purpose.

There are a few exceptions to the rule that the whole personal estate vests in the executor. Thus fish in a pond and deer in a park (Co. Litt. 8 a) pass with the *freehold*, unless, in the case of deer, they are reclaimed. *Ford v. Tynte*, 2 J. & H. 150; *Morgan v. Abergarvenny*, 8 C. B. 768. Trees, except in certain special cases, do not pass to the executors. Wms. Exors. 8th Ed., 713. Where, at the death of a testator, the owner in fee of larch plantations, a large number of the larch trees had been more or less uprooted by extraordinary gales, it was held that trees which might continue to live but could not grow as ordinary trees, belonged to the executors, and trees that would continue to grow, but would have to be cut for the proper cultivation of the plantations, belonged to the tenant for life under the will. *Swinburn v. Ainslie*, 28 Ch. D. 89. But this was reversed, the Court of Appeal holding that if a tree was attached to the soil it was realty, if severed personalty. W. N., 1885, p. 173. Heir-looms are such personal chattels as go by *special custom* to the heir with the inheritance, and the custom determines what are heir-looms. *Ib.* 680. Lord Coke mentions "the best bed, table, pot, pan, cart," &c., as things which, by custom, may descend to the heir as heir-looms. Co. Litt. 18 b. There are also certain chattels which, though not strictly heir-looms, are in the nature of heir-looms, and go with the inheritance; for instance, an ancient horn, by the tenure of which land is held (*Pusey v. Pusey*, 1 Ver. 273), and charters, court-rolls, deeds, and other evidences of title, and the chests in which they are preserved. Com. Dig. Biens, B.; see *Lord v. Wardle*, 3 B. N. C. 680. The court has jurisdiction to order a sale of heir-looms apart from the land to which they are attached for the purpose of paying off mortgages, and will do so at the instance of a tenant for life where satisfied that it will be for the benefit of the parties interested that they should be sold, even where there are infant tenants in tail in remainder. *Fane v. Fane*, 2 Ch. D. 711; See the Settled Land Act, *post*. As to the limitations of heir-looms see *ante*, p. 244. With respect to fixtures, some pass to the heir, others to the executor. Of the former class are fixtures so affixed to the freehold that they cannot be removed without doing damage to the inheritance. See *Hellawell v. Eastwood*, 6 Ex. 295—312. As to what is or is not a sufficient annexation to the freehold, see *Walmesley v. Milne*, 7 C. B., N. S. 115; *Huntley v. Russell*, 13 Q. B. 572; *Martin v. Roe*, 7 E. & B. 237. As between heir and executor the rule obtains with the most rigour in favour of the inheritance and against the right to disannex therefrom. See *Elwes v. Maw*, 3 Ea. 51; *Fisher v. Dixon*, 12 Cl. & Fin. 312. For the particular things which have been held in these cases to come within the denomination of

fixtures, see Grady on Fixtures, 3rd Edit., p. 33, *et seq.* and 52 *et seq.*, and *D'Eyncourt v. Gregory*, L. R., 3 Eq. 382.

There may, in some cases, be an exception to the general rule, where the fixtures have been affixed for the mere purposes of trade, quite unconnected with the enjoyment of the land. But it is now settled that where even trade fixtures or machines have been erected and affixed to the freehold for the purpose of the beneficial enjoyment of the land, they will go to the heir and not to the executor. *Fisher v. Dixon*, 12 Cl. & F. 312; see *Mather v. Fraser*, 2 K. & J. 536; *Metrop. Counties Soc. v. Brown*, 26 Bea. 454.

The executor is sometimes entitled to *emblemments*, which comprise corn and other products of the soil that are not of spontaneous growth, but are the result of labour and industry applied to the soil. Thus corn and grain of all kinds, hops, hemp, flax, potatoes and, it would seem, roots of all kinds, come under the denomination of emblemments (2 Blac. Com. 123), but not fruit growing on trees. Wms. Exors. 8th Ed. 713. The executor of a tenant in fee is entitled to emblemments as against his heir (*Lawton v. Lawton*, 3 Atk. 16), but not as against his devisee (*Cooper v. Woolfitt*, 2 H. & N. 122), and the executor of a tenant in tail or tenant for life is entitled to emblemments as against the remainderman. Com. Dig. Biens, G. 2; Co. Litt. 55 b; see *Graves v. Weld*, 5 B. & Ad. 105.

Several Executors.] Several executors or administrators are in law as one person, and the acts of any are, in general, to be deemed the acts of all. *Jacomb v. Harwood*, 2 Ves. sen. 267; *Ex parte Rigby*, 19 Ves. 462. Therefore one executor or administrator may settle accounts (*Smith v. Everett*, 27 Bea. 446), release, receive or pay a debt (*Jacomb v. Harwood*, 2 Ves. sen. 267, *supra*; see *Charlton v. E. Durham*, L. R., 4 Ch. 433). As to receipts by trustees, see *post*, tit. "Trusts," ch. 5. So one executor may assent to a legacy (Wms. Exors. 8th Ed., 952), and grant or assign a term or other property. *Simpson v. Gutteridge*, 1 Mad. 609, 616.

The receipt of one executor is a sufficient discharge for money due to the testator, notwithstanding the debtor may intend to have the receipt of all; and a forgery of the name of one executor will not affect the validity of a receipt duly signed by another. *Charlton v. E. Durham*, L. R., 4 Ch. 433.

With regard to the receipts of executors, it was held formerly, that merely *joining in receipts* was sufficient to make the executor so joining responsible for the money expressed to be received. See *Aplyn v. Brewer*, Pr. Ch. 173, and numerous other early cases. For it was considered that as there was no necessity for his joining, as there was in the case of trustees, his doing so should be construed as assuming power over, and consequently responsibility in respect of, the fund. *Chambers v. Minchin*, 7 Ves. 198; *Brice v. Stokes*, 11 Ves. 324. But the doctrine of the court in this respect has undergone a change, and now the mere joining in the receipt is not *per se* considered as acting; but the question is whether, *irrespective of that*, he can be considered

as acting. *Ib.*; *Walker v. Symonds*, 3 Sw. 64; see *Martindale v. Picquot*, 3 K. & J. 317. As to the liability of one executor for the devastavit of another executor, see *post*, Chap. IV.

On the death of one executor (*Flanders v. Clark*, 3 Atk. 509) or administrator (*Hudson v. Hudson*, Ca. t. Tal. 127), the office devolves upon the surviving executors or administrators, if any; and as they are joint tenants, the property likewise vests wholly in the survivors. Where the last executor or administrator dies, leaving the estate wholly or in part unadministered, the representation must be carried on as mentioned *ante*, p. 252.

CHAPTER III.

PAYMENT OF DEBTS AND PERFORMANCE OF COVENANTS.

<i>In general</i>	257	<i>Appointing Creditor Executor—</i>	
<i>Debts paid before Legacies</i>	257	<i>Retainer</i>	263
<i>Creditors not bound to wait</i> ...	257	<i>Legal—Equitable Assets</i>	263
<i>Promise by Executor</i>	258	<i>Debt void under the Statute of</i>	
<i>Power to compound, &c.</i> ...	258, 259	<i>Frauds</i>	263
<i>Payments, &c., under Power of</i>		<i>Mortgagee Executor cannot</i>	
<i>Attorney</i>	259	<i>tack</i>	263
<i>Notice to Creditors</i>	260	<i>Executor of Executor</i>	264
<i>Cesser of Liabilities</i>	260	<i>Executor de son Tort</i>	264
<i>Covenants of Testator</i>	260	<i>Executor of Debtor and Credi-</i>	
<i>Assignment of Lease</i>	260	<i>tor</i>	264
<i>Executor de son Tort</i>	261	<i>Appointing Debtor Executor</i>	265
<i>Statute of Limitations</i>	260, 261	<i>Release at Law not in Equity</i> .	265
<i>Preferential Payment of Debts</i>	261	<i>Legacy to Executor subject to</i>	
<i>Effect of 32 & 33 Vict. c. 46</i> ...	261	<i>Right of Set-off</i>	265
<i>Preference where Debts of equal</i>		<i>Admission of Assets</i>	265
<i>Degree</i>	262	<i>By Pleading</i>	265
<i>Debts of different Degree</i>	262	<i>Payment of Probate Duty</i>	265
<i>Executor—Surety</i>	262	<i>Admission of Legacy Due</i>	265
<i>Set-off</i>	262	<i>Payment of Interest</i>	265
<i>Mutual Debts</i>	262	<i>Following Assets</i>	266
<i>Debt barred by Statute of</i>		<i>Where devastavit</i>	266
<i>Limitations</i>	262	<i>Purchaser for Value</i>	266
<i>Devisees and Legatees</i>	263	<i>From Executor—Legatee</i>	266
		<i>Assets settled on Marriage</i>	266

In General.] One of the most important duties of an executor or administrator is to pay the debts of the deceased testator or intestate. As to the order of liability of assets, see *ante*, pp. 36, 37. Executors will be personally liable if they allow legatees to receive their legacies before the debts are paid and liabilities provided for (*Spode v. Smith*, 3 Russ. 511), even where the debts or liabilities are contingent, as on a covenant of the testator which may never be broken, or on shares in a company which is a going concern at the testator's death (*Knatchbull*

v. *Fearnhead*, 3 M. & C. 122; *Off. Man. Newcastle, &c. Co. v. Hymers*, 22 Bea. 367; *Taylor v. Taylor*, L. R., 10 Eq. 477), unless the executors are protected by acting under an order of the court (*Dean v. Allen*, 20 Bea. 1; *Fletcher v. Stevenson*, 3 Ha. 360; *Smith v. Smith*, 1 Dr. & S. 384), or by the 22 & 23 Vict. c. 35, *post*.

A guarantee the consideration for which is given once for all cannot be determined by the guarantor, does not cease on his death, and his executors will be liable upon it. Whether a guarantee for future advances, which the party guaranteed is not bound to make, is not determinable by the guarantor, and whether it does not cease on notice of his death, *quære*. *Lloyds v. Harper*, 16 Ch. D. 290; see *Ashby v. Day*, W. N. 1885, p. 67.

Executors may deal with the assets as they think best in the way of administration, but "they will be taken by the court as having applied in payment of debts such a portion of the fund as, together with the income of that portion for one year, was necessary for the payment of the debts." Per Wood, V.-C., *Allhusen v. Whittell*, L. R., 4 Eq. 303. This rule is not affected by the circumstance that the debts and legacies have been paid before the expiration of a year from the testator's death, and that the income from the continuance of the estate in the business carried on by the testator has greatly exceeded five per cent., so that the rule operates unfavourably to the tenant for life. *Lambert v. Lambert*, L. R., 16 Eq. 320.

Although executors cannot, as a very general rule, be called upon to pay legacies before the expiration of a year, they can be sued for the testator's debts immediately after his death. *Nicholls v. Judson*, 2 Atk. 301.

By the 4th section of the Statute of Frauds, 29 Car. 2, c. 3, no action shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate, unless the agreement, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized. A verbal promise by a person to whom letters of administration are afterwards granted may, however, in certain cases, be binding upon him as administrator. *Tomlinson v. Gill*, Amb. 330; *Gregory v. Williams*, 3 Mer. 590. There must be, as before the statute, a consideration for the promise, unless it be by deed, or it will not bind the executor or administrator personally, though it may be in writing. *Reech v. Kennegal*, 1 Ves. sen. 126. Forbearance of suit is a good consideration. *Hawes v. Smith*, 2 Lev. 122; *Bradly v. Heath*, 3 Sim. 543; *Lucas v. Williams*, 3 Giff. 150. So if the executor have assets, that will be a good consideration. *Reech v. Kennegal*, *sup.*; see *Barnard v. Pumfrett*, 5 M. & C. 71. And an executor, by agreeing to pay the debt at a future time, makes the debt his own. *Childs v. Monins*, 2 Br. & B. 460.

By the 23 & 24 Vict. c. 145, s. 30, executors had power to pay debts similar to the power presently mentioned. This section was repealed by the 44 & 45 Vict. c. 41 Conveyancing Act, 1881, by which, however, it was in effect re-enacted by s. 37, which is as follows:—

“(1.) An executor may pay or allow any debt or claim on any evidence that he thinks sufficient.

“(2.) An executor, or two or more trustees acting together, or a sole acting trustee where, by the instrument, if any, creating the trust, a sole trustee is authorised to execute the trusts and powers thereof, may, if and as he or they think fit, accept any composition, or any security, real or personal, for any debt, or for any property, real or personal, claimed, and may allow any time for payment of any debt, and may compromise, compound, abandon, submit to arbitration, or otherwise settle any debt, account, claim, or thing whatever relating to the testator's estate or to the trust, and for any of those purposes may enter into, give, execute, and do such agreements, instruments of composition or arrangement, releases, and other things as to him or them seem expedient, without being responsible for any loss occasioned by any act or thing so done by him or them in good faith.

“(3.) As regards trustees, this section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument and to the provisions therein contained.

“(4.) This section applies to executorships and trusts constituted or created either before or after the commencement (Jan. 1st, 1882) of this act.”

“Where a power or trust is given to or vested in two or more executors or trustees jointly, then, unless the contrary is expressed in the instrument, if any, creating the power or trust, the same may be exercised or performed by the survivor or survivors of them for the time being.—s. 38.—(1).”

This section applies only to executorships and trusts constituted after or created by instruments coming into operation after the commencement of this act.—(2).

Whether or not a compromise by executors of a debt due from one of themselves will be excused and upheld if beneficial to the estate is not settled. But if a compromise and the mode in which it is carried out are injurious to the estate a person affected by it in the absence of any consent or acquiescence by him is not bound by it. *De Cordova v. De Cordova*, L. R. 4 App. C. 692.

By the 22 & 23 Vict. c. 35 (13th August, 1859), trustees, executors or administrators making payments, or doing any act under or in pursuance of a power of attorney, shall not be liable in consequence, by reason that the person giving the power was then dead or had avoided it, if this was unknown to them at the time of the payment or act done by them, without prejudice to the rights of any person entitled as against the person to whom the payment shall have been made (s. 26). See *Re Jones*, 3 Drew. 679.

Executors, though without notice of a debt, were liable to pay it, even after a lapse of many years, if they had originally assets sufficient to discharge it, which they had distributed among the residuary legatees after payment of other debts. *Knatchbull v. Fearnhead*,

3 M. & C. 122; see *March v. Russell*, *ib.* 30. Even advertising for debtors was insufficient to protect the executors. *Hill v. Gomme*, 1 Bea. 540.

Now, by the 22 & 23 Vict. c. 35, where executors or administrators have given such notice as would be given by the court in an administration suit to creditors and others to send in their claims, they may distribute the assets, having regard to the claims of which they have notice, and are not to be liable in respect of claims of which they have no notice; but this is without prejudice to the rights of creditors to follow the assets into the hands of those who have received them (s. 29). The notice must be given in the *London Gazette*, and generally an advertisement has also been required in *The Times*. *Wood v. Weightman*, L. R., 13 Eq. 434. A notice to "creditors and other persons having claims or demands against or upon the estate of the intestate," to send in particulars of their claims or demands to the administrator, or that, in default thereof, he will, at the expiration of the time mentioned in the notice, proceed to administer the assets of the deceased, having regard only to the claims and demands of which he should then have had notice is a sufficient notice to a person having a claim as *next of kin*. *Newton v. Sherry*, 1 C. P. D. 246.

Where an executor or administrator, liable as such to the covenants or agreements in any lease or agreement for a lease of their testator or intestate, shall have satisfied all liabilities thereunder due and claimed up to the time of the assignment after mentioned, and have set apart sufficient to answer future claims in respect of fixed sums agreed to be laid out on the property, *and have assigned the lease or agreement to a purchaser*, he may distribute the assets, nevertheless, without prejudice to the rights of the lessor to follow the assets into the hands of those who have received them. 22 & 23 Vict. c. 35, s. 27. This section is retrospective. *Smith v. Smith*, 1 Dr. & S. 384; *Re Green*, 2 D., F. & J. 121. There is a corresponding clause where the liability is under "any conveyance on chief rent or rent-charge," or agreement for such conveyance, &c., granted or assigned to or made and entered into with the testator or intestate (s. 28). Executors acting in accordance with the provisions of the act have the same protection which they would have had formerly, if they had administered the estate under the decree of the court. *Clegg v. Rowland*, L. R., 3 Eq. 368. *Hunter v. Young*, 4 Ex. D. 256. Formerly, where the executor of a lessee sold, a portion of the testator's estate was set apart as an indemnity fund. See *Cochrane v. Robinson*, 11 Sim. 378; *Hickling v. Boyer*, 3 Mac. & G. 635; see *Reilley v. Reilley*, 34 Bea. 406. But an indemnity is no longer necessary where the executor has acted under sect. 27. *Dodson v. Sammell*, 1 Dr. & Sm. 575.

An executor is not bound to set up the Statute of Limitations to a claim, and though the debt may be barred, he may nevertheless pay it. *Norton v. Frecker*, 1 Atk. 526; *Stahlschmidt v. Lett*, 1 Sm. & G. 415; *Hill v. Walker*, 4 K. & J. 166. But in an administration suit by a residuary legatee, after decree the statute may be set up

against a creditor, although the executor does not interfere. *Shewen v. Vanderhorst*, 2 R. & My. 75; see *Moodie v. Bannister*, 4 Drew. 432; *Briggs v. Wilson*, 5 D., M. & G. 12; *Hunter v. Baxter*, 3 Giff. 214. And after a decree an executor cannot acknowledge a debt so as to take it out of the statute. *Phillips v. Beal*, 32 Bea. 26. But in such a case the court is not bound to disallow claims against the estate barred by the statute, if the personal representative and parties to the suit or under the decree do not set it up. *Alston v. Trollope*, L. R., 2 Eq. 205.

The rule that a claim upon the estate of a deceased person cannot be maintained upon the unsupported testimony of the claimant applies to cases of alleged debt as well as to cases of alleged gift. *In re Finch*, 23 Ch. D. 267. It would seem that an executor *de son tort* may be sued for a debt due by the testator. *Rayner v. Kœhler*, L. R., 14 Eq. 262; *Coote v. Whittington*, L. 16 Eq. 534. See, however, *Cary v. Hills*, L. R., 15 Eq. 79. And if the creditor has allowed six years from the death of the testator to elapse without taking steps to enforce his claim, and nothing having been done to keep it alive, the rightful executor who has proved, although more than six years after the testator's death, may set up the statute. *Boatwright v. Boatwright*, L. R. 17 Eq. 71.

An executor cannot set up the Statute of Limitations as an answer to a claim founded on a breach of trust by his testator. *Brittlebank v. Goodwin*, L. R. 5 Eq. 545; see *Baker v. Martin*, 5 Sim. 380; *Obee v. Bishop*, 1 D., F. & J. 141. See the cases of *Dunne v. Doran*, 13 Ir. Eq. R. 545; *Brereton v. Hutchinson*, 3 Ir. Ch. R. 361, which are *contra*, but have not been followed.

Where executors have a power of sale over real estate, see *post*, tit. "POWERS," Ch. 5, sec. 5.

Preferential Payment of Debts.] As regards the payment of some debts in preference to others, the law would seem to be materially altered by the statute already noticed, the 32 & 33 Vict. c. 46 (*ante*, p. 31). The object of the statute appears to be, to place all debts subject to the act upon an equal footing so far as regards the applicability of the assets of an intestate to the discharge of them, and of a testator also who has made no special provision for their payment. See *Wilson v. Corwell*, 23 Ch. D. 764, and as to this case, *Norton v. Compton*, W. N. 1885, p. 123. The act does not apply to debts of record, and it will be convenient shortly to state what the rules as to the payment of debts of equal and different degree were previously.

An executor was always justified in paying a debt of a lower degree (see *ante*, p. 38), though a debt of a superior degree, of which he had no notice, might be unpaid (*Hawkins v. Day*, Amb. 162), if a reasonable time had elapsed since the testator's death. (Wms. Exors., 8th ed. 1033 n. But not if he had notice, for that was a *devastavit* (*post*, Ch. V.). Executors are presumed to have notice of judgment debts and decrees in equity for payment of debts, but not of other debts. See *Herbert's Case*, 3 P. W. 117.

An executor may pay one creditor in preference to another of

equal degree. See *Lyttleton v. Cross*, 3 B. & C. 322; *E. Vane v. Rigden*, L. R., 5 Ch. 669, *per James*, L.J.; consider the observations *ante*, p. 261. But if one of such creditors sued the executor and obtained judgment or a decree, it gave priority (*Ashley v. Pocock*, 3 Atk. 208; see *Morrice v. Bk. England Case*, Ca. t. Tal. 217; *Perry v. Phelps*, 10 Ves. 34; *Dollond v. Johnson*, 2 Sm. & G. 301; *Parker v. Ringham*, 33 Bea. 535), and if two or more actions or suits were commenced by creditors of equal degree, the executor might give priority to one by confessing judgment to him. *Parker v. Dee*, 3 Sw. 531, n.; *Lyttleton v. Cross*, *supra*. The mere commencement of an action formerly by one creditor against the executor, who had notice of it, put it out of the power of the latter to prefer another by voluntary payment. *Abbis v. Winter*, 3 Sw. 578, n. But not the mere commencement of a suit in equity. *Darston v. Ld. Orford*, Pr. Ch. 188; *Robinson v. Tonge*, 3 P. W. 401; *Maltby v. Russell*, 2 S. & S. 227; see *Abbis v. Winter*, *supra*. And this is now the rule. *In re Radcliffe*, 7 Ch. D. 733.

If the executor be a surety for his testator in a joint and several obligation, he may at once discharge the debt out of his testator's assets. *Rogers v. Danvers*, Fr. K. B. 128. See *Boyd v. Brooks*, 34 Bea. 7, *post*, p. 264.

Set-off.] By the 2 Geo. 2, c. 22, where there are mutual debts between the plaintiff and defendant, or if either party sues or is sued as executor or administrator and there are mutual debts between the testator and intestate and either party, one debt may be set off against the other (s. 13). This act was repealed by the 46 & 47 Vict. c. 49, s. 4. But this repeal does not affect "any jurisdiction or principle or rule of law or equity established by any enactment repealed" (s. 5 (b)). The principle of set-off is still therefore, it is apprehended, in force. The right does not exist where one debt has been contracted by the testator and the other with his executor or administrator; thus, if a creditor of an intestate purchases part of his property from the administrator, who sues for the price, the debt due from the intestate cannot be set off. *Lambarde v. Older*, 17 Bea. 542; *Wrouth v. Doves*, 25 Bea. 369. But a debt due to the administrator of an intestate in his own right from one of the next of kin may be set off in a suit by the next of kin for administration of the estate against a sum due from the administrator in respect of the next of kin's share of the intestate's estate. *Taylor v. Taylor*, L. R., 20 Eq. 155.

Executors may set off a debt barred by the statute owing to the testator against a debt not so barred owing by him (see *Gee v. Liddle*, 35 Bea. 629), or a legacy given by him. *Courtenay v. Williams*, 3 Ha. 539, affirmed 15 L. J., Ch. 204; *Coates v. Coates*, 33 Bea. 249. So an administrator is entitled to set off against the share of one of the next of kin in the intestate's estate, the whole of a debt of which part had become barred by the Statute of Limitations. *White v. Cordwell*, L. R., 20 Eq. 644. Where a married woman, whose husband was indebted to a testator, having become entitled under his will to a legacy in reversion not limited to her separate use, joined with her

husband in assigning it to A. for value, by deed duly executed and acknowledged by her under 20 & 21 Vict. c. 57, and on the reversion falling in, the executors claimed to be entitled to retain the amount of the debt out of the legacy, it was held that there was no right of retainer, and that A. must be paid in full. *Sloper v. Oliver*, L. R., 16 Eq. 481.

With reference to an equitable right of set-off, as regards legatees and devisees, it may be observed that a debt due from a person to whom the testator devises an estate is no charge upon the estate. *Ex parte Barff*, De G. 613. An estate devised to the executor or trustee, if legal, cannot be taken and applied in replacing losses occasioned by a breach of trust. *Egbert v. Butler*, 21 Bea. 560; *Fox v. Buckley*, 3 Ch. D. 508. If a debtor to the testator's estate, being also a legatee under it, becomes bankrupt, the executor, by proving in bankruptcy, loses any right of retainer he may have, and the assignees will be entitled to the legacy. *Stammers v. Elliott*, L. R., 3 Ch. 195. The right by an executor to deduct out of a legacy or share of residue a debt due to his testator is not in strictness a right of set-off, but a right to pay the estate of the deceased out of a fund in hand belonging to the debtor. The right to receive and the obligation to pay must be in the same person. If he become bankrupt, not having obtained his certificate, the right to receive his legacy or share of residue is not in him, but in the trustee in bankruptcy, and the rule will not apply. *Cherry v. Boulton*, 4 M. & C. 442; *Hodgson v. Fox*, 9 Ch. D. 673; *Beswick v. Orpen*, 16 Ch. D. 202. As to the doctrine of set-off in equity, see *Middleton v. Pollock*, L. R., 20 Eq. 29, and cases there cited, correcting the *dicta* in *Cochrane v. Green*, 9 C. B., N. S. 448.

Appointing Creditor Executor—Retainer.] An executor or administrator may retain out of *legal assets* the amount of his own debt, though the debt may be barred by the Statute of Limitations (*Stahlschmidt v. Lett*, 1 Sm. & G. 415; *Hill v. Walker*, 4 K. & J. 166), as against all other creditors of equal degree. The right of retainer by an executor has not been abolished by the 32 & 33 Vict. c. 46, *ante*, p. 31, nor has it been enlarged so as to enable the executor to retain his debt as against a creditor of higher degree than himself. Thus, the assets must be apportioned; the specialty creditor must be paid in full; the executor must then retain his debt out of the residue; and the surplus (if any) must be divided equally among the simple contract creditors. *Wilson v. Coxwell*, 23 Ch. D. 764. But this case only applies where the fund out of which he pays himself comes to his hand or is paid into court in his lifetime, except in such cases it is overruled. *Norton v. Compton*, W. N. 1885, p. 123. The principle of retainer does not extend to the Statute of Frauds. An executor or administrator would commit a *devastavit* who paid a debt to a creditor who is prevented from enforcing it by that statute. And for the same reason an executor or administrator cannot retain such debt if due to himself. *Field v. White*, 29 Ch. D. 358. An executor may retain the amount of a debt for which he was surety for the testator, and

which he has paid since the testator's death. *Boyd v. Brooks*, 34 Bea. 7, affirmed 34 L. J., Ch. 605. Or which is due to himself and others. *In re Hubback*, 29 Ch. D. 934. But he cannot retain out of equitable assets (see *ante*, p. 35) more than a proportionate part as compared with other creditors of equal degree. See *ante*, p. 38; *Hopton v. Dryden*, Pr. Ch. 181; *Hall v. Kendall*, Mose. 328; *Bain v. Sadler*, L. R., 12 Eq. 570. The cases of *Lovegrove v. Cooper*, 2 Sm. & Giff. 271, and *Hall v. Macdonald*, 14 Sim. 1, are *contra*, but were not followed in *Bain v. Sadler*, *sup.* A married woman's separate estate is equitable assets. *Thompson v. Bennett*, 6 Ch. D. 739. The right prevails in respect of debts due to him as a trustee (*Plumer v. Marchant*, 3 Burr. 1380), or to another as trustee for him. *Cockroft v. Black*, 2 P. W. 298; *Loomes v. Stotherd*, 1 S. & S. 461; see, at law, *De Tastet v. Shaw*, 1 B. & Al. 664. But not in respect of a debt proved in an administration suit and bequeathed to the executor of the testator in the cause. *Jones v. Evans*, 2 Ch. D. 420. Real estate is by the statute 3 & 4 Will. 4, c. 104, made assets for the payment of debts only in equity, and an executor has no right of retainer against it. *Walters v. Walters*, 18 Ch. D. 182.

Personal estate being the primary fund for the payment of specialty debts, the circumstance that the specialty debts of a testator, whose personal estate is insufficient to pay those debts in full, have been actually paid in the first instance partly out of the proceeds of the sale of real estate, will not give the executor a right to retain his own simple contract debt out of personal estate subsequently realized, which he would not have had if the whole personal estate had been applied in the first instance in payment of the specialty debts. *Walters v. Walters*, 18 Ch. D. 182. The right of retainer is not affected by the circumstance that the executor is himself the plaintiff, suing on behalf of himself and all the other creditors, and that he has submitted to account in the ordinary form of an administration decree. *Campbell v. Campbell*, 16 Ch. D. 198. A mortgagee who is the executor of the mortgagor cannot, under an executor's general right of retainer or preference, tack a simple contract debt, to the prejudice of a creditor of a higher degree, whether the debt is due to himself individually or to a partnership of which he happens to be a member. *Talbot v. Frere*, 9 Ch. D. 568. Payment into court with the executor's assent is in substance a payment by him, and he is entitled to a right of retainer out of the fund. *Richmond v. White*, 12 Ch. D. 361.

The privilege of retainer obtains in the case of one of several executors. *In re Hubback*, 29 Ch. D. 941. And of an executor of a sole or last surviving executor. *Hopton v. Dryden*, *supra*; *Thompson v. Grant*, 1 Russ. 540, n.; cons. *Norton v. Compton*, W. N. 1885, p. 123.

An executor *de son tort* cannot, except in very special cases (see 43 Eliz. c. 8), retain even for his own debt of a superior degree. *Vernon v. Curtis*, 2 H. Bl. 18. An executor of both creditor and debtor may retain the debt due to the former out of the assets of the latter. *Wynch v. Grant*, 18 Jur. 1010; see *Thompson v. Cooper*, 1 Coll. 85; *Fox v. Garrett*, 28 Bea. 16.

Appointing Debtor Executor.] The appointment of a debtor or one of several debtors as executor is a release of the debt at law (*Freakley v. Fox*, 9 B. & C. 130) but not in equity, and the debt is assets not merely for creditors of the testator but for legatees under the will, or, failing them, his next of kin (*Carey v. Goodinge*, 3 B. C. C. 110; *Berry v. Usher*, 11 Ves. 87; *Simmons v. Guttridge*, 13 Ves. 264), though the debt may be barred at law by the Statute of Limitations. *Ingle v. Richards*, 28 Bea. 366. But the right in equity may be rebutted, by showing a continuing intention on the part of the testator to forgive or release the debt. *Strong v. Bird*, L. R., 18 Eq. 315. And if a legacy be given to an executor debtor of the testator, it is subject to an equitable right of set-off in respect of his debt to the estate (*Skinner v. Sweet*, 3 Madd. 244; see *Stammers v. Elliott*, L. R., 3 Ch. 195), and the assignee of an executor's legacy takes subject to any claims against the executor. *Morris v. Livie*, 1 Y. C. C. 380; see *Barnett v. Sheffield*, 1 D., M. & G. 371. Where the wife with her husband's concurrence assigns her reversionary legacy to A. for value, there is no right of set-off or retainer by the executors liable to pay the legacy in respect of a debt due by the husband to the testator. *Sloper v. Oliver*, L. R., 16 Eq. 481. But where a person seised in trust for himself and another in common in fee retains the entire rents, the debts arising in favour of the co-tenant will not be charged, on the principle of *Morris v. Livie*, *supra*, on the trustee's beneficial interest as against a purchaser without notice from him. *Br. Mutual &c. Co. v. Smart*, L. R., 10 Ch. 567.

Admission of Assets.] An admission may be express, or implied from the acts of the executor. If in an action against an executor he does not plead *plene administravit* but payment only, on which plea he fails, this will be an admission of assets. *Erving v. Peters*, 3 T. R. 685. So if he allows judgment to go by default. *Re Higgins*, 2 Giff. 562. Payment of probate duty is presumptive evidence of an admission (but not an absolute admission) of assets to the extent covered by the amount of duty paid. *Lazonby v. Rawson*, 4 D., M. & G. 556; see *Hutton v. Rossiter*, 7 D., M. & G. 9; *Mann v. Lang*, 3 A. & E. 699. An admission by the executor of a legacy being due by him is an admission of assets. *Holland v. Clark*, 2 Y. C. C. 319; see *Stephens v. Venables*, 31 Bea. 124. So payment of interest on a legacy from time to time. *Att.-Gen. v. Chapman*, 3 Bea. 255; *Parry v. Huddleton*, 18 Jur. 992; comp. *Savage v. Lane*, 6 Ha. 32; *Postlethwaite v. Mounsey*, *ib.* 33, n. But payment of interest on a specific or demonstrative legacy is not an admission of general assets. *Severs v. Severs*, 1 Sm. & G. 400. As to an entry in partnership books of the amount of a legacy to the credit of the legatee, see *Hutton v. Rossiter*, 7 D., M. & G., 9; *Townend v. Townend*, 1 Giff. 201. An admission of assets to one claimant is an admission to all. *Barnard v. Pumfrett*, 5 M. & C. 63, 70. But the payment of one legacy under a will by executors, not *as such* but out of their own moneys, is not an admission of assets for the payment of other legacies. *Cadbury v. Smith*, L. R.,

9 Eq. 37. An admission is, however, open to qualification or explanation, and must be taken to have reference to the circumstances under which it was made. *Payne v. Little*, 22 Bea. 69.

Following Assets.] Where an executor applies the money of his testator in the purchase of property in his own name, the property will be liable in his hands to the same extent and for the same purposes that the money would have been, if it can be clearly shown that the money was that of the testator, but not otherwise. *Ryall v. Ryall*, 1 Atk. 59; *Lane v. Dighton*, Amb. 409; see *Lench v. Lench*, 10 Ves. 516. As regards a purchaser from the executor where the sale amounts to a devastavit, see Chapter V. As a general rule, where the personal assets of a testator have come to the hands of a purchaser for value from the executor, they cannot, though specifically bequeathed, be followed either by legatees or creditors. *Ewer v. Corbet*, 2 P. W. 148. And if a legatee under the will *bonâ fide* disposes of property bequeathed to him, to a purchaser for value without notice that the testator's debts are not satisfied, the executor having assented to the bequest, the property cannot, it would seem, be followed. See *Noble v. Brett*, 24 Bea. 499. An equitable deposit with memorandum of charge by a devisee is an alienation which *pro tanto* prevents a creditor of the testator from subsequently obtaining a charge on the estate as assets under the 3 & 4 Will. 4, c. 104. *Br. Mutual, &c., Co. v. Smart*, L. R., 10 Ch. 567, overruling *Carter v. Sanders*, 2 Drew. 248; see *Coope v. Cresswell*, L. R., 2 Ch. 122. But if there is a fund in court available for the testator's debts, although there may even be a certificate of the Chief Clerk that there are no debts, the claim of a creditor of the testator will prevail over the rights of assignees for value of the residuary legatee. *Hooper v. Smart*; *Piper v. Piper*; *Bailey v. Piper*, 1 Ch. Div. 90. Purchasers of choses in action are exposed to great risk, *per Hall, V.-C., ib.*, 98. Marriage, being a good consideration, will, in general, equally protect personal property which is *bonâ fide* settled on the marriage. In *Spackman v. Timbrell*, 8 Sim. 260, where a legatee of leaseholds, who was also one of the executors, settled them upon his marriage, his wife and children taking interests under the settlement, it was held that, as against them, the property was not liable to the testator's debts. So in *Dilkes v. Broadmead*, 2 D., F. & J. 566, assets of the testator, which passed under the residuary bequest to his daughter, were settled upon her marriage, and it was held that they ceased to be liable to subsequently-accruing claims against the testator's estate, but of which the parties to the settlement had no notice at the time it was executed. The rule was the same as regards real assets prior to the 3 & 4 Will. 4, c. 104, *ante*, p. 31. And a settlement by the heir, of such assets *bonâ fide* on marriage was valid against the creditors of his ancestor, the realty not being *specifically charged* under the acts then in force. *Richardson v. Horton*, 7 Bea. 112; *Spackman v. Timbrell*, 8 Sim. 253. How far the rule is the same since this statute would seem not to be settled by any express decision. No doubt the statute makes the real

estate itself assets in one sense. *Evans v. Brown*, 5 Bea. 114; *Hamer's Devisees' Case*, 2 D., M. & G. 366 (explained 2 Jur., N. S., Pt. 2, 313, acc. Sug. V. & P. 656, n. (g)). But in *Spackman v. Timbrell* the lands were those of a deceased debtor, which were assets for debts under the 47 Geo. 3, c. 74, just as the lands of deceased persons generally are now assets under the act of Will 4. The principle of this case, therefore, would apply to the latter act. See *Kinderley v. Jervis*, 22 Bea. 1; Sug. V. & P. 656; Wms. Exors., 8th Ed., 1698; *Hodkinson v. Quinn*, 1 J. & H. 303; *Storry v. Walsh*, 18 Bea. 559. See further as to following assets, *post*, tit. "WILLS."

CHAPTER IV.

DEVASTAVIT.

<i>In general</i>	267	<i>Negligence</i>	270
<i>What—Who liable for</i>	267	<i>Leaving Assets outstanding</i> ...	270
<i>Married Woman</i>	267-8	<i>May keep Reasonable Balance.</i>	271
<i>Liability of Co-executor</i>	268	<i>Executors may act in regular</i>	
<i>Of Executor or Administrator</i>		<i>course of Business</i>	271
<i>of Executor</i>	268	<i>In getting in Debts</i>	271
<i>Of Third Persons</i>	268	<i>Laches of Creditor</i> ..	271
<i>Is a simple Contract Debt</i>	269	<i>Accidental Loss of Assets</i>	272
 <i>Improper Sales—Payments</i>	269	 <i>Executor retaining his Testator's</i>	
<i>Sale at Undervalue</i>	269	<i>Money</i>	272
<i>Delaying Sale</i>	269, 270	<i>Balance during first Year</i>	272
<i>Too speedy Sale</i>	270	<i>Interest on Balances</i>	272
<i>Debts barred by Statute of</i>		<i>Applying to his own use</i>	272
<i>Limitations</i>	270	<i>Employing in Business</i>	272
<i>Negligence in paying Debts</i> ...	270	 <i>Improper Investments</i>	273
<i>Wrong Payments to and by</i>		<i>Retaining not Investing</i>	273
<i>Executor</i>	270	<i>Unauthorized Loans, &c.</i>	273

In general.] An executor will be personally liable for any act by which the assets of the testator are wasted, in law termed a *devastavit*, which is a mismanagement of the estate in squandering and misapplying the assets contrary to the duty of the executor. Bac. Abr., Exors. (L.) 1.

Where a wife was executrix, her husband was liable for her *devastavit* committed before the marriage; but on her death his personal liability ceased, as in the case of her ordinary debts prior to the marriage (tit. "HUSBAND AND WIFE;" *Adair v. Shaw*, 1 Sch. & L. 263); but her choses in action, coming to him as her administrator, were liable in his hands. 30 Car. 2, c. 7; 4 & 5 Will. & M. c. 34, s. 12. He was also liable during the coverture, not only for his own *devastavit*, but for her *devastavit* committed during that time (*Adair v. Shaw*, 1 Sch. & L. 243); and for such a *devastavit* he was also personally liable after her death, and not merely as her administrator, at all events

in equity. *Ib.*; *Smith v. Smith*, 21 Bea. 385; see *Clough v. Bond*, 3 M. & C. 490. And a married woman executrix, proving the will and surviving her husband, was liable for *his* devastavit committed during their joint lives. *Soady v. Turnbull*, L. R., 1 Ch. 494; overruling *Beynon v. Gollins*, 2 B. C. C. 323. See now, as to the respective liabilities of husband and wife under the recent Acts, *post*, tit. "HUSBAND AND WIFE."

The devastavit of one executor does not render his co-executors liable for it, if they have been merely passive and were not cognizant of it (*Langford v. Gascoyne*, 11 Ves. 333; *Williams v. Nixon*, 2 Bea. 472; *Dix v. Burford*, 19 Bea. 412), unless they have directly or indirectly contributed to it, as by unnecessarily permitting their co-executor to have possession of the assets (*Shipbrook v. Hinchinbrook*, 11 Ves. 252; *Hewett v. Foster*, 6 Bea. 259; *Macpherson v. Macpherson*, 1 Macq. H. L. C. 243; *Candler v. Tillett*, 22 Bea. 263; *Burrows v. Walls*, 5 D., M. & G. 233; *Mendes v. Guedalla*, 2 J. & H. 259; *Lewis v. Nobbs*, 8 Ch. D. 591); and an executor who is cognizant that his co-executor is about to commit or is committing a breach of trust, and takes no steps either to prevent or to remedy it, is responsible for the consequences of it. *Booth v. Booth*, 1 Bea. 125; *Lincoln v. Wright*, 4 Bea. 427; see *Horton v. Brocklehurst*, 29 Bea. 510. Executors or trustees, who appoint one of their number to act as their agent, are liable for his defaults as agent and not as co-trustee, just as they would be liable for the acts of any other agent. *Home v. Pringle*, 8 Cl. & Fin. 264; *Toplis v. Hurrell*, 19 Bea. 423.

Where an executor is, in pursuance of the will, to have the exclusive control over a particular part of the assets, he becomes in effect sole trustee of such part, and a devastavit committed by him in respect of it will not, in general, render his co-executors liable. See *Davis v. Spurling*, 1 R. & My. 64. As to the liability of one executor for joining in receipts, see *ante*, p. 256.

By the 30 Car. 2, c. 7, it is enacted that all and every the executors and administrators of any person or persons, who, as *executor or executors in his or their own wrong*, or administrators, shall waste or convert any goods, chattels, estate or assets of any person deceased to their own use, shall be liable and chargeable in the same manner as their testator or intestate would have been if they had been living (s. 2). This act was made perpetual by the 4 & 5 Will. & M. c. 24, s. 12, by which also it was expressly made applicable to the case of executors, or administrators of executors, or administrators of right, as to which doubts had arisen. Before these enactments an executor was not answerable for a devastavit by his testator, for this was considered to be a personal tort in the latter, which died with the person. *Anon.*, or *Browne v. Collins*, 1 Vent. 293; see *Wheatley v. Lane*, 1 Saun. 219, c; and consider the observations in *Thorne v. Kerr*, 2 K. & J. 75.

To make a *third person* liable for a devastavit by an executor, there must, as a general rule, be a misapplication of the trust property with the assistance of such third person, who must also be cognizant

that a misapplication was intended. A personal benefit derived by him from the transaction would be strong evidence to show that he was cognizant of the breach of trust. *Gray v. Johnston*, L. R., 3 H. L. 1. In this case it was held that a banker cannot refuse to honour the cheques of an executor or administrator in favour of such executor and another with whom he is in partnership, although these partners are also customers of the bank with an overdrawn account, and although by the cheque being placed to their credit, the banker is incidentally and indirectly benefited. See *Collinson v. Lister*, 7 D., M. & G. 634; *Walker v. Taylor*, 8 Jur., N. S. 681. Purchasers from residuary legatees take, subject to making good a breach of trust by the vendor or trustee, although the breach of trust was subsequent to the purchase. *Hooper v. Smart*, 1 Ch. D. 90, 98.

The devastavit of an executor creates a simple contract debt only against him, which is barred at the end of six years. *Thorne v. Kerr*, 2 K. & J. 54, 63. But the executor who commits a devastavit would seem only to be protected after the lapse of six years where the action is founded on the devastavit (consider the judgment in *Thorne v. Kerr*, *sup.*) The lapse of six years would not, it is considered, be an answer if the action is founded on a specialty, the statutory limitation as to which is twenty years, so that if the action be brought within *that* period, the executor who committed the devastavit more than six years before action brought, would nevertheless be liable. *Re Baker*, *Re Seaman*, 20 Ch. D. 230; see *Re Gale*, 22 Ch. D., where in the judgment the non-liability of the executor is put upon the ground that a demand against him *in respect of a devastavit* was barred at the end of six years; see *ib.*, p. 825. In *Bowden v. Layland*; *Gibbs v. Layland*, 26 Ch. D. 783, a testator mortgaged leaseholds and died. His executors took possession of his estate, received the rents, paid the interest on the mortgage, and, without providing for the mortgage debt, made certain payments to the beneficiaries under the will. It was held that the executors having acknowledged the mortgage debt by payment of interest, and being bound in equity by a trust properly to deal with the assets, could not set up their own wrong by way of devastavit as a defence in order to claim the benefit of the *Statute of Limitations*. See *Fordham v. Wallis*, 10 Ha. 217. The devastavit may be of such a nature as to render the executor or trustee liable to a criminal prosecution under the 24 & 25 Vict. c. 96, s. 80. See tit. "TRUSTS."

Improper Sales—Payments.] An executor who improperly sells his testator's assets, by which a loss is entailed on the estate, will be guilty of a devastavit. As where he sells at an undervalue. *Rice v. Gordon*, 11 Bea. 263; comp. *Selby v. Bowie*, 4 Giff. 300; affirmed 9 Jur., N. S. 425.

In *Buxton v. Buxton*, 1 M. & C. 80, where an executor allowed certain bonds to remain unsold for nineteen months, though against the wishes of his co-executor, and then sold them at a loss, it was held that he was not responsible as he had acted throughout with diligence

and good faith. *Marsden v. Kent*, 5 Ch. D. 598. But some sufficient reason must be given for non-conversion within a year after the testator's death. In *Grayburn v. Clarkson*, L. R., 3 Ch. 605, executors were held liable for loss occasioned to the testator's estate by non-conversion of shares in a company within the year after his death, he having directed a conversion with all convenient speed and no explanation of the delay being given. And see *Phillips v. Phillips*, Fr. Ch. 12; *Taylor v. Tabrum*, 7 Sm. 28; *Hughes v. Empson*, 22 Bea. 181. If executors have been directed by the will to sell the real estate, and they allow one of their number to hold stores and buildings at less than a fair occupation rent, they are chargeable with what would have been a fair occupation rent. *De Cordova v. De Cordova*, 4 App. C. 692. Where executors sold stock in trade and goodwill three weeks after their testator's death, though against the wish of the party beneficially interested, and though there was evidence that a better price might have been obtained, they were held not responsible, as they acted honestly. *Selby v. Bowie*, 4 Giff. 300, affirmed 9 Jur., N. S. 425. To make an executor personally liable there must be some gross act of wilful default, some gross and striking inattention to his duty. Per Bruce, L.J., *ib.* It will be a devastavit where the executor pays a debt to which his testator's estate is not liable. *Shallcross v. Wright*, 12 Bea. 558. But if his testator was originally liable, he may pay it, though the debt is barred by the Statute of Limitations, and such payment is not a devastavit. *Norton v. Frecker*, 1 Atk. 526; and see *ante*, p. 260. Again, an executor who, having assets in his hands, has been negligent in paying debts carrying large interest, will be liable for the loss thereby occasioned to the estate. *Hall v. Hallet*, 1 Cox, 134. So an executor must bear the loss arising from payments made by him to persons not entitled, though he was misled by means of forged documents. *Eaves v. Hickson*, 30 Bea. 136. If executors improperly incur expenditure, e.g., by building, but honestly in the hope of improving their testator's property, they may in general take the property, making good the loss occasioned by the devastavit. See *Vyse v. Foster*, L. R., 7 H. L. 318; *Jones v. Foxall*, 15 Bea. 388.

It may be observed, that an executor to whom money is paid by mistake, which he applies in payment of his testator's debts, must nevertheless refund out of his own property, if there are no assets of the testator. *Pooley v. Ray*, 1 P. W. 355; *Pickering v. Stamford*, 2 Ves. jun. 583.

[*Negligence.*] An executor will also, in general, be liable unless protected by the 22 & 23 Vict. c. 35, s. 31, which applies to trustees upon express or implied trusts, if loss be occasioned by his unnecessarily leaving money in the hands of bankers, brokers or others instead of investing it. *Moyle v. Moyle*, 2 R. & My. 710; *Darke v. Martyn*, 1 Bea. 525; *Johnson v. Newton*, 11 Ha. 160; *Bacon v. Clark*, 3 M. & C. 294; *Munch v. Cockerell*, 5 M. & C. 178; *Phillipson v. Gatty*, 7 Ha. 516; *Byrne v. Norcott*, 13 Bea. 336; *Garner v. Moore*, 3 Drew. 277;

Gibbins v. Taylor, 22 Bea. 344; *Rehden v. Wesley*, 29 Bea. 213. But executors may keep a reasonable balance at their bankers, having regard to their testator's estate, and will not be liable for the banker's failure. *Swinfen v. Swinfen*, 29 Bea. 211.

An executor will be liable in consequence of his unnecessarily allowing a person to receive money who misapplies it. *Ghost v. Waller*, 9 Bea. 497; *Bostock v. Floyer*, L. R., 1 Eq. 26. See *Re Speight*, 22 Ch. D. 727. But he will be protected if he acts from necessity, and conformably to the regular course of business, in administering the property. Thus, where an auctioneer is employed to sell and he receives the deposit (*Edmonds v. Peake*, 7 Bea. 239), or money is remitted to an agent or attorney in the country to pay debts there (*Bacon v. Bacon*, 5 Ves. 334), and the money so paid or remitted is misapplied, the executor will not be responsible. In *Oriental Commercial Bank v. Savin*, L. R., 16 Eq. 203, an executor having employed in proving the will the solicitor who was employed by the testatrix in making it, also employed the same solicitor to negotiate for the compromise of a debt due from the estate. The executor and the creditor were both living in London. The solicitor wrote to the executor informing him that a compromise had been effected, and the executor, in July, sent a cheque for the amount to the solicitor, who misappropriated it; but the executor, having taken no step in the meantime, did not find out the loss until December. It was held that the money ought to be allowed to him. Where an executor or trustee employs an agent to collect money under circumstances which make such employment proper, and the money collected is lost by the agent's insolvency, the burden of proof is not on the executor to show that the loss was not attributable to his own default, but on the persons seeking to charge him to prove that it was. *Brier v. Evison*, 26 Ch. D. 238. A trustee investing trust funds is justified in employing a broker to procure securities authorized by the trust and in paying the purchase-money to the broker, if he follows the usual and regular course of business adopted by ordinary prudent men in making such investments. *Speight v. Gaunt*, 9 App. C. 1. *Semble* by the Earl of Selborne, L.C., that if the broker had represented to the trustee that the contracts were with a corporation for loans *direct to them from the trustee* he would not have been justified in paying the money to the broker, for which in such a case there would have been no moral necessity or sufficient practical reason, *ib.*

An executor will also be liable if he be negligent in getting in debts or other assets (*Louson v. Copeland*, 2 B. C. C. 156), or allowing money to remain on personal security any longer than is absolutely necessary (*Powell v. Evans*, 5 Ves. 839), though lent on bond by the testator. *Bullock v. Wheatley*, 1 Coll. 130; *Styles v. Guy*, 1 Mac. & G. 422; *Paddon v. Richardson*, 7 D., M. & G. 563.

Mere laches in abstaining from calling upon the executors to realise for the purpose of paying his debt will not deprive a creditor of his right to sue the executors for *devastavit*, unless there has been such a

course of conduct, or express authority, on his part that the executors have been thereby misled into parting with the assets, available to answer his claim. *In re Birch*, 27 Ch. D. 622. See *In re Baker*, 20 Ch. D. 230; *Jewsbury v. Mummery*, L. R., 8 C. P. 56. See tit. "TRUSTEES." "BREACH OF TRUST."

In case the assets are accidentally lost or destroyed, the executor will not, in general, be liable in equity in consequence. *Croft v. Lyndsey*, Fr. Ch. 1; *Jones v. Lewis*, 2 Ves. sen. 240; *Job v. Job*, 6 Ch. D. 562. But otherwise if he ought to have sold or converted them, and they are subsequently lost. See *Clough v. Bond*, 3 M. & C. 496; *Fry v. Fry*, 27 Bea. 146.

Executor retaining his Testator's Money.] The amount of ready money which an executor is entitled to have in hand and uninvested will depend much upon the circumstances of the case; for instance, the value and condition of his testator's property, and the claims upon it. During the first year of his executorship, in particular, he may be entitled to have larger balances uninvested, to meet claims, than after they have wholly, or, to a great extent, been paid. See *Forbes v. Ross*, 2 Cox, 115. Mere delay, *not attributable to the executor*, in taking the account, is not sufficient to charge him with interest. *Blogg v. Johnson*, L. R., 2 Ch. 225. (The first paragraph of the head-note should, it would seem, be somewhat qualified; see the judgment, p. 230.) But on a clear case being made out that the executor is keeping money idle in hand, without any necessity, he will be chargeable with interest upon it at 4l. per cent. where there is only negligence (*Ashburnham v. Thompson*, 13 Ves. 402; *Melland v. Gray*, 2 Coll. 295), or at a greater rate if there are special circumstances (*Treves v. Tounshend*, 1 B. C. C. 385; *Hosking v. Nicholls*, 1 Y. C. C. 478, 480; see *Knott v. Cottee*, 16 Bea. 80; *Att.-Gen. v. Alford*, 4 D., M. & G. 843), and sometimes with annual rests. See *Walker v. Woodward*, 1 Russ. 107; *Townend v. Townend*, 1 Giff. 201; *Walrond v. Walrond*, 29 Bea. 586.

An executor, who uses his testator's money for his own purposes, is, in general, chargeable at the option of those entitled to it, either with interest (for the whole period) at 5l. per cent., or with the profits which have been derived from such use of it. *Burden v. Burden*, cited 1 J. & W. 134; *Heathcote v. Hulme*, *ib.* 122; *Docker v. Somes*, 2 M. & K. 655; *Robinson v. Robinson*, 1 D., M. & G. 257; *Wedderburn v. Wedderburn*, 22 Bea. 100. And an executor, who places his testator's money with his own at his banker's, is chargeable with interest at 5l. per cent. *Sutton v. Sharp*, 1 Russ. 146; see *Westover v. Chapman*, 1 Coll. 177 (in which case the executor used the money in his own business); comp. *Burden v. Burden*, and the cases, *supra*. But mixing the trust money with the ordinary account of a firm of solicitors at a banker's is not such an employment of it in business as will render a member of the firm liable to compound interest, which will only be given against an accounting party when he has employed

the money in business. *Burdick v. Garrick*, L. R., 5 Ch. 233. See *Emmet v. Emmet*, 17 Ch. D. 142.

If an executor, being authorized, carries on the testator's business, and in so doing contracts debts, the fact that he has carried on the business in his own name and that the testator's assets employed in it belong ostensibly to the executor, will not entitle a judgment creditor of the executor to take in execution the testator's assets. Lapse of time and an enjoyment of the assets in a manner inconsistent with the will, coupled with the consent of the beneficiaries, may, however, raise an inference of a gift of the assets by them to the executor, and entitle his judgment creditor to take them in execution. *In re Morgan*, 18 Ch. D. 93. See *Ray v. Ray*, G. Coop. 264.

[*Improper Investments.*] An executor will commit a devastavit if he lend his testator's money on any improper security; for instance, *personal security*. *Walker v. Symonds*, 3 Sw. 63; see *Bacon v. Clark*, 3 M. & C. 294. See *Langston v. Ollivant*, Coop. 33, unless clearly authorized, and then he must not lend to a co-executor. — *v. Walker*, 5 Russ. 7; *Stickney v. Sewell*, 1 M. & C. 8.

Trustees or executors who are directed to invest their trust money in particular securities—for instance, stock—but retain the money in their own hands instead, are chargeable either with the money or amount of stock which the money would have purchased, at the option of the parties entitled (*Shepherd v. Moul*s, 4 Ha. 503); though trustees or executors who are not bound to invest in any particular securities, but have a discretion as to the investments, and fail to invest at all, will be chargeable with the amount of the trust fund and interest, but *not* with the value of any particular investment. *Robinson v. Robinson*, 1 D., M. & G. 247.

The duties of an executor with reference to investments, when he has occasion to make any, are for the most part the same as the duties of a trustee, and these will be considered hereafter in tit. "TRUSTS."

CHAPTER V.

ADMINISTRATION OF AND DEALING WITH THE ASSETS.

<i>Carrying on Business, &c.</i>	274	<i>Allowance and Payments to Executors</i>	276
<i>Direction of Testator</i>	274	<i>Not for trouble</i>	277
<i>Executor personally liable</i>	274	<i>Professional Charges</i>	277
<i>When Testator's Estate liable</i> .	274	<i>Direction authorizing Charge</i> .	277
<i>All must act</i>	274	<i>Agents</i>	277
<i>Executor may wind-up Business</i>	274, 275	<i>Repayment of Advances</i>	277
<i>Equities of Creditors</i>	275	<i>Protecting Statutes—Administration Suits—Orders</i>	277
<i>Contracts—Leases</i>	275	<i>Executors are Trustees in Equity</i>	278
<i>Power to Sell, Mortgage, and Realise Estate</i>	275	<i>Paying Money into Court</i>	278
<i>Executor may Sell or Mortgage</i>	275	<i>Opinion of Court</i>	278
<i>Must act bona fide</i>	275	<i>Clause of Indemnity</i>	278
<i>Lis pendens</i>	276	<i>Special Case</i>	279
<i>May grant Underleases</i>	276	<i>Equity favours equality of Distribution</i>	279
<i>Cannot Purchase</i>	276	<i>General Probate—Administration</i>	280
<i>Cannot Buy up Legacies</i>	276	<i>Operation of Release</i>	280

Carrying on Business.] An executor who carries on the business of his testator will be personally liable to creditors on bills or notes given by him to them (*Wightman v. Townroe*, 1 M. & S. 412; *Lucas v. Williams*, 3 Giff. 150), and for all trade debts contracted after the testator's death. *Labouchere v. Tupper*, 11 Moo. P. C. 198; see *Payn v. Hornby*, 27 L. J., Ch. 689. Since, therefore, executors have no authority, merely as executors, to carry on their testator's business, there ought to be the most distinct and positive authority in the will for that purpose (*Kirkman v. Booth*, 11 Bea. 280; see *Travis v. Milne*, 9 Ha. 141); and, notwithstanding such authority and direction, they run great risk, unless they act under the protection of the Court of Chancery. See *Barker v. Barker*, 1 T. R. 295; *Labouchere v. Tupper*, 11 M. P. C. 198; *M'Neillie v. Acton*, 4 D., M. & G. 744; particularly the judgment of Turner, L.J. Such a direction by the testator, without more, does not authorize the employment of more of the testator's property than was so employed at his death. *Ib.* See *Cutbush v. Cutbush*, 1 Bea. 184. Where several trustees are authorized to carry on a business, all must do so. If some only so act they are not within the authority. *Ex parte Butcher*, 13 Ch. D. 465. The extent of the liability of the testator's estate under such circumstances depends upon the directions in his will and the amount authorized by him to be employed in the business, and it will be liable to that extent but not beyond it. *Ex parte Garland*, 10 Ves. 110; *M'Neillie v. Acton*, 4 D., M. & G. 744. *Fraser v. Murdock*, 6 App. C. 855. But these rules do not prohibit executors from carrying on the business for a reasonable time, to enable them to wind it up and

dispose of it to the best advantage (*Garrett v. Noble*, 6 Sim. 504; *Collinson v. Lister*, 20 Bea. 356), nor from completing the testator's contracts unfinished at his death, for this they are bound to do. *Marshall v. Broadhurst*, 1 Cr. & J. 405; *Dakin v. Cope*, 2 Russ. 170; see *Cooper v. Jarman*, L. R., 3 Eq. 98. The business of a testator may be carried on in pursuance of his will on his premises rent free. If they are freehold and not disposed of by the will, the heir has the right that the business shall not be carried on longer than is necessary to provide for payment of legacies, &c., although there is a direction in the will that it shall be carried on until a son attains a particular age. *In re Cameron, Nixon v. Cameron*, 26 Ch. D. 19. If an executor or trustee is directed to carry on a business, having the right to resort for his indemnity to the assets directed to be employed in carrying it on, the creditors of the trade are entitled to the same benefit, and may resort to the same fund. *Ex parte Garland*, 10 Ves. 120; *Ex parte Edmonds*, 4 D., F. & J. 488, 498; see *Strickland v. Symons*, 26 Ch. D. 245. But this rule does not apply where the executor or trustee is in default to the estate. *Re Johnson*, 15 Ch. D. 548; see *Owen v. Delamere*, L. R., 15 Eq. 134. Where the executrix of a trader, who was also his residuary legatee, continued after his death to carry on his business ostensibly as her own, and not under any authority in the will, it was held that the assets of the business in the hands of the executrix were not impressed with any trust in favour of the testator's creditors. *Re Fells, Ex parte Andrews*, 4 Ch. D. 509. Executors must perform their testator's covenant to take a renewal of a lease if there are assets, though they are not compellable to enter into covenants binding them personally unless, it would seem, where the lease is a beneficial one claimed by them. *Phillips v. Everard*, 5 Sim. 102; *Stephens v. Hotham*, 1 K. & J. 571.

Power to sell and realize Testator's Estate.] The executor may sell the personal estate of the testator though specifically bequeathed (*Ewer v. Corbet*, 2 P. W. 149), so he may mortgage it (*Scott v. Tyler*, 2 Dick. 712, 725), and give a power of sale (*Russell v. Plaice*, 18 Bea. 21), and the purchaser or mortgagee is not bound to see to the application of the purchase or mortgage money. *Macleod v. Drummond*, 17 Ves. 154. And see the cases *post*, tit. "MORTGAGE," Ch. 3. An executor is not precluded from mortgaging to a building society. *Cruikshank v. Duffin*, L. R., 13 Eq. 555. In this case the testator himself had borrowed money from a building society. And the learned judge (Malins, V.-C.) adverted to this fact in his judgment, but he does not say that such a circumstance is necessary to give validity to the mortgage by the executor. So the executor may sell part of the assets at a fixed price to clear a creditor's debt (*Hepworth v. Heslop*, 6 Ha. 561), or mortgage them to a creditor to secure his debt. *E. Vane v. Rigden*, L. R., 5 Ch. 663. But a person cannot by contract with an executor to whom he has lent money acquire a right to prove against the testator's estate and so come into competition with the creditors of the testator, but the executor has power to

give a lien on specific assets. *Farhall v. Farhall*, L. R., 7 Ch. 123. The executor must act *bonâ fide*, and there must be no collusion between him and the purchaser or mortgagee. *Rice v. Gordon*, 11 Bea. 265; see *Eland v. Eland*, 4 M. & C. 427; *Cole v. Muddle*, 10 Ha. 186; *Haynes v. Forshaw*, 11 Ha. 99; *E. Vane v. Rigden*, L. R., 5 Ch. 668; and see *ante*, pp. 268, 269. And there must be no negligence on the part of the mortgagee, in making proper inquiries which, if made, would have led to the discovery that the mortgage was an improper one. *Jones v. Stöhwasser*, 16 Ch. D. 577. As to sales under the 22 & 23 Vict. c. 35, see tit. "POWERS." The fact that there is a bill filed against the executor does not suspend his power of dealing with the assets. There must be a *decree* to have this effect. See *Neeves v. Burrage*, 14 Q. B. 504. Where an executor has power to sell, and as trustee has power to convey, the legal estate, a sale by him is valid, and although he does not in the conveyance acknowledge the receipt of the purchase money as executor, that will not affect the validity of the transaction. *West of England Bank v. Murch*, 23 Ch. D. 138.

An executor may grant underleases of his testator's property (Bac. Abr. Lease (I.) 7), except in those cases in which it would be a breach of trust to do so, as where the property is directed to be sold. *Evans v. Jackson*, 8 Sim. 217. An executor or administrator may grant an underlease, if necessary for the due administration of the property, but cannot give an option of purchase at a future time. *Oceanic Steam Navigation Company v. Sutherland*, 16 Ch. D. 236. As a general rule, an executor cannot purchase any part of the assets; and, if he do so, will be considered as a trustee for those entitled to the testator's property. *Hall v. Hallett*, 1 Cox, 134; *Smedley v. Varley*, 23 Bea. 358. And an executor cannot buy up legacies (*Barton v. Hassard*, 3 Dr. & W. 461), nor debts due from the testator's estate for less than their value (*Ex parte James*, 8 Ves. 346), for his own benefit; nor can the executor of a mortgagee for a term buy up the equity of redemption in fee in his own name and for his own benefit, but he will be held to be a trustee for the benefit of his testator's estate, being repaid what he has advanced. *Fosbrook v. Balguy*, 1 M. & K. 226.

Allowances and Payment to Executors.] An executor is entitled to be allowed for all proper expenses (*Potts v. Leighton*, 15 Ves. 277), (now expressly provided for by the 22 & 23 Vict. c. 35, s. 31, *post*), including the necessary expenses of keeping up the testator's establishment for a reasonable time. *Field v. Pecket*, 29 Bea. 576. The term "executorship expenses" in a will has the same meaning as testamentary expenses, and includes expenses incident to the proper performance of the duty of an executor, costs incurred in obtaining the advice of solicitors or counsel, costs in an action, whether instituted by the executors themselves or by a beneficiary, for the administration of the testator's personal estate; funeral expenses, expenses for the protection of specific legacies—as, for instance, for warehousing

furniture specifically bequeathed—pending the distribution of the assets and payments in discharge of debts. *Sharp v. Lush*, 10 Ch. D. 468. In the absence of express directions in the will, an executor is not entitled to any allowance for trouble or loss of time (*Robinson v. Pett*, 3 P. W. 251), or for carrying on the testator's business (*Burden v. Burden*, 1 V. & B. 170; *Stocken v. Dawson*, 6 Bea. 371), nor if he is a solicitor is he entitled to act in that capacity for his testator's estate, and to make the usual charges for so acting, but only to costs out of pocket. *New v. Jones*, 1 Mac. & G. 668, n. See tit. "TRUSTS." But to obviate the inconvenience arising from this rule, it is by no means uncommon, where a testator is desirous of retaining the services of his solicitor as executor, and at the same time of remunerating him in the capacity of solicitor, to insert a direction in the will that he shall be at liberty to charge for ordinary professional services. This, however, does not entitle him to charge for doing that which an executor ought to do without the intervention of a solicitor; for instance, for attending to pay premiums, make transfers, pay legacies, or the like. *Harbin v. Darby*, 28 Bea. 325. An agent, who is appointed executor by his principal, is not entitled to charge commission for business done after the testator's death. *Sheriff v. Ace*, 4 Russ. 33. Nor is an auctioneer who is appointed executor (*Kirkman v. Booth*, 11 Bea. 273). And if the testator was in partnership as a banker, the surviving partners, who are his executors, cannot charge commission against his estate. *Heighington v. Grant*, 5 M. & C. 258, 262. An executor, who advances money out of his own pocket to pay pressing creditors or debts of his testator carrying interest, may repay himself with interest before paying the other creditors. *Spackman v. Holbrook*, 2 Giff. 198. Where an executor from time to time out of his own moneys advances sums in excess of the balance in his hands, the court, in administration, will allow him 4l. per cent. on the balances appearing due to him at the end of each year, without including any interest in the computation of such balances. *Finch v. Pescott*, L. R., 17 Eq. 554. But executors will not be allowed interest on voluntary payments made by them for an infant entitled until 21 to the income of a fund paid into court, and after that age to the corpus. *In re King*, W. N. 1885, p. 175. Executors who have made a proper distribution, and have been ready to produce proper accounts, and an administration action is instituted by the unpaid residuary legatees, in which it is found that the accounts are substantially correct, the costs of the action must be borne by the residuary legatees who take the benefit of it; but otherwise where the executors have made serious mistakes in the distribution of the estate. *Hilliard v. Fulford*, 4 Ch. D. 389.

Protecting Statutes—Administration Suits and Orders.] Various statutes have been passed, having for their object in part the protection and safety of executors and administrators in the discharge of their duties, and in part the protection of creditors, legatees and others interested in the due administration of the property of the deceased

testator or intestate. Executors or administrators are entitled to all the equitable interests of the deceased in his personal property, and may enforce them in a court of equity. See *Com. Dig. Chancery*, 2 (3 G. 1); *Wms. Exors.* 8th ed. 1909. On the other hand, as regards such property in general, they are considered as trustees, and equity exercises the same jurisdiction with reference to their dealings with it, as it does with reference to dealings by trustees with their trust estate. See *Adair v. Shaw*, 1 Sch. & L. 262. A trustee may be appointed in place of an executor to perform the duties incident to the office of an executor. *In re Moore*, 21 Ch. D. 778. By "The Trustee Act, 1850," 13 & 14 Vict. c. 60, the words "trust and trustee" in that act "extend to and include the duties incident to the office of personal representative of a deceased person" (s. 2). The cases under this act will be more conveniently considered under tit. "Trusts." Under the 10 & 11 Vict. c. 96 (amended by 12 & 13 Vict. c. 74), executors, like trustees, may pay money into court; and if, after paying money into court, they discover that there are debts of the testator, they are entitled to have the money paid out to them for the purpose of discharging the debts. *Ex parte Tournay*, 3 De G. & S. 677.

By the 22 & 23 Vict. c. 35, any trustee, executor or administrator, may, without suit, apply by petition to any judge in chancery, or by summons upon a written statement to any such judge at chambers, for the opinion, advice or direction of such judge on any question respecting the management or administration of the trust property or the assets of any testator or intestate, such application to be served upon, or the hearing thereof to be attended by, all persons interested in such application, or such of them as the said judge shall think expedient; and the trustee, executor or administrator, acting upon the opinion, advice or direction given by the said judge, shall be deemed, so far as regards his own responsibility, to have discharged his duty as such trustee, executor or administrator, in the subject-matter of the said application; unless he has been guilty of any fraud or wilful concealment or misrepresentation in obtaining such opinion, advice or direction (s. 30). Under this section it has been held that where a married woman who was of unsound mind, but not so found by inquisition, was entitled for her separate use to the income of certain trust funds, and her written consent was also required to the investments by the trustees, the court had jurisdiction to direct that the whole income might be paid to the husband on his undertaking to apply it to the maintenance of the wife, and that her consent to investments might be dispensed with. *In re T*—, 15 Ch. D. 78. See 23 & 24 Vict. c. 38, s. 9, and *Re Muggerridge's Settlement*, 29 L. J., Ch. 288; *Re Mockett*, *ib.* 291; *Re Hooper*, 29 Bea. 656; *Re Evans*, 30 Bea. 232; *Re Barrington*, 1 J. & H. 142.

In most well-drawn settlements and wills there is, or was formerly, a clause similar in effect to that which is embodied in the following section of the same statute.

"Every deed, will or other instrument creating a trust either expressly or by implication shall, without prejudice to the clauses actually

contained therein, be deemed to contain a clause in the words or to the effect following (that is to say), 'That the trustees or trustee for the time being of the said deed, will or other instrument shall be respectively chargeable only for such moneys, stocks, funds and securities as *they shall respectively actually receive*, notwithstanding their respectively signing any receipt for the sake of conformity, and shall be answerable and accountable only for *their own acts, receipts, neglects or defaults*, and not for those of each other, nor for any banker, broker, or other person, with whom any trust moneys or securities may be deposited, nor for the insufficiency or deficiency of any stocks, funds or securities, nor for any other loss, unless the same shall happen through *their own wilful default respectively*; and also that it shall be lawful for the trustees or trustee for the time being of the said deed, will or other instrument, to *reimburse themselves or himself*, or pay or discharge out of the trust premises *all expenses* incurred in or about the execution of the trusts or powers of the said deed, will or other instrument' " (s. 31).

It will be observed that this section does not in terms apply to executors or administrators like the preceding section; it would seem, therefore, that a distinction was intended to be drawn between them, but there are many cases in which executors become trustees of property, and in such cases, at all events, the section will apply.

By the 13 & 14 Vict. c. 35, persons interested in any question cognizable in chancery, &c., might formerly have concurred in stating a special case for the opinion of the court, and executors, administrators and trustees might have concurred therein (s. 1). This act was repealed by the 46 & 47 Vict. c. 49, s. 3. By the Judicature Act, 1875, the parties may, after a writ of summons has been issued, concur in stating the questions of law arising in the form of a special case (Order 34). Courts of equity are favourable to an equal distribution of assets among creditors, and sanction the practice of friendly suits by executors, that is, in the name of a creditor against themselves, under which, as soon as a decree is obtained (*Rush v. Higgs*, 4 Ves. 638), all proceedings by separate creditors, at law or in equity, can be restrained, the object being that one creditor shall not by means of a judgment obtain priority in payment over other creditors. See, as to the general principle, *Dreury v. Thacker*, 3 Sw. 541; *Clarke v. Ormonde*, Jac. 123; *Whitaker v. Wright*, 2 Ha. 310; *Graham v. Maxwell*, 1 Mac. & G. 71. But there should be no delay in applying to the court. See *Rouse v. Jones*, 1 Ph. 464. As to restraining execution on a judgment obtained before the decree in equity, see *Lee v. Park*, 1 Ke. 714; *Burles v. Popplewell*, 10 Sim. 383; *Kirby v. Barton*, 8 Bea. 45; *Vincent v. Godson*, 3 De G. & S. 717. Decrees or orders of the court in administration suits completely indemnify an executor who acts under them. *Williams v. Headland*, 4 Giff. 505; *Dodson v. Sammell*, 1 Dr. & Sm. 575; *Bennett v. Lytton*, 2 J. & H. 155; see *England v. Ld. Tredegar*, L. R., 1 Eq. 344, in which case the court held that an insurance company paying money due on a lost policy under a decree of the court, was sufficiently indemnified by the

decree. Where the probate court has granted a general probate of the will of a testator domiciled in Scotland, the Chancery Division will make the ordinary decree for the administration of the personal estate of the testator, without limiting it to the English assets, and notwithstanding the opposition of a majority of the executors. *Stirling-Maxwell v. Cartwright*, 11 Ch. D. 522. In an administration action no costs ought to be given out of the estate, except for those proceedings that are in their origin directed with some show of reason and a proper foundation for the benefit of the estate, or which have in their result conduced to the benefit thereof. *Croggan v. Allen*, 22 Ch. D. 101. Formerly, by the 13 & 14 Vict. c. 35, the Court of Chancery could, on the application of executors or administrators, by order direct a reference to take an account of the debts and liabilities of a deceased person, and there were various provisions in relation thereto. These clauses, however, were repealed by the 46 & 47 Vict. c. 49, s. 3. In the preamble to this act the grounds of the repeal are stated to be as to some of the repealed statutes, that the subject-matter is provided for by the Supreme Court of Judicature Acts or rules made pursuant thereto.

A release to executors will not comprise interests in property of the testator not known to exist at the time of the release. *Lindo v. Lindo*, 1 Bea. 496; *Hall v. Turner*, 14 Ch. D. 829; comp. *Howkins v. Jackson*, 2 Mac. & G. 372.

CHAPTER VI.

OF THE EXECUTOR'S RIGHT TO UNDISPOSED-OF RESIDUE.

<i>When the Executor entitled formerly</i>	280	<i>Executor an Infant</i>	281
<i>11 Geo. 4 & 1 Will. 4, c. 40</i>	280	<i>To one of several</i>	281
<i>Rules before the Act</i>	280	<i>Residue given in trust</i>	281
<i>Legacy to Executor</i>	281	<i>Residuary Bequest lapsing</i>	282
		<i>Parol Evidence</i>	282

PRIOR to the 11 Geo. 4 & 1 Will. 4, c. 40, executors were at law, and *in general* in equity also, entitled beneficially to the residue not expressly disposed of or given to them in trust. See *Pratt v. Sladden*, 14 Ves. 197; *Johnstone v. Hamilton*, 11 Jur., N. S. 777. By this act the executor of any person dying after the 1st September, 1830, is to be deemed in equity a trustee for the persons who would be entitled under the Statute of Distributions in respect of any *undisposed-of residue*, unless it shall appear by the will or codicil that the executor was intended to take beneficially (s. 1).

With regard to the first section, the statute was meant to cast on the executor the burthen of proving from the testamentary instrument

a *distinct intention* that he should take the residue beneficially. *Juler v. Juler*, 29 Bea. 37. See *Love v. Gaze*, 8 Bea. 472; *Andrew v. Andrew*, 1 Coll. 686; *Juler v. Juler*, 29 Bea. 34, where it was held that an intention did not sufficiently appear that the executor was intended to take beneficially, and *Harrison v. Harrison*, 2 H. & M. 237; *Shepherd v. Nottidge*, 2 J. & H. 766, where it was held that it did. The act does not affect the executor's rights if there are no persons entitled to the residue under the Statute of Distributions (s. 2) (see *Taylor v. Haygarth*, 14 Sim. 8; *Russell v. Clowes*, 2 Coll. 648; as to the last case, see *Powell v. Merrett*, 1 Sm. & G. 381); and the question in such cases must be determined as between the executors and the crown, in the same way as if the testator had died before the act and had left next of kin, and the question had arisen between them and the executors. *Read v. Stedman*, 26 Bea. 495; *Dacre v. Patrickson*, 1 Dr. & Sm. 182. Nor does the statute apply where the residue has been expressly disposed of, *semble*. See *Saltmarsh v. Barrett*, 29 Bea. 474; 3 D., F. & J. 279.

With regard to such cases, therefore, as are not affected by the act, it is still material to consider what was the doctrine of the court on the subject before the act. As to this, the general rule was that when a legacy was given to a sole executor, a presumption arose that he could take nothing else beneficially (*Farrington v. Knightly*, 1 P. W. 544; *Cradock v. Owen*, 2 Sm. & G. 241), though otherwise when the legacy was given to his wife (*Fruer v. Bouquet*, 21 Bea. 33), or to him *for life* with remainder to another (*Grancille v. Beaufort*, 1 P. W. 114; comp. *Dicks v. Lambert*, 4 Ves. 725), or he was an infant (*Williams v. Jones*, 10 Ves. 77), or the legacy was given to him as one of several executors and nothing to the others (*Griffiths v. Hamilton*, 12 Ves. 298; see *Dawson v. Thorne*, 3 Russ. 235), or unequal legacies were given to the executors (*Russell v. Clowes*, 2 Coll. 648); though if *equal* legacies were given to all the executors, the presumption arose that they were not beneficially entitled, in the same way as when the gift was to a sole executor. *Ommanney v. Butcher*, T. & R. 260, 269; see *Taylor v. Haygarth*, 14 Sim. 8; *Saltmarsh v. Barrett*, 3 D., F. & J. 279. Where there is an appointment of A. as executor and trustee, and a bequest to him of a legacy, and ultimately after other bequests, a gift to him of the residue (subject to a specified debt), he takes the residue beneficially subject to the debt. *Williams v. Arkle*, L. R., 7 H. L. 606.

Where the residue was given to an executor in trust, or he was appointed in trust, although no trusts were declared (*Graydon v. Hicks*, 2 Atk. 18; *Pratt v. Sludden*, 14 Ves. 198; *Dawson v. Clarke*, 18 Ves. 254; see *Ellcock v. Mapp*, 3 H. L. C. 492), or failed (*Powell v. Merrett*, 1 Sm. & G. 381; comp. *Russell v. Clowes*, 2 Coll. 648), he was held to be a trustee for the next of kin. So if the bequest was void under the Mortmain Act. *Dacre v. Patrickson*, 1 Dr. & S. 182; *Johnstone v. Hamilton*, 11 Jur. N. S. 777 (cases since the act arising between the executors and crown). And though the words *in trust*, or the like, might not have been expressly used, yet if it clearly appeared

that the testator appointed the executor to act in trust, he would not have taken beneficially. See *Cranley v. Hale*, 14 Ves. 307; *Giraud v. Hanbury*, 3 Mer. 150; *Braddon v. Farrand*, 4 Russ. 87; *Barrs v. Fewkes*, 2 H. & M. 60. Nor would the executor have been entitled if the residuary bequest lapsed (*Bennet v. Batchelor*, 3 B. C. C. 28), or became void (*Att.-Gen. v. Tomkins*, Amb. 216); nor if an intention clearly appeared to dispose of the residue, though such intention was ineffectual. *Davers v. Dewes*, 3 P. W. 40; *North v. Purdon*, 2 Ves. sen. 495; *Dawson v. Clarke*, 18 Ves. 254; *Mence v. Mence*, 18 Ves. 348; see *White v. Williams*, 3 V. & B. 72.

Parol evidence was not admissible in such cases, if the will contained an express declaration that the executor was to take in trust, but otherwise where a presumption of trust only arose (*Gladding v. Yapp*, 5 Madd. 56, 59); and now the statute (*ante*, p. 280) expressly provides that it must appear by the will that the executor was intended to take beneficially. See *Love v. Gaze*, 8 Bea. 472; *Barrs v. Fewkes*, 2 H. & M. 60.

CHAPTER VII.

OF THE DISTRIBUTION OF THE PERSONAL ESTATE OF INTESTATES.

<i>Domicil</i>	282	<i>Effect of advancement—Hotchpot</i> ...	284
<i>Regulates Distribution of Per-</i>		<i>What is an advancement</i>	284
<i>sonality</i>	282	<i>What is not an advance-</i>	
		<i>ment</i>	284
<i>Statute of Distributions</i>	282	<i>Issue of deceased advanced</i>	
<i>Distribution prior to Statute</i> ...	283	<i>Children</i>	285
<i>Under the Act</i>	283	<i>Where Child need not bring</i>	
<i>Proportions—No Children</i>	283	<i>into Hotchpot</i>	285
<i>Representatives</i>	283	<i>Share of deceased Brother</i>	285
<i>When Distribution to be made</i> .	283	<i>Widow and advanced Child</i> ...	285
<i>Posthumous Child</i>	284	<i>Customs of London and York</i>	285
<i>Only Child</i>	284	<i>Are now abolished</i>	285
<i>Half Blood</i>	284	<i>Table of Persons entitled as Next of</i>	
<i>Blood Relationship necessary</i> .	284	<i>Kin</i>	286, 287
<i>Bastard has no Next of Kin</i> ...	284		

Domicil.] The distribution of the personal property, wheresoever situate, of an intestate is regulated by the law of the place of his domicile at the time of his death. *Pipon v. Pipon*, Amb. 26; *Thorne v. Watkins*, 2 Ves. sen. 35; *Bremer v. Freeman*, 10 Moo. P. C. 306; *Enoch v. Wylic*, 10 H. L. C. 1; *Eames v. Hacon*, 16 Ch. D. 407; *Doglioni v. Crispin*, L. R., 1 H. L. C. 301; *Ewing v. Orr-Ewing*, 9 App. C. 34. But if the property be situate in this country, letters of administration must be granted here. *Preston v. Melville*, 8 Cl. & F. 1; *Campbell v. Beaufof*, Johns. 326.

Statute of Distributions, 22 & 23 Car. 2, c. 10.] Prior to this

statute the administrator was entitled, after payment of the intestate's debts and funeral expenses, to the residue of his estate *beneficially*. See Wms. Exors., 8th Ed., 1489. And this is still the case where administration is granted to the husband of his deceased wife's estate, for the Statute of Distributions does not extend to such estates. 29 Car. 2, c. 3, s. 25 (Statute of Frauds). If the husband die without administering, administration *de bonis non* to the wife's estate is, as a rule, granted to the representatives of the husband who are the parties beneficially entitled. *Fidler v. Hanger*, 3 Hagg. 769. By the 3rd section of the Statute of Distributions, the residue is made distributable "amongst the wife and children or children's children, if any such be, or otherwise to the next of kindred to the deceased person in equal degree or legally representing their stocks *pro suo cuique jure* according to the laws in such cases and the rules and limitation hereafter set down."

The distribution of the residue is as follows: one-third to the wife, the residue equally amongst the children of the intestate and such persons as legally represent the children in case any be then dead, *other than* a child or children (*not being the heir at law*, taking any land by descent or otherwise from the intestate) who shall have any estate by settlement of the intestate, or shall be advanced by him in his lifetime, in which case such children (except the heir) take out of the residue only as much as will make their shares equal to those of the other children not so provided for, thus bringing their shares into hotchpot. But *the heir* shares equally with the other children notwithstanding he may take land by descent or otherwise (s. 5); but if he has had an advancement out of *personal estate* he must bring it into hotchpot. *Smith v. Smith*, 5 Ves. 721. The *younger son* taking lands as heir in Borough-English has the same privilege as an ordinary heir. *Lutwyche v. Lutwyche*, Ca. t. Tal. 277.

In the event of there being no children, or legal representatives of them, one moiety goes to the wife, the other equally between the next of kin (of the testator), if any (s. 6); if none, to the crown. *Cave v. Roberts*, 8 Sim. 214. Where the crown has possession of the property and next of kin are afterwards discovered, the crown must restore with 4 per cent. interest. *Edgar v. Reynolds*, 4 Drew. 269; *Att.-Gen. v. Köhler*, 9 H. L. C. 654; *In re Gosman*, 15 Ch. D. 67.

No representatives are admitted among collaterals after *the intestate's* brothers' and sisters' children, see *Caldicot v. Smith*, 2 Show. 286. Where there is no wife, the intestate's children take equally; where no child, the next of kin in equal degree, and their representatives as aforesaid (s. 7).

No distribution of shares is to be made until a year after the intestate's death, and if debts due by him are afterwards recovered or appear, the parties receiving the shares are to refund rateable portions of them (s. 8). A court of equity will compel the administrator to make distribution according to the statute. *Adair v. Shaw*, 1 Sch. & L. 262.

A posthumous child has the same rights as a child actually born in the intestate's lifetime. *Wallis v. Hodson*, 2 Atk. 117. For to entitle a person to take as one of the next of kin, it is sufficient if he be in *ventre sa mère* at the time of the intestate's death, the rule being that such a child is considered as *in esse*, if to be so considered is for his benefit. *Burnet v. Mann*, 1 Ves. sen. 156; *Blasson v. Blasson*, 2 D., J. & S. 665; *Pearce v. Carrington*, L. R., 8 Ch. 969. An only child takes all, there being no other child or children to share with him. *Palmer v. Garrard*, Pr. Ch. 21; *Brown v. Farndell*, Carth. 52. Those who are of the intestate's kin of the half blood, share with those of the same degree of the whole blood. *Crooke v. Watt*, 2 Ver. 124. No person can take as next of kin unless blood relationship exists between him and the intestate, therefore a mother-in-law or step-mother of an intestate, or persons similarly connected with him, cannot take. *Rutland v. Rutland*, 2 P. W. 216.

As a bastard, who dies intestate not leaving a wife or child, can have no next of kin, his personal property goes to the crown (*Taylor v. Haygarth*, 14 Sim. 8); but if he leave a widow, there being no child, she takes one half, and the crown the other. *Cave v. Roberts*, 8 Sim. 214.

Effect of Advancement.] The statute excludes advanced children (except the heir) unless they bring their shares into hotchpot. The advanced child, however, may elect to keep his portion or provision and give up his rights under the statute. *Edwards v. Freeman*, 2 P. W. 443. A provision contingent at the father's death will, if that contingency happen, be an advancement. *Ib.* 442. So a provision made for a child by settlement is an advancement; and the rule is the same whether the provision be under a voluntary settlement or one for value. *Ib.* But a provision for a child *by will*, where the parent dies intestate as to part of his personal estate, need not be brought into hotchpot. *Ib.* 440. And if the money has been advanced by the father on the occasion of the son's marriage, the entire sum must be brought into hotchpot—not merely the son's interest. *Weyland v. Weyland*, 2 Atk. 635. An annuity (*Edwards v. Freeman*, 2 P. W. 435), the value to be estimated at the time of the grant (*Ld. Kircudbright v. Ly. Kircudbright*, 8 Ves. 51), or if it has ceased, the payments received under it, must be brought into hotchpot; see *Hatfield v. Minet*, 8 Ch. D. 136. So premiums paid for articling a son to an attorney or apprenticing him, and payments in discharge of a son's debts are advancements. *Boyd v. Boyd*, L. R., 4 Eq. 305; *Blockley v. Blockley*, 29 Ch. D. 250. The opinion, *contra*, of Jessel, M.R., in *Taylor v. Taylor*, L. R., 20 Eq. 155, dissented from. See *Ashmore v. Paley*, W. N., 1885, p. 154; also *Auster v. Powell*, 1 D., J. & S. 99, on the ordinary hotchpot clause in a will. But small sums of money given from time to time are not advancements (3 P. W. 317, n. (o); see *Elliot v. Collier*, 3 Atk. 528); nor is an allowance for education or maintenance an advancement (*Edwards v. Freeman*, *sup.*); nor money laid out in the repairs of houses

belonging to a child, though a gift of the houses themselves would be. *Smith v. Smith*, 5 Ves. 721; *Taylor v. Taylor*, L. R., 20 Eq. 155. The issue of deceased children who have been advanced must bring their parents' advanced shares into hotchpot. *Proud v. Turner*, 2 P. W. 560. But a child need not bring the value of an advancement into hotchpot where he claims a share of a deceased brother's interest, accruing by his death in the parent's lifetime (*Cowper v. Scott*, 3 P. W. 124); nor where the only claimants are the widow and the advanced child. *Ward v. Lant*, Pr. Ch. 182; *Kircudbright v. Kircudbright*, 8 Ves. 64. The rule as to hotchpot does not apply in case of children claiming as next of kin of their deceased mother. *Holt v. Frederick*, 2 P. W. 356.

Where a testator directs that advancements shall be brought into hotchpot, they must be, irrespective of any subsequent qualifying letters of the testator. *Smith v. Couder*, 9 Ch. D. 170. So, if he directs that an estate shall be brought into hotchpot, a subsequent settlement of it, and then a sale, the proceeds to be held on the same trusts will not vary this direction. *Middleton v. Windross*, L. R., 16 Eq. 212. The advances are to be brought into hotchpot, with interest at 4 per cent. per annum up to the distribution of the estate; such interest to be computed from the death of the tenant for life (if any), and not from the dates of the advances or death of the testator. *Rees v. George*, 17 Ch. D. 701; see *Andrews v. George*, 3 Sim. 393; *Hilton v. Hilton*, L. R., 14 Eq. 468; *Poole v. Poole*, L. R., 7 Ch. 17; *Limpus v. Arnold*, 15 Q. B. D. 300.

Customs of London and York.] The Statute of Distributions did not affect these customs (s. 4). This section, however, is repealed by the 19 & 20 Vict. c. 94 (an act of one section only), save with respect to the distribution of the estate of persons dying on or before 31st December, 1856. The distribution of the personal estate of persons dying after that day, is now, in all cases, regulated by the Statute of Distributions, as if such customs had never existed.

Table.] A table has been added, which may be found convenient for ready reference, showing the interests the next of kin take under the statute in a variety of cases. It is in part compiled from that contained in Bridgman's Index; see also 1 Chitty's Equity Index, p. 437 (ed. 1837). The authority for each proposition has, however, been added.

It will be seen, that each proposition or statement in the first column assumes that there are none entitled in a nearer degree than those named in that column.

If intestate die leaving.	His personal representatives will take in the following proportions.
Wife and child or children	One-third to wife, rest to child or children, and if children are dead, then to their representatives. Stat. of Distrib.
Wife, no child	Half to wife, half to next of kin in equal degree to intestate. <i>Ib.</i>
Wife, no child, no next of kin ...	Half to wife, half to crown. <i>Cave v. Roberts</i> , 8 Sim. 214; see <i>Dacre v. Patrickson</i> , 1 Dr. & Sm. 182.
Child or children only, no wife .	All to child (<i>Palmer v. Garrard</i> , Pr. Ch. 21); or, if more than one, to children equally. Stat. of Distrib.
Child or children or their representatives, <i>e.g.</i> grandchildren or great grandchildren.	Children <i>per capita</i> equally, grandchildren or great grandchildren by representation <i>per stirpes</i> . Toller, 374; Wms. Exors., 8th ed., 1503. <i>Bridge v. Abbot</i> , 3 B. C. C. 226. See <i>In Re Ross's Trusts</i> , L. R., 13 Eq. 286.
If no wife or child or representatives of child.	All to next of kin in equal degree to intestate. Stat. of Distrib.
Husband	Whole to him. 29 Car. 2, c. 3, s. 25.
Father and brother or sister	Whole to father. <i>Ratcliff's Case</i> , 3 Rep. 40 a; see <i>Blackborough v. Davis</i> , 1 P. W. 51.
Mother and brother or sister of the whole or <i>half blood</i> .	Whole to them equally. 1 Jac. 2, c. 17, s. 7; <i>Jessopp v. Watson</i> , 1 M. & K. 665.
Wife, mother, brothers, sisters, nephews and nieces.	Half to wife, residue to mother, brothers, sisters, nephews and nieces equally, the nephews and nieces taking <i>per stirpes</i> . 1 Jac. 2, c. 17, s. 7; <i>Keylway v. Keylway</i> , 2 P. W. 344; see <i>Stanley v. Stanly</i> , 1 Atk. 455.
Wife, mother, nephews and nieces	Half to wife, one-fourth to mother, and remaining fourth to nephews and nieces. <i>Stanley v. Stanley</i> , 1 Atk. 455.
Mother only, no child, father, brother, sister, nephew or niece.	Whole to mother (it being then out of statute of 1 Jac. 2, c. 17). <i>Ratcliff's Case</i> , 3 Rep. 40 a; <i>Jessopp v. Watson</i> , 1 M. & K. 676.
Wife and father, brothers and sisters.	Half to wife, half to father. <i>Keylway v. Keylway</i> , 2 P. W. 344; Gilb. Eq. Cas. 190.
Brothers or sisters of whole blood, and brothers or sisters of half blood.	Equally to all. <i>Crooke v. Watt</i> , 2 Ver. 124; <i>Smith v. Tracey</i> , Freem. K. B. 294.
Posthumous brother or sister and mother.	Equally. <i>Burnet v. Mann</i> , 1 Ves. sen. 156.
Posthumous brother or sister and brother or sister born in lifetime of father.	Equally. <i>Burnet v. Mann</i> , 1 Ves. sen. 156.
Grandfather by father's and mother's side.	Equally to both. <i>Moor v. Barham</i> , cited <i>Blackborough v. Davis</i> , 1 P. W. 53.

If intestate die leaving.	His personal representatives will take in the following proportions.
Brothers or sisters and nephews and nieces.	Brothers and sisters in equal shares <i>per capita</i> , nephews and nieces <i>per stirpes</i> . <i>Lloyd v. Tench</i> , 2 Ves. sen. 215.
Grandfather or grandmother, uncle or aunt.	All to grandfather or grandmother. <i>Lloyd v. Tench</i> , 2 Ves. sen. 215.
Uncles, aunts, nephews and nieces.	Equally to all. <i>Durant v. Prestwood</i> , 1 Atk. 454.
Nephew and grandnephew	All to nephew. <i>Pett's Case</i> , 1 P. W. 25.
Nephew by brother and nephew by half sister.	Equally <i>per capita</i> . <i>Lloyd v. Tench</i> , <i>supra</i> .
Nephews and nieces	Equally <i>per capita</i> . <i>Bowers v. Littlewood</i> , 1 P. W. 595.
Brother and grandfather	Whole to brother. <i>Evelyn v. Evelyn</i> , 3 Atk. 762.
Brother and two aunts	Whole to brother. See <i>Lloyd v. Tench</i> , <i>supra</i> .

FRAUDULENT AND VOLUNTARY CONVEYANCES AND SETTLEMENTS.

CH. 1.—AS REGARDS CREDITORS, 13 ELIZ. c. 5, p. 288.

CH. 2.—AS REGARDS PURCHASERS, 27 ELIZ. c. 4, p. 295.

CH. 3.—OF THE CONSIDERATION WHICH WILL SUPPORT CONVEYANCES AND SETTLEMENTS, p. 298.

CH. 4.—VOLUNTARY SETTLEMENTS AND GIFTS MUST BE COMPLETE, p. 300.

CH. 5.—OF UNDUE INFLUENCE, p. 305.

CH. 6.—OF THE EFFECT OF A VALID VOLUNTARY CONVEYANCE OR SETTLEMENT, p. 311.

CHAPTER I.

AS REGARDS CREDITORS.

13 Eliz. c. 5 288 <i>Gifts to delay, hinder or defraud</i> <i>Creditors are void</i> 288, 289 <i>Unless for good consideration —</i> <i>Penalties</i> 289 <i>Creditors only within the Statute...</i> 289 <i>To what Property Statute applies...</i> 289 <i>Fraud a Question of Fact</i> 290 <i>Assignment by way of Mortgage</i> ... 290 <i>Valuable Consideration but mala fides</i> 290 <i>Sale to defeat Execution or Sentence</i> 290	<i>Preference of one Creditor</i> 291 <i>Voluntary Settlements</i> 291 <i>Indebtedness of Settlor</i>..... 291 <i>Debt secured</i> 291 <i>Consideration — Benefit of Third Person</i>..... 292 <i>What Creditors may Impeach</i> 292 <i>How far Settlement Void</i> 292 <i>Bankruptcy Acts, 1869 and 1883</i> ... 292 <i>What necessary to constitute Fraudulent Preference</i> 293 <i>Creditor Protected</i> 294
---	---

FRAUDULENT and voluntary settlements and conveyances frequently give rise to questions at law and in equity. At an early period such assurances were made the subject of statutory regulation designed for the protection of the creditors of, and purchasers from, the persons making them. These enactments will be considered, first, as regards such creditors; and secondly, as regards such purchasers.

By the 13 Eliz. c. 5, *for the avoiding of feigned, covinous and fraudulent feoffments, &c., contrived of malice, fraud, covin, collusion or guile, to delay, hinder or defraud creditors or others, it is enacted*

that all and every feoffment, gift, grant, alienation, bargain and conveyance of lands, tenements, hereditaments, goods and chattels, or of any of them, or of any lease, rent, common or other profit or charge out of the same lands, &c., goods and chattels or any of them, by writing or otherwise, and all and every bond, suit, judgment and execution to or for any intent or purpose *before declared and expressed* shall be deemed and taken only as against that person or persons, his or their heirs, successors, executors, administrators and assigns, whose actions, suits, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries and reliefs by such guileful, covinous, or defraudulent devices and practices as is aforesaid, are, shall or might be in any ways disturbed, hindered, delayed or defrauded, to be clearly and utterly void, frustrate and of none effect, any pretence, colour, feigned consideration, or any other matter or thing to the contrary notwithstanding (s. 1).

The act shall not extend to any estate or interest in lands, &c., goods or chattels assured upon good consideration and *bonâ fide* to any person not having at the time of such conveyance or assurance any notice or knowledge of such covin, fraud or collusion as is aforesaid (s. 5).

As to the consideration which will support conveyances, see Chapter III. The gift or conveyance must be with *intent* to defraud creditors. See *Gooch's case*, 5 Rep. 60 a; *Nunn v. Wilshire*, 8 T. R. 521; *Doe v. Ball*, 11 M. & W. 531. Volunteers who are creditors, for instance, under bonds or obligations given without valuable consideration, are nevertheless creditors within the meaning of the statute. *Adames v. Hallett*, L. R., 6 Eq. 468. Every party to the fraudulent conveyance shall incur the forfeiture of one year's value of the said lands, and the whole of the value of the said goods, and the money contained in such bond, and also, being convicted thereof, shall suffer imprisonment for one half-year (s. 2). See as to the obligation of defendants to answer to a bill of discovery, though it may expose them to penalties under the statute, *Wick v. Parker*, 22 Bea. 59; *Bunn v. Bunn*, 12 W. R. 561.

The statute applies to real and personal estate generally. It was held formerly that it did not apply to copyholds, as they were not subject to debts (*Matthews v. Feaver*, 1 Cox, 278); but by the 1 & 2 Vict. c. 110, s. 11, copyholds may now be taken in execution under an *elegit*. They are, consequently, liable to debts. See also 1 Sm. L. C. 8th ed. 38. With regard to personal estate, "goods and chattels," the statute applies to such things only as can be *taken in execution*. *Rider v. Kidder*, 10 Ves. 360. The remedy in this respect has been extended by the 1 & 2 Vict. c. 110, s. 12. See *Norcutt v. Dodd*, Cr. & P. 100; *Barrack v. McCulloch*, 3 K. & J. 110; *Stokoe v. Cowan*, 29 Bea. 637.

An assignment of choses in action is not within the statute during the lifetime of the assignor (*Norcutt v. Dodd*, Cr. & Ph. 100), except as regards such choses in action as can now be taken in execution under the 1 & 2 Vict. c. 110.

The question of fraud or no fraud is one of fact (*Martindale v. Booth*, 3 B. & Ad. 498; *Hale v. Saloon, &c. Co.*, 4 Drew. 492), even when the conveyance is absolute and the grantor remains in possession, though this may be an indication or badge of fraud (*Twyne's Case*, 3 Rep. 80); and if it be found, in fact, that there is no fraud, the conveyance will, as a rule, be good within the statute. See *Martindale v. Booth* and cases *sup.* Consider, however, the observations in *Freeman v. Pope*, L. R., 5 Ch. 538, as to the question being one *solely* for a jury. Where the conveyance is not absolute, but by way of mortgage, as the retention of the possession by the mortgagor until default in payment is in accordance with the deed, the assignment is not fraudulent. *Edwards v. Harben*, 2 T. R. 587.

A valuable consideration (*post*, Chap. III.) will not support the conveyance if there be *mala fides* and an intent to delay or defraud creditors. *Harman v. Richards*, 10 Ha. 89; *Strong v. Strong*, 18 Bea. 408; *Bott v. Smith*, 21 Bea. 511; *Colombine v. Penhall*, 1 Sm. & G. 228; see *Acraman v. Corbett*, 1 J. & H. 410. So if the object of the conveyance be, to place the property beyond the reach of process, it will be void, though it may be, or purport to be, for value. *Barling v. Bishopp*, 29 Bea. 417; *Reese River Co. v. Atwell*, L. R., 7 Eq. 347; see *Blenkinsopp v. Blenkinsopp*, 1 D., M. & G. 495. But these decisions would seem to be not altogether reconcilable with *Darvill v. Terry*, 6 H. & N. 807, in which it was held, that a mortgage, if executed as a security for money actually lent, is not fraudulent within the act, although its object was to defeat an expected execution of a judgment creditor. See also *Hale v. Saloon Omnibus Co.*, 4 Drew. 492; *Alton v. Harrison*, L. R., 4 Ch. 622.

An assignment by a prisoner on the eve of trial for felony of all his effects in trust for his wife is within the statute and void as against the crown (*Saunders v. Watson*, 4 Giff. 179); but otherwise if made *bonâ fide* and for value. *Chowne v. Baylis*, 31 Bea. 351.

A debtor may assign property to one creditor in preference to the others where the transaction is *bonâ fide*. *Wood v. Dixie*, 7 Q. B. 892. And an assignment for the benefit of creditors generally is not within the act, though made to delay an individual creditor. *Pickstock v. Lyster*, 3 M. & S. 371; see *Harland v. Binks*, 15 Q. B. 718; *Evans v. Jones*, 3 H. & C. 423; comp. *Spencer v. Slater*, 4 Q. B. D. 13. But an absolute assignment in consideration of a past debt of property of much greater amount than the debt by a person in a dying state is void as against other creditors under the statute. *Stokoe v. Cowan*, 7 Jur., N. S. 901.

A distribution by a debtor, when in a weak state of mind and body, of the whole of his property among his children, partly in consideration of annuities for his life, partly by voluntary settlement, and partly by pecuniary gifts, is void, the court being satisfied on the evidence that the children were aware at the time that the creditors' claims would be defeated, though it did not appear that the debtor had any such intention. *Cornish v. Clark*, L. R. 14 Eq. 184.

: As to the conveyance being a fraudulent preference within the meaning of the bankrupt acts, see *post*, p. 292 *et seq.*

The statute mentions only feigned and fraudulent gifts, &c. *Voluntary* conveyances or settlements, however, have long been held to be within the statute if made to hinder or defraud creditors. The *mere fact*, however, that the settlement is *voluntary* will not invalidate it. See *post*, Chaps. IV. and VI. The indebtedness of the settlor at the time of the settlement is usually relied upon as showing the intent to delay and defraud creditors. The indebtedness need not be to the extent of insolvency, though this was formerly held to be necessary. *Lush v. Wilkinson*, 5 Ves. 384. The mere fact of a settlement being voluntary is not enough to render it void, but there must be unpaid debts existing at the time, and the settlor must have been so largely indebted as to induce the court to believe that the intention of the settlement, taking the whole transaction together was to defraud creditors. *Holmes v. Penney*, 3 K. & J. 99. See *Skarf v. Soulby*, 1 Mac. & G. 364, 375; *Thompson v. Webster*, 4 D. & J. 600; *aff. H. L.*, 7 Jur., N. S. 531; *Kent v. Riley*, L. R., 14 Eq. 190; *Taylor v. Coenen*, L. R. 1 Ch. D. 636; *Spencer v. Slater*, 4 Q. B. D. 13; *comp. Boldero v. Lon., &c. Co.*, 5 Ex. D. 47; *Ridler v. Ridler*, 22 Ch. D. 74.

On the other hand, although indebtedness to this extent may not exist, and the property of the grantor not subject to the conveyance may be enough to pay his debts existing at the time of the conveyance, it will not *necessarily* be good. *Spirett v. Willows*, 3 D. G. & S. 293. In this case Lord Westbury, L.C., observed, in effect, that if the debt of the creditor by whom the settlement is impeached existed at the date of the settlement, and it was shown that the remedy of the creditor thereby was defeated or delayed, it was immaterial whether the debtor was or was not solvent. But that if a voluntary settlement or deed of gift were impeached by *subsequent* creditors, it was necessary to show either that the settlement was made with express intent to delay, hinder or defraud creditors, or that after the settlement the settlor had not sufficient means or reasonable expectation of being able to pay his then existing debts; that was to say, was reduced to a state of insolvency. These observations must, however, it would seem, be taken in connection with the facts of the case in which they were made. See *Frecman v. Pope*, L. R., 5 Ch. 538. In this case it was held, that a settlement not founded upon valuable consideration may be set aside without proof of actual intention to defeat or delay creditors, if the circumstances are of such a nature that the settlement must necessarily have that effect. See *Mackay v. Douglas*, L. R. 14 Eq. 106; *Cornish v. Clark*, *ib.*, 184; *Crossley v. Elworthy*, L. R., 12 Eq. 158.

Although the settlor may be indebted, yet if the debts are *secured* the settlement will not be void by reason of such indebtedness. *Stephens v. Olive*, 2 B. C. C. 90.

A conveyance, if otherwise within the statute, will not be taken out of it merely because the consideration for it is not for the benefit of

the grantor, but of another person. Thus, where a person in insolvent circumstances sold his business in consideration (in part) of an annuity to his wife, it was held that the wife was not entitled to the annuity as against her husband's creditors. *French v. French*, 6 D., M. & G. 95; *Neale v. Day*, 4 Jur., N. S. 1225.

A merely *voluntary* settlement would seem to be void only as against *existing* creditors (*Kidney v. Coussmaker*, 12 Ves. 136; see *Townsend v. Westacott*, 4 Bea. 58) and creditors subsequent to the date of the deed, where some of the antecedent debts still remain unsatisfied. *Richardson v. Smallwood*, Jac. 558; *Ede v. Knowles*, 2 Y. C. C. 172—178; *Jenkyn v. Vaughan*, 3 Dr. 419; *Freeman v. Pope*, L. R., 5 Ch. 538. But a deed *in fact* fraudulent, and executed expressly to hinder and delay future creditors, may be impeached by them, though there were no creditors at the date of the deed, or they have subsequently been paid. *Barling v. Bishopp*, 29 Bea. 417; *Reese River Co. v. Atwell*, L. R., 7 Eq. 347. It is not necessary that a creditor should have obtained a judgment, lien, decree, or charging order; without any of these he may bring an action impeaching the validity of a fraudulent conveyance. But he must have obtained such a judgment, &c., before he can have execution against the property comprised in the deed. *Reese River, &c. Co. v. Atwell*, L. R., 7 Eq. 347; see *Coleman v. Croker*, 1 Ves. jun. 161; *Goldsmith v. Russell*, 5 D., M. & G. 547; *Collins v. Burton*, 4 D. & J. 612. The conveyance is only void to the extent that may be necessary to satisfy the creditors of the settlor. *Curtis v. Price*, 12 Ves. 103. In all other respects the conveyance, if complete (*post*, Ch. IV.), will be good, and will not be set aside *merely* because it is voluntary. *Bill v. Cureton*, 2 M. & K. 503; see *De Hoghton v. Money*, L. R., 2 Ch. 164. Thus it will be good against the grantor (*Robinson v. M'Donnell*, 2 B. & A. 134), parties who are privy to it (*Olliver v. King*, 2 Jur., N. S. 312), volunteers claiming under the grantor, for instance, devisees (*Villers v. Beaumont*, 1 Ver. 100), and also against mere strangers (*Bessey v. Windham*, 6 Q. B. 166). If the conveyance or settlement be voidable, the voluntary grantee may, before it is avoided, make a valid transfer to a purchaser for value. *Morewood v. S. Yorkshire R. Co.*, 3 H. & N. 798; see *Daubeny v. Cockburn*, 1 Mer. 626, and *post*, p. 296.

By the Bankruptcy Act, 1883 (in force, 1st January, 1884), 46 & 47 Vict. c. 52, s. 4:—1. A debtor commits an act of bankruptcy in each of the following cases: *a.* If in England or elsewhere he makes a conveyance or assignment of his property to a trustee or trustees for the benefit of his creditors generally; *b.* or makes a fraudulent conveyance, gift, delivery or transfer of his property, or of any part thereof; *c.* or makes any conveyance or transfer of his property or any part thereof, or creates any charge thereon which would under this or any other act be void as a fraudulent preference if he were adjudged bankrupt.

This (except *c.*) corresponds with s. 6 (1, 2) of the act of 1869.

And with reference to the settlement of property, by the Bankruptcy Act of 1883, "any settlement of property, not being a settlement made before and in consideration of marriage, or made in favour

of a purchaser or incumbrancer, in good faith and for valuable consideration, or a settlement made on or for the wife or children of the settlor of property which has accrued to the settlor after marriage in right of his wife, shall, if the settlor becomes bankrupt within *two years* after the date of such settlement, be void as against the trustee in bankruptcy; and shall, if the settlor becomes bankrupt at any subsequent time within *ten years* after the date of the settlement, be void against the trustee in the bankruptcy, unless the parties claiming under such settlement can prove that the settlor was, at the time of making the settlement, able to pay all his debts without the aid of the property comprised in the settlement, be void against such trustee, and that the interest of the settlor in such property had passed to the trustee in such settlement on the execution thereof" (s. 47 (1)).

"Every conveyance or transfer of property or charge thereon made, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any person unable to pay his debts as they become due from his own monies, in favour of any creditor or any person in trust for any creditor, with a view of giving such creditor a preference over the other creditors, shall, if the person making, taking, paying or suffering the same is adjudged bankrupt on a bankruptcy petition presented within three months after the date of making, taking, paying or suffering the same, be deemed fraudulent and void as against the trustee in the bankruptcy" (s. 48 (1)). This section shall not affect the rights of any person making title in good faith and for valuable consideration through or under a creditor of the bankrupt (2).

These sections correspond to sections 91 and 92 of the act of 1869, except that in s. (91) of the act of 1869 the provision was restricted to settlements made by *traders*, and did not contain the provision in the last part of the corresponding s. 47 (1), as to the interest passing to the trustee on the execution of the settlement. In the act of 1869 also, instead of s. 48 (2) of the act of 1883, the provision was in s. 91 of the former act that it should not affect the rights of *purchasers, payees, or incumbrancers* in good faith. See *Butcher v. Lawrence*, L. R., 7 H. L. 839. On this it was held that a trustee of a post-nuptial settlement of leaseholds for the benefit of the settlor's wife and children was *not* a purchaser within this section. *Ex parte Hillman*, 10 Ch. D. 622. Hence, probably, the more extensive language used in the act of 1883. The rule that the conveyance of a man's whole property to secure a past debt, whether he be a trader or non-trader, is an act of bankruptcy, was not altered by the act of 1869. *Re Wood*, L. R., 7 Ch. 302; see *Ex parte Hawker*, *ib.* 214. In *Ex parte Tempest*, L. R., 6 Ch. 70, it was held that the Bankruptcy Act of 1869 made no difference in the law of fraudulent preference existing prior to that act. To constitute such a preference two things must concur:—1st. The act of preference must be *voluntary* on the part of the debtor. 2ndly. It must have been done by him when in such a state of insolvency as that it may or must be inferred that bankruptcy was then in his contemplation. See *S. C.*, L. R., 10 Eq. 653; *Ex parte Huxtable*, *In*

re Conibeer, 2 Ch. D. 54. Therefore where an assignment or conveyance is made by a debtor to a creditor upon the demand of the latter for payment or security, it will not be fraudulent within the act. *Ib.*

On the act of 1869 it has been held that a settlement is void against creditors if it is evidently executed with the view of putting the settlor's property out of the reach of his creditors in case he should fail in a business speculation on which he is about to enter. *Mackay v. Douglas*, L. R., 14 Eq. 106; see *Crossley v. Elworthy*, L. R., 12 Eq. 158. Such a settlement is void against the trustee in the liquidation under this section. *Ex parte Russell*, 19 Ch. D. 588. In order that a payment of money or a transfer of property made by a debtor in favour of one of his creditors should be void as a fraudulent preference, it is sufficient that the preferring the creditor should have been the substantial, effectual, or dominant view with which the debtor made it; it is not necessary that it should have been his sole view. *Ex parte Hill*, 23 Ch. D. 695; see *Ex parte Caldecott*, 4 Ch. D. 150; *Ex parte Stubbins*, 17 Ch. D. 58. An assignment of part of the property of a man who is unable to meet his engagements to a trustee for a special class of creditors is not prevented from being a fraudulent preference by any amount of pressure. *Ex parte Saffery*, 4 Ch. D. 555. Where a specialty creditor brought an action to set aside a conveyance as fraudulent under 13 Eliz. c. 5, nearly ten years after the death of the grantor, and the plaintiff had been aware of the facts during the whole of that period, it was held that as the plaintiff was coming to enforce a legal right his mere delay to take proceedings was no defence against him, as it had not continued long enough to bar his legal right, the case standing on a different footing from a suit to set aside on equitable grounds a deed which was valid at law. *In re Maddever*, 27 Ch. D. 523; see *Golden v. Gillam*, 20 Ch. D. 389. A creditor for valuable consideration who has no notice or suspicion that his debtor is in insolvent circumstances when the payment or transfer by way of fraudulent preference is made to him, is protected. *Ex parte Butcher*, L. R., 9 Ch. 595. The creditor of an insolvent debtor, who dies without having been adjudicated bankrupt, is entitled to the benefit of any payment or security made or given by the debtor, although such payment or security would in case of bankruptcy have been set aside as a fraudulent preference. *Middleton v. Pollock*, 2 Ch. D. 104.

CHAPTER II.

OF FRAUDULENT CONVEYANCES AS REGARDS PURCHASERS.

27 ELIZ. c. 4.

<i>Conveyances not containing Powers of Revocation.....</i>	295	<i>Conveyances containing Powers of Revocation.....</i>	297
<i>To what Property Statute extends.....</i>	296	<i>Act does not apply to bonâ fide Mortgages.....</i>	297
<i>Who are Purchasers.....</i>	296	<i>Void against subsequent Conveyances for Value.....</i>	297
<i>Contract of Sale subsequent to Settlement.....</i>	296	<i>First Conveyance though for Value void.....</i>	297
<i>Second Conveyance must be for Value.....</i>	296	<i>Contrivances to evade Statute.....</i>	297
<i>Charities.....</i>	296	<i>Unlimited Powers of Leasing or Mortgaging.....</i>	297
<i>Operation of Statute.....</i>	297	<i>Release of Power.....</i>	297
<i>Two Voluntary Conveyances ...</i>	297		

THE 13 Eliz. c. 5, the subject of the preceding chapter, relates to creditors. The 27 Eliz. c. 4, which will form the subject of this chapter, relates to purchasers. By the 27 Eliz. c. 4, after reciting the great loss and prejudice by reason of fraudulent and covinous conveyances, &c., with intent to deceive purchasers, it is in substance enacted that all conveyances, grants, charges, leases, estates, incumbrances and limitations of use or uses of, in or out of any *lands, tenements or other hereditaments* whatsoever, made for the intent to defraud and deceive such person or persons, bodies politic or corporate, as had purchased or should purchase in fee simple, fee tail for life, lives or years, the same lands, tenements and hereditaments, or any part thereof, or to defraud and deceive such as had or should purchase any rent, profit or commodity in or out of the same or any part thereof, shall be deemed and taken only as against that person and persons, bodies politic and corporate, his and their representatives, and persons claiming under them for good consideration, utterly void, frustrate and of none effect, any pretence, colour, feigned consideration to the contrary notwithstanding (s. 2). The act does not extend to defeat any conveyance, assignment of lease, assurance, grant, charge, lease, estate, interest or limitation of use of, in, to or out of any lands, &c., for good consideration and *bonâ fide* (s. 4). A mortgage retained by the mortgagor to be used, if thought convenient, in favour of a mortgagee, with the secret intent that the same should be at the free disposition of the mortgagor so that, if he does not wish to bring it forward, he can keep it secret and get an advance of money or forbearance by conveying the estate, either by way of mortgage or sale to other parties, is void under the statute. *Cracknall v. Janson*, 11 Ch. D. 1. See the judgment of Jessel, M.R., p. 22.

The statute extends to copyholds as well as freeholds (*Doe v. Bottrell*, 5 B. & Ad. 131; *Currie v. Nind*, 1 M. & Cr. 17); but not to personal estate (*Jones v. Croucher*, 1 S. & S. 315), being in this respect unlike the 13 Eliz. c. 5, *ante*, Ch. I. As to chattels real, see last note in *Saunders v. Deheu*, 2 Ver. 272. The statute applies also to the estates of *femes covert*s. *Currie v. Nind*, 1 M. & C. 17. Mortgagees (*Doe v. Webber*, 1 A. & E. 733; *Dolphin v. Aylward*, L. R., 4 H. L. 486), legal or equitable (*Ede v. Knowles*, 2 Y. & C. C. 172), are purchasers *pro tanto*; but a judgment creditor is not (*Beavan v. Ld. Oxford*, 6 D., M. & G. 507), nor (at law) a mortgagee by deposit of title deeds. *Kerrison v. Dorrien*, 9 Bing. 76. Lessees are purchasers (*Doe d. Goodright v. Moses*, 2 W. Bl. 1019); but not a lessee without fine or rent. *Upton v. Basset*, Cro. El. 445. The settlor himself cannot defeat the settlement by an admission of the receipt of money (*Doe v. Webber*, *sup.*); and if he has contracted to sell, the contract may be enforced against him (*Buckle v. Mitchell*, 18 Ves. 100; *Dakin v. Whimper*, 26 Bea. 568); but he cannot enforce it against the purchaser (*Smith v. Garland*, 2 Mer. 123; *Clarke v. Willott*, L. R., 7 Ex. 313), unless there has been part performance by the purchaser receiving possession and paying part of the purchase-money (see *Peter v. Nicolls*, L. R., 11 Eq. 391), and notice to the purchaser of the settlement is immaterial. *Buckle v. Mitchell*, 18 Ves. 100; *Doe v. Manning*, 9 Ea. 59. As to conveyances on or after marriage in pursuance of ante-nuptial parol agreements, see *post*, tit. "MARRIAGE SETTLEMENTS," Pt. 1, Ch. 1, in particular *Trowell v. Shenton*, 8 Ch. D. 318. The voluntary grantee has no equity to the purchase-money as against the vendor. *Dakin v. Whimper*, 26 Bea. 568; *Rosher v. Williams*, L. R., 20 Eq. 210. To avoid a prior conveyance, however, to a volunteer, the subsequent purchase must be for *value*, and the consideration must not be grossly inadequate, or a presumption of fraud and collusion will arise. *Doe v. Routledge*, Cowp. 705; *Metcalf v. Pulvertoft*, 1 V. & B. 184. When the subsequent conveyance is a mortgage, the voluntary grantees will be entitled, subject to the mortgage; and if unsettled estates of the settlor are included in the mortgage, the voluntary grantees are entitled to throw the mortgages on the unsettled estates. *Hales v. Cox*, 32 Bea. 118. A subsequent mortgagee is not entitled to consolidate as against a voluntary grantee. *In re Walkhampton Estate*, 26 Ch. D. 391.

There is an exception to the rule in the case of charities, for a voluntary endowment of a charity will not be defeated by a subsequent conveyance for value (*Corp. Newcastle v. Att.-Gen.*, 12 Cl. & F. 402), though it will be avoided if it do not fulfil the requirements of the Mortmain Act. *Ante*, tit. "CHARITY AND MORTMAIN."

A voluntary deed may become good by subsequent dealings with the property by the grantee prior to any consideration for value by the grantor, as if the grantor conveys for value (*Prodgers v. Langham*, 1 Sid. 133; see *Doe v. Martyr*, 1 N. R. 332; *Parr v. Eliason*, 1 Ea. 92), or settles it on marriage. *Kirk v. Clark*, Pr. Ch. 276; *Payne v. Mortimer*, 4 D. J. 447, *ante*, p. 292. The operation of the statute is

to destroy the estates created by the voluntary conveyance as against the purchaser, who cannot therefore be affected by the trusts of those estates. *Currie v. Nind*, 1 M. & Cr. 17, 25. But the voluntary settlement will be defeated so far only as may be necessary to give effect to the subsequent conveyance. *Croker v. Martin*, 1 Bl., N. S. 573; *Dolphin v. Aylward*, L. R., 4 H. L. 486.

Where the grantor makes two voluntary conveyances, and the grantee under the last sells for value, the sale is void as against the first grantee; the grantor having, after the first conveyance, *no estate* to convey except to a purchaser for value. *Doe v. Rusham*, 17 Q. B. 723, overruling *Jones v. Whittaker*, Lon. & Tow. 141; see *Lewis v. Rees*, 3 K. & J. 134. It may be observed, too, that if *personally* be settled, on certain specified trusts, in favour of volunteers, the settlement cannot be altered by any subsequent settlement. *Newton v. Askew*, 11 Bea. 145. As a person claiming under a will is a volunteer, a voluntary settlement will not be revoked by a subsequent will disposing of the settled property. *Bale v. Newton*, 1 Ver. 464; *Jefferys v. Jefferys*, Cr. & Ph. 138. Comp. *Nanney v. Williams*, 22 Bea. 452.

A purchase in the name of a wife or child is not within this statute. See tit. "TRUSTS." As to what consideration will support a conveyance or settlement, see Chapter III.

Conveyances containing Powers of Revocation.] The 5th section of the 27 Eliz. c. 4, in substance declares that if any person shall make any conveyance, gift, grant, demise, charge, limitation of use or assurance of, in or out of any lands, tenements or hereditaments, with any clause of revocation, determination or alteration at his will or pleasure, and after such conveyance, gift, &c., shall convey or charge the same lands, &c., for money or other *good consideration* (the said first conveyance or grant, &c., not being revoked), the said former conveyance, grant, &c., shall, as against those claiming under the latter conveyance, &c., be deemed void. The act does not apply to mortgages made *bonâ fide* and for value (s. 6). The act avoids the first conveyance, though to a purchaser for value (*Buller v. Waterhouse*, T. Jo. 94; see *Hungerford v. Earle*, Fr. Ch. 120), and cannot be evaded by making the exercise of the power apparently conditional, as that the consent of a third person, appointed by the grantor, shall be obtained. *Standen v. Bullock*, cited 3 Rep. 82 b; *Lavender v. Blackston*, 3 Keb. 526. The reservation of an unlimited power of leasing on fines is in effect a general power of revocation. *Lavender v. Blackston*, *sup.* So also a power to mortgage, unless it be limited to a specified sum upon an estate of much greater value. *Jenkins v. Keymis*, 1 Lev. 150. A settlement with power of revocation is void against a subsequent purchaser, although the settlor has released or extinguished the power previously to the sale (*Bullock v. Thorne*, Moore, 615), unless the release was for a valuable consideration, the settlement containing the power being also for value. Sug. Ven. & Pur., 14th Ed., 722.

CHAPTER III.

OF THE CONSIDERATION WHICH WILL SUPPORT SETTLEMENTS.

<i>Valuable Consideration</i>	298	<i>Husband and Wife</i>	298
<i>Marriage is</i>	298	<i>Payments to or for Settlor</i>	298, 299
<i>Moral Obligation is not</i>	298	<i>Surrender of Voluntary Bond</i>	299
<i>Post-Nuptial Settlements</i>	298	<i>Immoral Consideration</i>	299
<i>Additional Portion</i>	298	<i>Evidence admissible</i>	299
<i>Release or Charge by Wife</i>	298	<i>Inquiry as to</i>	299

CONVEYANCES or settlements will not be void as against purchasers or creditors if supported by a *valuable consideration*, except in cases where a power of revocation is reserved to the settlor. *Supra*. The mere *quantum* of consideration is not material, at all events in general. *Townend v. Toker*, L. R., 1 Ch. 446, 458.

Marriage is a valuable consideration, and will support a settlement. See tit. "MARRIAGE SETTLEMENTS." Though, as a general rule, a settlement after marriage, even upon a wife or children, is voluntary, there being merely a moral consideration, which will not support a promise (*ante*, p. 70) or settlement. An *additional portion* received by the husband after the marriage will support a post-nuptial settlement on her and her children. *Ward v. Shallett*, 2 Ves. sen. 18; *Ramsden v. Hylton*, *ib.* 308.

A release by the wife of the past income of property settled to her separate use, or her concurrence in a particular settlement (*Harman v. Richards*, 10 Ha. 81), or the release of her jointure (*Ball v. Burnford*, Pr. Ch. 113), or right of dower (*Jones v. Boulter*, 1 Cox, 288), or a charge by her upon her own estate (*Ly. Arundel v. Phipps*, 10 Ves. 139), will support a settlement by her husband. Where there is a valid contract between husband and wife having, or one of them having, certain interests, and one or the other gives up something, it amounts to a valuable consideration, and the settlement made in pursuance of the contract is good. *Hewison v. Negus*, 16 Beav. 594; 22 L. J. Ch. 655; *Teasdale v. Braithwaite*, 5 Ch. D. 630; *In re Foster and Lister*, 6 Ch. D. 87. The cases of *Goodright v. Moses*, 2 W. Bl. 1019, and *Butterfield v. Heath*, 15 Bea. 408, are *contra*, but not followed. The conveyance by the husband, though binding on the estate by the curtesy which he would have had in his wife's freeholds if there had been issue, in the absence of any conveyance by her, is not sufficient to raise a consideration moving from the husband. *Shurmur v. Sedgwick*; *Crossfield v. Shurmur*, 24 Ch. D. 597. The payment by a third person of the settlor's debts is a good consideration for a

settlement upon his wife and children. *Holmes v. Penney*, 3 K. & J. 90; *Scott v. Scott*, 4 H. L. C. 1065. Where A. granted farming property in trust for her daughters, in consideration of which they covenanted to pay the debts "incurred by A. up to the date of the deed in connection with the working arrangement of the farm," and to maintain A. it was held that the deed was an honestly intended family arrangement, not executed with the object of defeating creditors, and it was valid under the stat. 13 Eliz. c. 5. *In re Johnson; Golden v. Gillam*, 20 Ch. D. 389. A loan to A. will be a good consideration for a settlement upon himself for life, with remainder to his children. *Thompson v. Webster*, 7 Jur., N. S. 531, H. L. So if a person incur expenses on the faith of a settlement, and in addition enters into a covenant to indemnify the settlor against certain incumbrances, this will be a good consideration for a settlement. *Townend v. Toker*, L. R., 1 Ch. 446. But a covenant by the grantee to build a house on the property conveyed to him by a voluntary deed, is not a sufficient consideration. *Rosher v. Williams*, L. R., 20 Eq. 210. The release or surrender of a voluntary bond is a good consideration. *Ex parte Berry*, 19 Ves. 218. As to settlements founded upon an immoral consideration, see the cases *ante*, p. 88. A settlement of leasehold property is not a voluntary conveyance under the 27 Eliz. c. 4, on the ground that the assignment of leasehold property to which liability is attached is, in itself, a conveyance for valuable consideration. *Price v. Jenkins*, 5 Ch. D. 619.

A settlement in form voluntary may be shown from extrinsic evidence to have been made for valuable consideration. *Pott v. Todhunter*, 2 Coll. 76. And, if necessary, an inquiry will be directed as to what the actual consideration was; for the consideration need not necessarily appear. *Kelson v. Kelson*, 10 Ha. 385; *Gully v. Bp. of Exeter*, 2 Moo. & P. 266; and see *ante*, p. 81. In *Bayspoole v. Collins* (L. R., 6 Ch. 228), the owner of property, which was worth beyond an incumbrance to which it was subject about 1,300*l.*, was persuaded by A. to make a post-nuptial settlement of it on his (the settlor's) wife and children. As an inducement to do this A. lent him 150*l.* The settlement was executed but no mention was made in it of the advance of 150*l.* It was held that the loan was a sufficient valuable consideration to support the settlement against a subsequent mortgagee of the settlor.

A conveyance to a trustee in trust to pay the debts of the grantor, although it may be voidable as regards him, will nevertheless entitle the assignee to take proceedings against persons in possession of the property which is assigned. *Glegg v. Rees*, L. R., 7 Ch. 71.

CHAPTER IV.

VOLUNTARY SETTLEMENTS AND GIFTS MUST BE COMPLETE.

<i>Property vested in the Donor—</i>		<i>Declaration of Trust</i>	303
<i>Voluntary Covenants—Choses in</i>		<i>What amounts to a Declara-</i>	
<i>Action</i>	300	<i>tion of Trust</i>	303
<i>Generally—must be complete</i> ...	300	<i>Direction to Trustees</i>	303
<i>Voluntary Covenants</i>	300	<i>Receipt</i>	303
<i>To surrender Copyholds</i>	300	<i>Verbal Gift or Acknowledgment</i>	
<i>Legal Obligation complete</i>	301	<i>of Gift</i>	303, 304
<i>Covenants—Bonds</i>	301	<i>Entries—Deposits</i>	304
<i>Covenant for further Assurance</i>	301	<i>Coupled with ineffectual Assign-</i>	
<i>Delivery of Property</i>	301	<i>ment</i>	304
<i>Stocks, Shares, &c.</i>	301	<i>Assignment—Power of Attorney</i>	304
<i>Power of Attorney</i>	301	<i>Mere Intention</i>	304
<i>Assignment of Policy by Deed</i> .	302	<i>Of Land</i>	304
		<i>Of Personalty</i>	304
<i>Property vested in a Trustee</i>	302	<i>Other Matters</i>	304
<i>Passes by Assignment by Deed</i> .	302	<i>Mistake</i>	304
<i>Notice to Trustee</i>	302	<i>To obtain Declaration of Legi-</i>	
<i>Transfer of Equitable but not</i>		<i>timacy</i>	305
<i>Legal Interest</i>	302		

Property vested in Donor—Voluntary Covenants—Choses in Action.] Although a voluntary settlement or grant may be valid as against creditors and purchasers, it may be *incomplete*, and upon this ground equity will refuse to enforce it against the settlor (*Antrobus v. Smith*, 12 Ves. 46; see *Ellison v. Ellison*, 6 Ves. 662; *Dillon v. Coppin*, 4 M. & C. 647) or persons claiming under him, even as volunteers; for instance, as devisees. *Jefferys v. Jefferys*, Cr. & Ph. 138. See *Ex parte Pye*, 18 Ves. 149.

It will be incomplete in general unless the interest of the donor be duly conveyed, as far as it is possible to do so, to the donee, or to a trustee for him, or there is a *declaration of trust (post)* in his favour. Therefore mere voluntary covenants or agreements to settle or convey will not, in general, be enforced. *Evelyn v. Templar*, 2 B. C. C. 148; see *Colman v. Sarel*, 1 Ves. jun. 50; *Jefferys v. Jefferys*, Cr. & Ph. 138. Thus, if there be a covenant to settle copyholds, and the covenantor die without surrendering them, the court will not compel a surrender by the heir in performance of the covenant (*Dening v. Ware*, 22 Bea. 184); but otherwise where there is also a covenant to stand possessed of the property *in trust* for the covenantees. *Steele v. Waller*, 28 Bea. 466; see *Andrews v. Andrews*, 15 Ch. D. 228.

A voluntary surrender, also, not perfected by admission, is incom-

plete. *Sowerby v. Gutteridge*, 18 L. J., N. S., Ch. 9. But where a covenant or other instrument creates a complete *legal obligation* on the part of the covenantor, the proper mode of enforcing it being by action at law, in which *damages* would be recoverable, such obligation will be considered as complete, and effect will be given to it, if necessary, in equity, as when a person covenants to pay a sum of money or an annuity. *Fletcher v. Fletcher*, 4 Ha. 67; *Watson v. Parker*, 6 Bea. 283; *Clough v. Lambert*, 10 Sim. 174; see *Hales v. Cor*, 32 Bea. 118; *Bonfield v. Hassell*, *ib.* 217. So a settlement or gift by the bond of the settlor is valid as a *legal obligation*, and as such may be enforced against the obligor's estate (*Denney v. Ware*, 22 Bea. 184; *Hall v. Palmer*, 3 Ha. 532); and a person claiming under such a bond is within the 13 Eliz. c. 5, and is entitled to the protection of the statute like any other creditor. *Adames v. Hallett*, L. R., 6 Eq. 468. Simple contract debts, however, were formerly entitled to priority of payment (*Lomas v. Wright*, 2 M. & K. 769; *Markwell v. Markwell*, 34 Bea. 12), unless there had been an assignment of the bond for value; for instance, upon marriage. *Payne v. Mortimer*, 4 D. & J. 447; see now 32 & 33 Vict. c. 46, *ante*, p. 31.

In *Hervey v. Audland* (14 Sim. 531) it was held, that a covenantee under a voluntary covenant for further assurance could not prove under an administration suit against the covenantor's estate. But in *Cox v. Barnard* (8 Ha. 310), this was allowed, upon the ground that though the court might not specifically execute the covenant, as damages were wanted, it could give damages. See *Patch v. Shore*, 2 Dr. & Sm. 589.

The delivery of property or securities *passing by delivery* is valid (*Irons v. Smallpiece*, 2 B. & Al. 551; *M'Culloch v. Bland*, 2 Giff. 428); and an assignment of personal chattels by deed is valid. *Irons v. Smallpiece*, *supra*. A gift by delivery of a policy, although it may not entitle the donee to the money assured, passes the property in the policy itself, and the court will not interfere with the right thus obtained. *Rummens v. Hare*, 1 Ex. D. 169. But if the grantor adopt some other mode of transfer than that which is necessary to effect a *complete* assignment of the property, the transferee will not be entitled, unless the instrument can be construed as a declaration of trust (*post*); as where the grantor attempts to assign shares or property of that description by some other mode than that which is effectual by the rules of the company or society in which the shares are held. Thus an assignment, whether by a mere writing or by deed, of East India stock and shares in an insurance company standing in the name of the assignor is not an effectual transfer. See *Antrobus v. Smith*, 12 Ves. 39; *Dillon v. Coppin*, 4 M. & C. 647; *Searle v. Law*, 15 Sim. 95; *Coningham v. Plunkett*, 2 Y. C. C. 245; *Weale v. Ollive*, 17 Bea. 252. So where the transfer is in other respects imperfect, and does not operate on the whole property, as where a mortgagee in fee assigns the mortgage debt with a power of attorney to receive it, but does not convey the estate (*Woodford v. Charnley*, 28 Bea. 96); and if the assignment or other mode of gift or settlement be incomplete, and the

gift is intended to take effect by it, the court will not construe it as a *declaration of trust (post)*, and upon this ground give effect to it. *Milroy v. Lord*, 4 D., F. & J. 264. The cases of *Grant v. Grant*, 34 Bea. 263; *Richardson v. Richardson*, L. R., 3 Eq. 686; and *Morgan v. Malleson*, L. R., 10 Eq. 475, are *contrà*, but would not now be followed. See *post*, p. 303. But if nothing more remains to be done or can be done by the grantor or donor,—if, as far as he is concerned, the conveyance or assignment is complete, and he has done all that is necessary to be done, having regard to the nature of the property,—the assignment or other assurance will be effectual in equity. See *Sloane v. Cadogan*, Sug. V. & P., 11th ed., App. 1119 (not cited in later editions); *Edwards v. Jones*, 1 M. & C. 238; *Milroy v. Lord*, *sup.* Thus an assignment of a policy of assurance by deed is valid, although the grantor may retain the deed and give no notice of the assignment to the office. *Fortescue v. Barnett*, 3 M. & K. 36; *Pearson v. Amicable Ass. Comp.*, 27 Bea. 229; see *Pedder v. Mosely*, 31 Bea. 159; *Kekewich v. Manning*, 1 D., M. & G. 187. And a formal deed of assignment has been held to be unnecessary. *Sewell v. King*, 14 Ch. D. 179. And where there is a voluntary assignment of a chose in action, followed by a power of attorney to receive it, this would seem to be sufficient to give a right in equity to have the deed enforced, even after the death of the assignor. *Blakeley v. Brady*, 2 Dr. & Wal. 311; *Kiddill v. Farnell*, 3 Sm. & G. 428; see *Weale v. Ollive*, 17 Bea. 252; *Woodford v. Charnley*, 28 Bea. 96.

Property vested in a Trustee.] When property is vested in a trustee, the *cestui que trust* may make a valid assignment of it by deed. *Sloane v. Cadogan*, Sug. V. & P., 11th ed., App.; *Kekewich v. Manning*, 1 D., M. & G. 176; *Donaldson v. Donaldson*, Kay, 711; *Voyle v. Hughes*, 2 Sm. & G. 18; see *Pearson v. Amicable Ass. Comp.*, 27 Bea. 229; *Re Way*, 2 D., J. & S. 365. And notice to the trustee does not seem necessary to perfect the trust, even as against a subsequent volunteer who does give notice (see *Justice v. Wynne*, 12 Ir. Ch. Rep. 289); though if not given, the trustee will be justified in paying over the fund to his *cestui que trust* the grantor. *Donaldson v. Donaldson*, *sup.* And if the settlor conveys his equitable interest to trustees, and directs them to hold it upon trust for A., that will be as effectual as if he had declared himself a trustee for A. *Gilbert v. Overton*, 2 H. & M. 110.

It has been held, however, that this rule is not applicable to the case of a mere transfer of the equitable interest when the transferor is able to procure a transfer of the legal interest. Thus, if trustees hold stock for A., and he assigns the stock to trustees for B., without calling on his own trustees to transfer to them for B., the assignment will be inoperative. See *Bridge v. Bridge*, 16 Bea. 315; *Beech v. Keep*, 18 Bea. 285; see, however, as to the doctrine laid down in *Bridge v. Bridge*, *sup.*; *Gilbert v. Overton*, 2 H. & M. 117. In the last case Wood, V.-C., observed that it may well be held that, if a settlor by voluntary settlement conveys all his interest, if that proves

to be equitable the assignee becomes entitled to claim a conveyance of the legal estate from the person in whom it is vested.

Declaration of Trust.] Another mode by which a voluntary settlement may be effected is by a declaration of trust, by which the owner of property declares either himself or the trustee in whom it is vested a trustee for the voluntary grantee. For a declaration of trust has, in a court of equity, the same effect as the transfer of the legal estate, or the vesting of the legal interest, has in a court of law. *Collinson v. Patrick*, 2 Ke. 123. A declaration of trust is not confined to any express form of words, but may be indicated by the character of the instrument. *Kekewich v. Manning*, 1 D., M. & G. 176.

The cases will now be referred to in which the court has held a conveyance or settlement, otherwise incomplete, to be effectual in equity, as a declaration of trust of the property in favour of the donee.

The most direct and unambiguous way of creating a trust is for the grantor, in express terms, to declare himself a trustee for the grantee. But this is not the only mode in which an effectual trust can be created in favour of a voluntary grantee. For instance, a letter stating the trusts is sufficient, see *In re Bellasis' Trusts*, L. R., 12 Eq. 218.

A direction by the grantor to a person who holds property in trust for him, to hold for the grantee, is valid as a declaration of trust (*Rycroft v. Christy*, 3 Bea. 238; *Bentley v. Mackay*, 15 Bea. 12; *M'Fadden v. Jenkyns*, 1 Ph. 153; *Meek v. Kettlewell*, *ib.* 342; *Gilbert v. Overton*, 2 H. & M. 110); and it is unnecessary that the trustee should assent to, or have notice of, the declaration of trust by the grantor. *Donaldson v. Donaldson*, Kay, 711. A receipt in the form "Received of B., for the use of A., 100*l.*, to be paid to A. at B.'s death," is a sufficient declaration of trust. *Moore v. Darton*, 4 De G. & Sm. 517; see *Paterson v. Murphy*, 11 Ha. 88.

In *Grant v. Grant*, 34 Bea. 623, Lord Romilly, M.R., observed in substance (p. 626), that if A., having a sum of consols, were to say to B., I give you that sum, or to C., I have given that sum to B., that would be sufficient to make A. a trustee for B. In *Morgan v. Malleon*, L. R., 10 Eq. 475, the donor made and signed a memorandum, "I hereby give and make over to A. a bond," specifying it, but retaining it in his own possession. This was held to amount to a sufficient declaration of trust of the bond in favour of A. In *Richardson v. Richardson*, L. R., 3 Eq. 686, the donor, by deed, purported to convey all his personal estate. This was held to amount to a declaration of trust of certain promissory notes belonging to him. This was followed in *Baddeley v. Baddeley*, 9 Ch. D. 112, and *Fox v. Hawks*, 13 Ch. D. 822. But the five last cited cases would not now, it is considered, be followed. There are the cases of *Warriner v. Rogers*, L. R., 16 Eq. 340; *Heartley v. Nicholson*, L. R., 19 Eq. 233; *Richards v. Delbridge*, L. R., 18 Eq. 11; *Moore v. Moore*, *ib.* 474; *Breton v. Woolven*, 17 Ch. D. 416, in which the rule laid down in *Milroy v. Lord*, *ante*, p. 302, *sup.*, was declared to be the governing

rule in such cases. Putting money or a cheque in the hands of a child, with the observation, "I give it to him," is not a gift or declaration of trust, where the donor takes it back again. *Jones v. Lock*, L. R., 1 Ch. 25. If A. sends B. a sum intending it as a gift, but B. treats it as a loan, he cannot after A.'s death treat the transaction as a gift. The uncorroborated evidence of B. in such a case, after A.'s death, that it was a gift, must be disregarded. *Hill v. Wilson*, L. R., 8 Ch. 888.

A banker who debits himself in his books with money in favour of another thereby declares himself a trustee of it. *Stapleton v. Stapleton*, 14 Sim. 186. So where a person deposits securities for money in the hands of a trustee, stating that he intends them as a provision for the voluntary grantee. *Arthur v. Clarkson*, 14 W. R. 754. An assignment or attempted assignment by the grantor of property in a way which is ineffectual to pass the interest at law,—for instance, an assignment of stock by deed and not by transfer,—will be good if the assignment is upon trust for the grantee in such terms that the court can construe it as a *declaration of trust* by the grantor. See *Airey v. Hall*, 3 Sm. & G. 315; *Parnell v. Hingston*, *ib.* 337. An assignment of a chose in action, with a power of attorney to enforce payment, coupled with a declaration that the fund should be held upon certain trusts for the benefit of the assignor and ultimately of the assignee, is valid. *Blakely v. Brady*, 2 Dr. & Wal. 311; see *Parnell v. Hingston*, 3 Sm. & G. 337. And a declaration of trust will be valid though the settlor may retain a control over the fund. *Wheatley v. Purr*, 1 Keen, 551; *Vandenberg v. Palmer*, 4 K. & J. 204. But a mere expression of intention, to be carried into effect by some future act, does not amount to a declaration of trust. *Bayley v. Boulcott*, 4 Russ. 345; *Re Glover*, 2 J. & H. 186. It has been held that a declaration of trust of realty (evidenced by some writing) is valid (*Tierney v. Wood*, 19 Bea. 330); and the dictum *contrà* in *Scales v. Maude*, 6 D., M. & G. 51, was corrected in *Jones v. Lock*, L. R., 1 Ch. 28. The declaration of trust, if of lands, tenements or hereditaments, including chattels real (see *Skett v. Whitmore*, Fr. Ch. 280; *Forster v. Hale*, 3 Ves. 696), must, by the 7th section of the Statute of Frauds, be manifested and proved by some writing signed by the party who is by law enabled to declare such trust, or by his last will in writing. *Kronheim v. Johnson*, 7 Ch. D. 60. See tit. "TRUSTS." But a declaration of trust of personalty may be by parol (*McFadden v. Jenkyns*, 1 Ph. 153), though more weight would attach to a declaration of trust in writing as a deliberate and unequivocal expression of intention. *Dipple v. Corles*, 11 Ha. 184; see *Re Cane*, 36 L. J., Ch. 744. The person to sign a declaration of trust under the 7th section of the Statute of Frauds is the beneficial owner, not the trustee having the mere legal estate. *Tierney v. Wood*, 19 Bea. 330; *Kronheim v. Johnson*, *sup.*

Other Matters.] A settlement executed under a mistake, containing no power of revocation, and not intended to take effect absolutely and

at all events, will be inoperative against a subsequent will disposing of the property comprised in the settlement. *Nanney v. Williams*, 22 Bea. 452; see *Forshaw v. Welsby*, 30 Bea. 243; comp. *Bale v. Newton*, 1 Ver. 464. See further, as to powers of revocation, *post*, p. 309. A bill apparently to obtain the declaration of the court as to the parties entitled under a settlement, but in reality to establish the illegitimacy of a particular person (the settlement being made for that express purpose), cannot in general be sustained. *Cooke v. Cooke*, 11 Jur. N. S. 533; see *Gurney v. Gurney*, 1 H. & M. 413, and the observations on it in *Cooke v. Cooke*.

CHAPTER V.

UNDUE INFLUENCE.

<i>Generally</i>	305	<i>Ignorance</i>	308
<i>Grounds of Rule</i>	305	<i>Settlor must understand Deed</i>	308
<i>Parent and Child—Relations</i>	305	<i>Independent Advice</i>	308
<i>Guardian and Ward</i>	306	<i>Onus of Proof</i>	309
<i>Trustee and Cestui que Trust</i>	306	<i>Where fiduciary relation</i>	309
<i>Doctor and Patient</i>	307	<i>Where not</i>	309
<i>Attorney and Client</i>	307	<i>At whose instance Conveyance, &c.,</i> <i>set aside</i>	309
<i>Counsel and Client</i>	307	<i>Property in Possession of Third</i> <i>Persons</i>	309
<i>Religious Influence</i>	307	<i>Confirmation—Acquiescence</i>	310
<i>Influence during Courtship</i>	307	<i>Laches</i>	310
<i>Badges of Fraud</i>	307	<i>Costs of Trustee</i>	310
<i>Fictitious Consideration—Conceal-</i> <i>ment—Intimidation</i>	308		

General Principles.] A voluntary settlement or gift may not be open to objection by reason either that it is void as against purchasers or creditors, or that it is incomplete, yet it may be of such a character that equity will not only not enforce it, but sometimes set it aside. For it may be liable to be impeached upon the ground that it has been obtained by the exercise of *undue influence*.

It is a very old head of equity, that where a settlement, conveyance, gift or grant, whether voluntary or by way of sale, has been procured by undue influence, the court will set it aside upon the ground of public policy (*Osmond v. Fitzroy*, 3 P. W. 129, and (n.); *Hatch v. Hatch*, 9 Ves. 292: and numerous cases presently noticed;) and the particular nature of the transaction makes no difference as to the application of the principle. Where undue influence has been exercised, whether in the matter of a sale, contract, mortgage, or in short almost any other matter, equity will interpose and either annul the transaction altogether, or put it upon a fair and just basis.

Undue influence most commonly springs out of the special relations

which exist between parent and child, guardian and ward, trustee and *cestui que trust*, and solicitor and client, but it is by no means exclusively confined to them; for wherever the court finds one of two persons exercising undue influence over the other, it will not allow a transaction resulting from, or produced by it, to stand. *Huguenin v. Baseley*, 14 Ves. 273, and cases next cited. "The relief stands upon a general principle applying to all the variety of relations in which dominion may be exercised by one person over another. *Per* Sir S. Romilly, arg. *Huguenin v. Baseley*, 14 Ves. 285, 286; *acc. per* Lord Cottenham, C., *Dent v. Bennett*, 4 M. & C. 269, 277: *Fowler v. Wyatt*, 24 Bea. 232, 237; cons. also the observations of Sir John Romilly, M.R., in *Hoghton v. Hoghton*, 15 Bea. 299 and in *Cooke v. Lamotte*, *ib.* 234; see *Billage v. Southee*, 9 Ha. 534. The principle is applicable to cases where one person standing in a fiduciary relation to another sells to him, directly or indirectly, property on terms advantageous to the former. To the extent of the profit thus made, the vendor will be considered as a trustee for the purchaser. *Tyrrell v. Bank of London*, 10 H. L. C. 26 (case of solicitor and client).

It has been observed (*ante*, p. 62), that family arrangements are favoured by the court. Where therefore the transactions between parent and child fairly come under this description, they are unimpeachable. See *ante*, tit. "COMPROMISES AND FAMILY ARRANGEMENTS." But if the transaction is substantially a gift to the father by the child, shortly after the latter attains his majority, and without independent advice, it will in general be set aside. See *Archer v. Hudson*, 7 Bea. 551; *Baker v. Bradley*, 7 D., M. & G. 597; *Chambers v. Crabbe*, 34 Bea. 457; *Potts v. Surr*, *ib.*, 543; *Dettmar v. Met. Prov. Bank*, 1 H. & M. 641. In such cases there must be the clearest and most unequivocal evidence that the transaction was fully understood by and was the voluntary and deliberate act of the donor. *Davies v. Davies*, 4 Giff. 417. And if one relation may fairly be presumed to have influence over another, the principles which have been stated will be applied to test the fairness of transactions between them, as in the case of securities given by a younger brother, just of age, to the creditors of his elder brother. *Sercombe v. Saunders*, 34 Bea. 382; comp. *Thorner v. Sheard*, 12 Bea. 589.

The same principles are particularly applicable to transactions between guardian and ward, trustee and *cestui que trust*. See *Hylton v. Hylton*, 2 Ves. sen. 547; *Pierse v. Waring*, 1 P. W. 121, n. (1); *Hunter v. Atkins*, 3 M. & K. 113; *Tate v. Williamson*, L. R., 2 Ch. 55. Thus, beneficial leases from a ward, who had just attained his majority, to a guardian will be set aside, even after an interval of some years. *Dawson v. Massey*, 1 Ba. & Be. 219; see *Aylward v. Kearney*, 2 Ba. & B. 463, where, after a lapse of thirty years, similar leases to the guardian's son were set aside, the ward being of weak intellect and being constantly under the guardian's influence. See *Hatch v. Hatch*, 9 Ves. 292; *Grosvenor v. Sherratt*, 28 Bea. 659. But transactions cannot be impeached by a ward after a lapse of years and the death of the guardian, there having been dealings between them,

amounting to a release, subsequent to the transactions complained of. *Motz v. Moreau*, 13 Moo. P. C. 376.

The same principles apply as between doctor and patient (*Dent v. Bennett*, 4 M. & C. 269; *Billage v. Southce*, 9 Ha. 534).

With regard to the relation of attorney and client the rule prevails, perhaps, even in a more stringent degree than in other cases; for there is professional knowledge on the one side, but not, or not always on the other. Even if the transaction be not in the nature of a gift or contract, it cannot stand if the solicitor has by means of his professional knowledge obtained an advantage from his client which equity considers unfair. Thus, while a suit is pending, an attorney is disqualified from accepting benefits from a client beyond his costs. *Wood v. Downes*, 18 Ves. 120; *Walker v. Smith*, 29 Bea. 394. And where an attorney allowed a client, who had devised property, unnecessarily to levy a fine, by which the devise was revoked, and the estate afterwards descended on the attorney, who was the *heir-at-law* of the client, it was held that the attorney was a trustee for the devisee. *Bulkley v. Wilford*, 2 Cl. & F. 102; see *Nanney v. Williams*, 22 Bea. 452; *Proctor v. Robinson*, 35 Bea. 329.

The mere circumstance, however, of a solicitor preparing a client's will, containing dispositions in the solicitor's own favour, does not of itself affect the validity of such disposition, for there is a distinction between the jurisdiction of the court as regards contracts and as regards wills; the former may be directed to be cancelled, but not the latter. *James v. Greaves*, 2 P. W. 270; *Hindson v. Wetherill*, 5 D., M. & G. 301; *Walker v. Smith*, 29 Bea. 394; comp. *Waters v. Thorn*, 22 Bea. 547. The rule applies to the case of counsel and client; and in *Broun v. Kennedy*, 33 Bea. 133, a gift of a large property by a client to her counsel was set aside on the ground of undue influence.

So gifts or settlements made by persons under the delusion, religious or otherwise, that the donees have supernatural powers, and under the influence thus exercised, will be set aside in equity. *Nottidge v. Prince*, 2 Giff. 246; *Lyon v. Home*, L. R., 6 Eq. 655; see Sir S. Romilly's most admirable argument in *Huguenin v. Baseley*, 14 Ves. p. 284, *et seq.*, which, from the unanimous adoption by the most eminent judges (see, in particular, *Dent v. Bennett*, 4 M. & C. 277) of the principles which it lays down, has assumed more the character of a judgment from the bench, than of an argument addressed by counsel to the court. See Lord Cottenham's observations, 4 M. & C. 277.

A security obtained without consideration from a female by a suitor during courtship, is subject to the same considerations, and the onus rests upon the suitor to show the *bona fides* of the transaction. *Cobbett v. Brock*, 20 Bea. 524; see *James v. Holmes*, 31 L. J., N. S., Ch. 567.

What will amount to undue influence is a question which must depend upon the circumstances of each particular case. There can necessarily be no fixed or invariable rules upon such a subject. It has been held that a fictitious consideration inserted in the deed is

an indication of fraud. *Bridgman v. Green*, 2 Ves. sen. 627; *Gibson v. Russell*, 2 Y. & C. C. C. 104. So where there has been concealment from those who ought naturally to have been made acquainted with the transaction. *Osmond v. Fitzroy*, 3 P. W. 129; *Groves v. Perkins*, 6 Sim. 576. And of course a gift or settlement procured by intimidation cannot stand. *Jevers v. Jevers*, 1 B. P. C. 272; see *Scrope v. Offley*, *ib.* 276. But it is by no means necessary that there should be a fictitious consideration, concealment or intimidation to call for the interposition of the court. The relation existing between the parties to the transaction and the circumstances attending the transaction are what the court regards. It is important to ascertain whether the person making the settlement or gift did so not only voluntarily but with all the knowledge of its nature and consequences. *Huguenin v. Baseley*, 14 Ves. 300; *Pratt v. Barker*, 4 Russ. 507. The mere proof that the deed or settlement was read over to a donor, unaccompanied by proper explanations, is not sufficient to satisfy the court that he understood it. *Hoghton v. Hoghton*, 15 Bea. 278; *Anderson v. Elsworth*, 3 Giff. 154. And, of course, where the deed is not read over at all, and no instructions for its preparation given by the grantor, the presumption against it is still stronger. *Clarkson v. Hanway*, 2 P. W. 203. But if the grantor fully understands the nature of the instrument, and it is prepared by his *own attorney*, it will in general be good. *Pratt v. Barker*, 4 Russ. 507; *Toker v. Toker*, 31 Bea. 629; aff. 8 L. T., N. S. 777. But agreements, though prepared by an independent solicitor, may be set aside if that one of the parties for whom the solicitor is acting is under the undue influence of the other party. *Moxon v. Payne*, L. R., 8 Ch. 881. The court will not consider the propriety or impropriety of the clauses, except as evidence that the settlor did not understand what he was doing; the only question being whether the settlor understood what he was doing and its effect on his position with regard to the property. *Per Jessel, M.R., Dutton v. Thompson*, 23 Ch. D. 278. But *quære* whether this applies to cases in which there are persons claiming adversely to the settlor, *ib.* *Per Cotton, L.J.* Where persons stand in a confidential relation to each other, the party benefited or a volunteer claiming through him (*Bainbrigge v. Broune*, 18 Ch. D., must be able to show that the donor had competent and independent advice. *Rhodes v. Batc*, L. R., 1 Ch. 252. In such cases the age or capacity of the person conferring the benefit, and the nature of the benefit, would seem to be of minor importance; they are important only when no such confidential relation exists, *ib.* As between parent and child, if a solicitor purports to act on behalf of the child a purchaser for value is entitled to assume that he has given him proper advice, although he may also be acting for the parent, *Bainbrigge v. Broune*, *sup.* Obviously, however, in such cases the surrounding circumstances must be carefully considered. It would seem clear also that, according to the general principles of the court, the capacity of the party conferring the benefit must be of great, if not paramount, importance; for, if there be a want of capacity, of what

possible avail can independent advice be which cannot be appreciated or perhaps understood? See *Griffiths v. Robins*, 3 Madd. 191; *Baker v. Bradley*, 7 D., M. & G. 597; *Hunter v. Atkins*, 3 M. & K. 113.

Where the fiduciary relation between grantor and grantee exists, the onus is on the latter to show that the transaction was fair and that no undue influence was exercised. *Gibson v. Jeyes*, 6 Ves. 266; *Wright v. Vanderplank*, 8 D., M. & G. 133; *Grosvenor v. Sherratt*, 28 Bea. 659; *Sharp v. Leach*, 31 Bea. 491; *Smith v. Kay*, 7 H. L. Cas. 750; see *Hoghton v. Hoghton*, 15 Bea. 278; *Turner v. Collins*, L. R., 7 Ch. 329. The onus of supporting a deed does not however necessarily in all cases rest upon those who set it up. *Henry v. Armstrong*, 18 Ch. D. 668. But it has been held that if a person takes a benefit under a voluntary gift which is not subject to a power of revocation, he has thrown upon him the burden of proving that the gift was meant by the donor to be irrevocable. *Wollaston v. Tribe*, L. R., 9 Eq. 44. Where there was a voluntary settlement of property in default or failure of issue in trust for the settlor's next of kin, although a proper one, and the settlor understood the terms of it, yet as he was not informed that he might have had a power of disposition over the property in default or failure of issue, it was held that such a power ought to be given, and the settlement was ordered to be rectified accordingly. *James v. Couchman*, 29 Ch. D. 212. Even where the matter appears to rest upon a good consideration, as where there is a sale, the court will inquire into the circumstances, with the view to ascertain whether undue influence was exercised or not. *Clark v. Malpas*, 31 Bea. 80; *Baker v. Monk*, 33 Bea. 419.

When undue influence is proved, the deed may be set aside at the instance of the donor or grantor, or, after his death, of his representatives or devisees. *Anderson v. Elsworth*, 3 Giff. 154. A solicitor who fails to exercise due and proper caution in preparing a voluntary settlement, and who acts on behalf of the party claiming under it, may himself be liable to pay the costs of a suit to set it aside. *Baker v. Loader*, L. R., 16 Eq. 49. It must be observed, however, that if the donor or settlor himself requires the aid of the court to transfer a fund in court which is the subject of the settlement to the donee, the court cannot refuse its assistance, whether the settlement may or may not be impeachable upon the ground of undue influence. *Re Metcalfe*, 2 D., J. & S. 122. If the subject-matter of the gift can be traced into the possession of third persons, it will be affected by the fraud or undue influence which attached to the original transaction. *Bridgman v. Green*, 2 Ves. sen. 627; *Huguenin v. Baseley*, 14 Ves. 273, 289. It will be observed, however, that in these cases the persons actually in the possession or enjoyment of the property so obtained were not purchasers for value without notice. In *Kempson v. Ashbee*, L. R., 10 Ch. 15, a young lady living with her step-father gave a bond as security for him which the court held to be void as given under undue influence, and that knowledge of this was to be imputed to the obligee of the bond. The court also held that a second bond given to secure the amount of a judgment obtained in an action on the first and costs was equally void. Although the evidence may

show the existence of undue influence at the time of the settlement or gift, it will not be set aside if the settlor has during a course of years and in several transactions acted upon it and treated it as in all respects valid. *Brown v. Carter*, 5 Ves. 862; *Wright v. Vanderplank*, 2 K. & J. 1; affirmed 8 D., M. & G. 133; *Dimsdale v. Dimsdale*, 3 Dr. 556; *Jarratt v. Aldam*, L. R., 9 Eq. 463.

The court will not undo a trifling benefit conferred by one person upon another standing in a confidential relation to him unless there is *mala fides*. *Rhodes v. Bate*, L. R., 1 Ch. 252. And although a gift made to a person standing in a confidential relation to the donor, as by a patient to a physician, may be voidable, yet if, after the confidential relation has ceased to exist, the donor intentionally elects to abide by the gift, and does in fact abide by it, it cannot be impeached after his death, even if it is not proved that the donor was aware that the gift was voidable at his election. *Mitchell v. Homfray*, 8 Q. B. D. 587. In the absence of proof of the exercise of control or influence on the part of the donee, or of the existence of the relation of guardian and ward between the donee and the donor, a gift of her property within a month before her death by a minor aged twenty, of business habits, firm will, and fully capable of managing her own affairs, to a relative with whom she had been residing from her father's death, for a period of five months until her own death is not invalid. *Taylor v. Johnston*, 19 Ch. D. 603.

Where acquiescence is relied upon, it must be shown to be *after* the discovery of the right to impeach a transaction (*King v. Savery*, 5 H. L. C. 627), in which case it will in general preclude the parties acquiescing from raising objections afterwards. *Skottowe v. Williams*, 3 D., F. & J. 535. And where a client dealing with his solicitor executes a voidable instrument, and afterwards chooses to confirm it by will, the confirmation will be effectual. *Stump v. Gaby*, 2 D., M. & G. 623. But in *Waters v. Thorn* (22 Bea. 547), it was held that as the transaction between the parties (a sale by a client to his solicitor) was invalid, the confirmation was inoperative. It is essential, in order that acquiescence or an act of confirmation may be valid, that there should be no *continuing influence*, as otherwise there would be no free agency on which to found acquiescence. *Hatch v. Hatch*, 9 Ves. 292; *Sharp v. Leach*, 31 Bea. 491. And where a confidential and fiduciary relation is shown to exist between persons, its continuance will be presumed, unless there is distinct evidence of its termination. *Rhodes v. Bate*, L. R., 1 Ch. 252.

Laches, however, and considerable delay in applying to the court to set aside an instrument impeachable by reason of undue influence, will, in general, be a bar to relief. *Barwell v. Barwell*, 34 Bea. 371; *Skottowe v. Williams*, 3 D., F. & J. 535; see *Proctor v. Robinson*, 35 Bea. 329; *Turner v. Collins*, L. R., 7 Ch. 329.

As to the costs of trustees refusing, without the direction of the court, to transfer a fund pursuant to an arrangement between parent and child, or others standing in a fiduciary relation to one another, see *Firmin v. Pulham*, 2 De G. & Sm. 99; *Re Cater*, 25 Bea. 361; *King v. King*, 3 Jur., N. S. 609; *Re Metcalfe*, 2 D., J. & S. 122.

CHAPTER VI.

OF THE EFFECT OF A VALID VOLUNTARY CONVEYANCE OR SETTLEMENT.

<i>Grantor or Settlor cannot in general</i>		<i>Is not Testamentary</i>	312
<i>defeat</i>	311	<i>On whom binding</i>	313
<i>Power of Revocation</i>	311	<i>Title paramount</i>	313
<i>Grant as Qualification for an Office</i>	312	<i>Settlement on unborn Children</i>	313
<i>Rectification of</i>	312	<i>Voluntary Remainders in Marriage</i>	
<i>Retention of Deed</i>	312	<i>Settlements</i>	313

WHERE the settlement or conveyance, whether by transfer of property or declaration of trust respecting it, is effectual, and not open to objection upon any of the grounds which have been adverted to, the grantor cannot, in general, avoid it, nor will the Court set it aside. *Bill v. Cureton*, 2 M. & K. 503; *Toker v. Toker*, 3 D., J. & S. 487; *Shafto v. Adams*, 4 Giff. 492. And it will not be revoked although the trustees of the property reconvey it to the grantor (*Ellison v. Ellison*, 6 Ves. 656), in which case they will be guilty of a breach of trust. *M'Donnell v. Hesilrige*, 16 Bea. 346. So the settlement will remain in force although the settled property may come back into the hands of the settlor. *Smith v. Lyne*, 2 Y. C. C. 345; *Gilbert v. Overton*, 2 H. & M. 110.

In *Forshaw v. Welsby* (30 Bea. 243), it was held that a voluntary settlement containing no power of revocation, made by a person in expectation of death, ought to be set aside at his instance, as it was not intended to be operative in the event of his recovery. Where there is no such power the argument is usually urged that the non-insertion is contrary to the intention of the settlor, particularly where the settlement is for the benefit of unborn or unascertained persons at some future time. See *Prideaux v. Lonsdale*, 1 D., J. & S. 433; *Coutts v. Ackworth*, L. R., 8 Eq. 558; *Wollaston v. Tribe*, L. R., 9 Eq. 44, ante, p. 309. A power of revocation is not, however, essential to the validity of a settlement. Each case must depend upon its own circumstances. *Phillips v. Mullings*, L. R., 7 Ch. 244. The absence of such a power, and the fact that the attention of the settlor was not called to that absence, do not make a voluntary settlement invalid, they are merely circumstances to be considered in deciding on the validity of a voluntary settlement. *Hall v. Hall*, L. R., 8 Ch. 430. In this case the trusts were for the benefit of the settlor's children, not merely for her next of kin. See *Henshall v. Fereday*, 8 W. N. 77; *Smith v. Iliffe*, L. R., 20 Eq. 666; *Hanley v. Pearson*, 13 Ch. 545; *Welman v. Welman*, 15 Ch. D. 570; *Henry v. Armstrong*, 18

Ch. D. 668; comp. *Elwes v. Elwes*, 3 D. & J. 667; *Prideaux v. Lonsdale*, 1 D., J. & S. 433.

A voluntary conveyance of land for the purpose of giving the grantee a qualification for a particular office will not operate as an absolute conveyance to all intents, but only for the purpose for which it is made. *Childers v. Childers*, 1 D. & J. 482; see *Brackenbury v. Brackenbury*, 2 J. & W. 391.

The court will not rectify a voluntary settlement, at the instance of the grantor only. *Broun v. Kennedy*, 33 Bea. 133; see *Bentley v. Mackay*, 31 Bea. 143. But a volunteer under a settlement may have a mistake rectified in the declaration of trusts of property conveyed to a trustee. *Thompson v. Whitmore*, 1 J. & H. 268. But if there are trusts declared of personalty by the owner of it, by parol, and a deed is subsequently executed by him, inconsistent with the trusts, and contrary to his apprehension of it, the deed will be ordered to be given up and cancelled. *Lister v. Hodgson*, L. R., 4 Eq. 30. The court ordered rectification of a post-nuptial settlement on the ground of mistake upon the evidence of the plaintiff alone, where no further evidence can be obtained. *Hanley v. Pearson*, 13 Ch. D. 545. In such cases if the legal estate is outstanding a reconveyance is unnecessary. See *Smith v. Iliffe*, L. R., 20 Eq. 666. A settlement by a person prior to the ceremony of marriage with his deceased wife's sister will not be set aside. *Ayerst v. Jenkins*, L. R., 16 Eq. 275; comp. *Coulson v. Allison*, 2 D., F. & J. 525; and *Wootton v. Wootton*, cited 16 Eq. 283, 284. A son excluded from his father's voluntary settlement, on adducing evidence showing reasons for impeaching it on the ground of the father's insanity, will be allowed to take proceedings for doing so. *In re Gordon*, L. R., 10 Ch. 192. Even after the deaths of donor and donee under special circumstances a deed may be set aside. *Phillipson v. Kerry*, 32 Bea. 628.

The mere retention of the instrument of settlement or gift by the settlor is immaterial. *Doe v. Knight*, 5 B. & C. 671. Comp. *Cracknall v. Janson*, 11 Ch. D. 1. So its destruction and non-communication of the contents to the trustees or *cestui que trust* (*Fletcher v. Fletcher*, 4 Ha. 67; *Re Way*, 2 D., J. & S. 365); and if found cancelled among the papers of the grantor after his death, it will be enforced against his representatives, upon the presumption that it was improperly cancelled. *Sluysken v. Hunter*, 1 Mer. 40. Any attempt by the settlor to invalidate the deed by razing the seals from it, and procuring a re-transfer of the trust fund from the trustee, will be ineffectual. *Smith v. Lyne*, 2 Y. C. C. 345. So if deeds of appointment in favour of volunteers are found in the custody of the family solicitor, the onus is on the party disputing them to prove their invalidity. *Rowley v. Rowley*, Kay, 242.

An instrument vesting property in trustees for the benefit of the grantor for his life, and after his decease for the benefit of other persons, with a power of revocation, is valid as a deed, and is not testamentary. *Tompson v. Browne*, 3 M. & K. 32.

A settlement, complete and valid, having regard to the rules previ-

ously stated, is binding on the settlor or grantor; and on his real and personal representatives and devisees (*Jefferys v. Jefferys*, Cr. & Phil. 138; see *Hales v. Cox*, 32 Bea. 118; *Gilbert v. Overton*, 2 H. & M. 110); and persons claiming under them, though for value. *Lewis v. Rees*, 3 K. & J. 132. A person, who takes by title paramount to the settlement, who does no act to repudiate it, will in general be considered to have acquiesced in it. *Thompson v. Finch*, 22 Bea. 316. All who claim under the instrument or trust are entitled to the benefit of it; and a settlement in favour of unborn children is binding and irrevocable, unless a power of revocation be reserved. *Petre v. Espinasse*, 2 M. & K. 496; *Bill v. Cureton*, *ib.* 503. But if the property consist of real estate, it will be subject to the rules stated in Chap. II., as regards a subsequent conveyance to a purchaser for value. See *Re Cullin*, 14 Ir. Ch. Rep. 506. If an appointment be made under a general power in favour of a volunteer, the appointed fund will in general be assets for the creditors of the appointor (*post*, tit. "POWERS," Ch. 2); but a purchaser for value from such volunteer has a better equity than such creditors, and will be preferred to them. *George v. Milbank*, 9 Ves. 189; *Daubeny v. Cockburn*, 1 Mer. 626, 638. With respect to voluntary remainders in marriage settlements, where all the prior limitations founded on the marriage consideration have failed, see tit. "MARRIAGE SETTLEMENTS."

GUARDIAN AND WARD—PARENT AND CHILD.

CH. 1.—GUARDIAN AND WARD, p. 314.

CH. 2.—PARENT AND CHILD, p. 320.

CH. 3.—INFANTS WARDS OF COURT, p. 323.

CHAPTER I.

GUARDIAN AND WARD.

<i>How Guardian appointed</i> 314 <i>Testamentary Guardian</i>..... 314 <i>The Mother is natural Guardian</i>..... 315 <i>Appointed by Court</i>..... 315 <i>Nature of Relation</i> 315 <i>Survivorship of Office</i>..... 315 <i>Particular Religious Persuasion of Guardian</i> 316 <i>Custody and Education of Ward</i> ... 316 <i>Intention of Testator</i> 316 <i>Religious Instruction</i> 316 <i>Education and Custody of</i> 316 <i>Wishes of Testator</i> 316 <i>Removal from Custody of Guardian</i>..... 317 <i>Orders of Divorce Court</i>..... 317	<i>Custody, &c., of Ward—continued.</i> <i>Guardian subject to Provisions of 6 Anne, c. 18</i>..... 317 <i>Management of Property</i> 317 <i>Lands—Personalty</i> 317 <i>Allowances to Guardian</i>..... 317 <i>Conveyancing Act, 1881</i> 318, 319 <i>Dealings and Transactions between.</i> <i>Guardian a Trustee</i>..... 319 <i>His accounts</i> 319 <i>Exercise of undue Influence</i> ... 320 <i>Discharge of Guardian</i> 320 <i>Continuance of Office — Not assignable</i> 320 <i>Marriage of Female Guardian.</i> 320 <i>Bankruptcy—Insolvency</i> 320
---	---

THE relation that exists between guardian and ward, so far as concerns the care and custody of the children, and management of their property, so much resembles that between parent and child, that both have been considered together in one title.

How Guardian appointed.] The father may appoint a guardian to his children by will (12 Car. 2, c. 24, s. 8), but the mother cannot. *Villareal v. Mellish*, 2 Sw. 536. But a father even cannot appoint a guardian to his illegitimate children; but, where he does so, the guardianship will usually be confirmed by the court without a reference. *Chatteris v. Young*, 1 J. & W. 106; see *Wallis v. Campbell*, 13 Ves. 517. So an appointment by the mother, though

not binding, will, in general, influence the choice of the court. *Re Kaye*, L. R. 1 Ch. 387. As to the considerations which in general influence the court in appointing guardians, see *ib.* If the father makes no appointment, the mother, if living, is the natural guardian of her infant children. *Reg. v. Clarke*, 7 E. & B. 186. She is also entitled to the guardianship of her illegitimate children. *Re Darcy*, 11 Ir. C. L. R. 298. When a person is appointed trustee and guardian, the revocation of his appointment as trustee is no revocation of his appointment as guardian. *Re Park*, 14 Sim. 89; see *Hare v. Hare*, 5 Bea. 629. The appointment need not be in express terms. A direction or request that a person shall have the care and management of the children is sufficient. *Miller v. Harris*, 14 Sim. 540. But when there is an express appointment of a guardian, and a recommendation as to the person to have the care of the children, though the court will give effect to the recommendation, it will not do so in such a way as to interfere with the general superintendence and control of the guardian. *Knott v. Cottee*, 2 Ph. 192. When infants have no guardians, they may after fourteen, or even before, it is said (Co. Litt. 87 b), under their hands and seals, appoint their own; and these are termed guardians by election. See Co. Litt. 88 b, n. 16. The authority in such cases is derived from the law, not the infant, and the guardians act in their own name. Bac. Ab. Guard. A. The object of such an appointment is chiefly that leases may be granted of the infants' lands. See 4 Bythewood's Conveyancing by Sweet, 226.

A guardian may be appointed by the court where there is no testamentary guardian, although there may be no suit depending (*Ex parte Birchell*, 3 Atk. 813; *Ex parte Myerscough*, 1 J. & W. 151), notwithstanding the infant may have appointed one by deed (*Curtis v. Rippon*, 4 Madd. 462; *Coham v. Coham*, 13 Sim. 639), and a guardian must in all cases be appointed where a suit is depending affecting the property or interests of the infant, who then becomes a ward of the court, though the father or testamentary guardian may be living. *Butler v. Freeman*, Amb. 303; *Stuart v. Ms. Bute*, 9 H. L. C. 440. A guardian duly appointed stands in the same position with regard to his ward as a parent does with regard to his child. *Nugent v. Vetzera*, L. R. 2 Eq. 712; *Savini v. Lonsada*, 5 W. N. 60; see *Butler v. Freeman*, Amb. 303.

The court may appoint guardians notwithstanding the infant is domiciled in Scotland and his property is there. *Johnstone v. Beattie*, 10 Cl. & F. 42. But where the infant is a ward of court a person to be appointed must be resident within the jurisdiction. *Logan v. Fairlee*, Jac. 193. On an appointment by the father of two or more guardians the office devolves upon the survivors or survivor, without any express direction to that effect (*Eyre v. Ly. Shaftesbury*, 2 P. W. 103); but otherwise on an appointment by the court. *Bradshaw v. Bradshaw*, 1 Russ. 528; *Hall v. Jones*, 2 Sim. 41. The mother is the natural guardian of her children in the absence of any appointed by the father, and she is not rendered incompetent to be their guar-

dian merely by reason of her subsequent marriage. *Corbet v. Tottenham*, 1 Ba. & Be. 59. But the practice is, in the event of her subsequent marriage, to direct a reference, under which she may be re-appointed if it is for the benefit of the infant. See *Anon*, 8 Sim. 346; *Re Gornall*, 1 Bea. 347. A married woman will not usually be appointed a sole guardian. *Re Kaye*, L. R. 1 Ch. 387. The particular form of religion professed by a person does not disqualify him from being appointed guardian. Thus a person is not disqualified because he is not a member of the Church of England. *Talbot v. E. Shrewsbury*, 4 M. & C. 672. An ante-nuptial agreement that the children shall be brought up in a different religion from that of the father is not binding at law or in equity; but such an agreement will have weight with the court in considering whether the father has abandoned his right to educate his children in his own religion. *Andrews v. Salt*, L. R. 8 Ch. 622; see *Hawksworth v. Hawksworth*, L. R. 6 Ch. 539, *Re Clarke*, 21 Ch. D. 817.

Custody and Education of Ward.] “In questions relating to the custody and education of infants the Rules of Equity shall prevail.” Judicature Act, 36 & 37 Vict. c. 66, s. 25 (10). Where the intention of a testator can be clearly collected from his will regarding the education and religious instruction of his children, parol evidence *contra* will not be admitted. *Storke v. Storke*, 3 P. W. 51. If he has left no instructions upon the subject, it will be presumed that his intention was that they should be brought up in his own religion. *Re Newbery*, L. R. 1 Ch. 263. *Hawksworth v. Hawksworth*, L. R. 6 Ch. 539; *Montagu v. Festing*, 28 Ch. D. 82; see *Stourton v. Stourton*, 8 D. M. & G. 760. The circumstance that it will be for the pecuniary benefit of a child to be educated in one faith rather than another will not induce the court to interfere with his religious education. *Talbot v. E. Shrewsbury*, 4 M. & C. 672. And the court will not take a child of tender years from the custody of its mother on the ground that the mother’s religion differs from that of the deceased father, and that such change of custody is requisite to the training of the child in the father’s religion. *Austin v. Austin*, 4 D. J. & S. 716. If the husband has, in his lifetime, allowed his wife, being of a different religious persuasion from his own, to have the religious education of his children, the court will not, it seems, give effect to the directions in his will that the children shall be brought up in his own faith. *Hill v. Hill*, 8 Jur., N. S. 609. In such cases the wishes of the children, if of an age to form an opinion, will weigh with the court. See *Witty v. Marshall*, 1 Y. C. C. 68; *Stourton v. Stourton*, 8 D., M. & G. 760. The guardian is the proper judge how the ward shall be educated (*Hall v. Hall*, 3 Atk. 721), and the proper person to have the custody of him. A person, who has been duly appointed by the will of a father to be guardian of his child, stands in loco parentis, and may, in order to obtain possession of his ward, claim a writ of habeas corpus, if he be a fit person and the child too young to choose for itself. Where, however, the validity of the testamentary appointment

is disputed, the court will direct an issue to be tried by a jury in order to establish the same. *In re Andrews*, L. R. 8 Q. B. 153. The mother of an illegitimate infant has a natural right to its custody, which will be regarded by the court. *The Queen v. Nash*, *In re Carey*, an infant, 10 Q. B. D. 454. But, if necessary, the court will remove him from the custody of his guardian (*Tombes v. Elers*, Dick. 88; see *D. of Beaufort v. Berty*, 1 P. W. 704); and if the ward has a mother living, will permit her to have the care of him, or to have access to him (*Ex parte E. Ilchester*, 7 Ves. 381; see *Wright v. Naylor*, 5 Madd. 77; *Talbot v. E. Shrewsbury*, 4 M. & C. 683), although the child is illegitimate. *Courtois v. Vincent*, Jac. 268; see *Re Darcy*, 11 Ir. C. L. R. 298. If the testator has expressed a desire that, in certain events, the testamentary guardian should place the children under the care of a particular person, the court will in general give effect to his wishes. *Knott v. Cottee*, 2 Ph. 192. But the court exercises a discretionary power according to the circumstances of each particular case. See *Hartley v. Smith*, 9 Jur., N. S. 97. It may be mentioned that, although the Chancery Division has power, in the administration of the trusts of the property of a person of unsound mind not so found, to give directions for his maintenance, it has no jurisdiction to appoint a guardian of his person. *In re Bligh*, 12 Ch. D. 364; see *Vane v. Vane* (2 Ch. D. 124), which was corrected in *Re Brandon's Trusts*, 13 Ch. D. 773.

The removal of a ward from the custody of the guardian appointed by the court is in its nature a criminal contempt. *Wellesley v. D. Beaufort*, 2 R. & My. 639. As to the custody of children under an order of the Divorce Court see *Chetwynd v. Chetwynd*, L. R., 1 P. & M. 39; *Mallinson v. Mallinson*, *ib.* 221; *March v. March*, *ib.* 437; *Barnes v. Barnes*, *ib.* 463. A guardian is subject to the provisions of the 6 Ann. c. 18, *ante*, p. 222.

Management of Property.] Where there is a testamentary guardian, by the 12 Car. 2, c. 24, he is to have the custody of the lands and personal estate of the infant until the infant attains his majority (s. 9). Where any person, whether a father or a stranger, enters upon the estate of an infant and continues the possession he will be treated as a guardian or bailiff for the infant. *Morgan v. Morgan*, 1 Atk. 489; *Dormer v. Fortescue*, 3 Atk. 124, 130; *Blomfield v. Eyre*, 8 Bea. 250; *Howard v. E. Shrewsbury*, L. R. 17 Eq. 378. See *Crowther v. Crowther*, 23 Bea. 305. A parent or guardian is, in a proper case, entitled, out of the rents of the ward's property, to a fair allowance for education and expenditure. *Wright v. Vanderplank*, 8 D. M. & G. 133.

The acts of the guardian, if beneficial to the ward, will, in general, be sanctioned by the court, though done without authority. *Milner v. Ld. Harewood*, 18 Ves. 273; see *Inwood v. Twyne*, Amb. 419. But the guardian must not commit waste, though beneficial, as by converting pasture into arable land (*Clark v. Thorp*, 2 Ves. sen. 232),

or by cutting timber on an estate to which his ward is only contingently entitled. *Knight v. Duplessis*, 2 Ves. sen. 362.

The Conveyancing Act, 1881.] By this act, 44 & 45 Vic. c. 41, "Where a person in his own right seised of or entitled to land for an estate in fee simple, or for any leasehold interest at a rent, is an infant, the land shall be deemed to be a settled estate within the Settled Estates Act, 1877," s. 41.

By s. 42.—(1.) "In the case of an infant, and being a woman who is also unmarried, the trustees appointed by the settlement, if any, if none, then the persons, if any, who are for the time being under the settlement trustees with power of sale of the settled land, or of part thereof, or with power of consent to or approval of the exercise of such a power of sale, or if none, then any persons appointed as trustees for this purpose by the Court, on the application of a guardian or next friend of the infant, may enter into and continue in possession of the land; and in every such case the subsequent provisions of this section shall apply.

(2.) "The trustees shall manage the land, with power to fell timber or cut underwood for sale, repairs, or otherwise, and to erect, pull down, rebuild, and repair houses and other buildings, and to continue the working of mines which have usually been worked, and to drain or otherwise improve the land, and to insure against loss by fire, and to make allowances to and arrangements with tenants and others, and to determine tenancies, and to accept surrenders of leases and tenancies, and generally to deal with the land in a proper and due course of management; but so that, where the infant is impeachable for waste, the trustees shall not commit waste, and shall cut timber on the same terms only, and subject to the same restrictions on and subject to which the infant could, if of full age, cut the same.

(3.) "The trustees may from time to time, out of the income of the land, including the produce of the sale of timber and underwood, pay the expenses incurred in the management, or in the exercise of any power conferred by this section, or otherwise in relation to the land, and all outgoings not payable by any tenant or other person, and shall keep down any annual sum, and the interest of any principal sum, charged on the land.

(4.) "The trustees may apply at discretion any income which, in the exercise of such discretion, they deem proper, according to the infant's age, for his or her maintenance, education, or benefit, or pay thereout any money to the infant's parent or guardian, to be applied for the same purposes.

(5.) "The trustees shall lay out the residue of the income of the land in investment on securities on which they are by the settlement, if any, or by law, authorised to invest trust money, with power to vary investments; and shall accumulate the income of the investments so made in the way of compound interest, by from time to time similarly investing such income and the resulting income of investments; and shall stand possessed of the accumulated fund arising

from income of the land and from investments of income on the trusts following (namely):

- (i.) If the infant attains the age of twenty-one years, then in trust for the infant;
- (ii.) If the infant is a woman and marries while an infant, then in trust for her separate use, independently of her husband, and so that her receipt after she marries, and though still an infant, shall be a good discharge; but
- (iii.) If the infant dies while an infant, and being a woman without having been married, then, where the infant was, under a settlement, tenant for life, or by purchase tenant in tail or tail male or tail female, on the trusts, if any, declared of the accumulated fund by that settlement; but where no such trusts are declared, or the infant has taken the land from which the accumulated fund is derived by descent, and not by purchase, or the infant is tenant for an estate in fee simple, absolute or determinable, then in trust for the infant's personal representatives, as part of the infant's personal estate;

but the accumulations, or any part thereof, may at any time be applied as if the same were income arising in the then current year.

(6.) "Where the infant's estate or interest is in an undivided share of land, the powers of this section relative to the land may be exercised jointly with persons entitled to possession of, or having power to act in relation to, the other undivided share or shares.

(7.) "This section applies only if and as far as a contrary intention is not expressed in the instrument under which the interest of the infant arises, and shall have effect subject to the terms of that instrument and to the provisions therein contained.

(8.) "This section applies only where that instrument comes into operation after the commencement of this Act." (1 Jan., 1882).

Dealings and Transactions between.] A guardian is a trustee; the Statute of Limitations, therefore, is no bar to a suit relating to his accounts. *Mathew v. Brise*, 14 Bea. 341. But he is not in general bound to account specifically for an allowance for maintenance unless in a case of gross abuse. *Re Oldfield*, 2 Moll. 294. See *Wainford v. Heyl*, L. R. 20 Eq. 321. And where there are two guardians who are trustees, and the income of the property has been paid to one of them for the maintenance and education of the ward, the other will not be discharged by the mere evidence of payment to his co-guardian, but if the ward has been properly maintained and educated, the sum proper for that purpose will be allowed, and *details* of the expenditure need not be given. *In re Evans*, 26 Ch. D. 58. If he expend more than is allowed, a reference as to such extra expenditure will not be directed by the court unless a special case be made. *Rainsford v. Freeman*, 1 Cox, 417. Where a fund was by will given to trustees for infants, and the trustees were desired to pay the income to the mother to be by her applied for their benefit at her discretion.

It was held that the court had power, where the mother had not exercised a sound discretion, to order the income to be paid to the father for the maintenance of the infants. *In re Roper's Trusts*, 11 Ch. D. 272. A guardian who continues to manage his ward's property at his request, after he has attained his majority, must account upon the same footing as if the transactions were during the ward's minority. *Mellish v. Mellish*, 1 S. & S. 138. As to transactions in which undue influence has been exercised by a guardian, see tit. "FRAUDULENT AND VOLUNTARY CONVEYANCES."

Discharge of Guardian.] The office of guardian continues, in general, until the ward attains the age of twenty-one years; and the marriage of the ward if a male under that age, will not put an end to the guardianship (*Roach v. Garvan*, 1 Ves. sen. 160); the marriage of a female ward, however, will, it is said, do so (*Mendes v. Mendes*, *ib.* 91, but *Roach v. Garvan*, *sup.*, is *contra*). A guardian will not be appointed after the marriage (*Roach v. Garvan*, *ib.*); and the office cannot be assigned. *Villareal v. Mellish*, 2 Sw. 533.

The Court of Chancery will interpose if the conduct of the guardian be such as to give rise to suspicion (*Beaufort v. Berty*, 1 P. W. 703), or on proof of his misbehaviour. *Dillon v. Ly. Mountcashell*, 4 B. P. C. 306. The court will sometimes even, though rarely, remove a testamentary guardian. *Roach v. Garvan*, 1 Ves. sen. 160. If the guardian be in insolvent circumstances, or a bankrupt, the court may appoint one in his place. *Heysham v. Heysham*, 1 Cox, 179; *Smith v. Bate*, Dick. 631; see *Stephens v. James*, 1 M. & K. 627. But a testamentary guardian will not be removed merely because he is resident abroad (*Re Lewis*, 2 Moll. 485), though in a proper case the court will give directions as to the education of the ward (*Ingham v. Bickerdike*, 6 Mad. 275), and will make orders regulating the conduct of the guardian. *Roach v. Garvan*, 1 Ves. sen. 160.

CHAPTER II.

PARENT AND CHILD.

<i>General Jurisdiction of the Court</i> .	320	<i>General Rights and Duties of Father</i>	322
<i>Power to appoint Guardian, though Parent living</i>	321	<i>The Father the natural Guardian</i>	322
<i>When Children may be removed from the Parent's Custody</i> ...	321	<i>Cannot usually free himself from his Duties</i>	323
<i>Access by Mother</i>	322	<i>Allowing Children to be brought up by Stranger</i>	323
<i>Separation Deeds</i>	322		

General Jurisdiction of the Court.] The Court of Chancery exercises a general jurisdiction in the case of infants, whether possessed

of property or not (*Re Spence*, 2 Ph. 247; comp. *Wellesley v. D. of Beaufort*, 2 Russ. 1); and even where the parents are living will sometimes appoint a person to act as guardian. Thus if the father be in insolvent circumstances, being also in other respects, from character and habits, an unfit person to have the custody of his children, they will be committed to the care of another. *Creuze v. Hunter*, 2 Cox, 242; *Ex parte Warner*, 4 B. C. C. 101; see *Lyons v. Blenkin*, Jac. 245. But a person will not in every case be removed from the guardianship of his own children, though unfit to be appointed guardian of the children of another (*Re Fynn*, 2 De G. & Sm. 457, 479); and the poverty of the father will not justify the removal of his children from his custody, nor will mere harshness of temper or severity, not being injurious to their health. *Curtis v. Curtis*, 5 Jur., N. S. 1147. But if the father be guilty of gross ill-treatment of his children (*Whitfield v. Hales*, 12 Ves. 492), or from immorality of conduct (*Wellesley v. D. of Beaufort*, 2 Russ. 1; *Anon.*, 2 Sim., N. S. 54; *Swift v. Swift*, 34 Bea. 266, aff. 11 Jur., N. S. 458), or from his opinions on religious subjects (*Shelley v. Westbrook*, Jac. 266), is, in the judgment of the court, an unfit person to have the charge of his children, they will be taken from him, though he will be allowed to have reasonable access to them. See *De Manneville v. De Manneville*, 10 Ves. 52; *Thomas v. Roberts*, 3 De G. & Sm. 758; comp. *Curtis v. Curtis*, *sup.* The rule is the same where the father endeavours to remove his child, being a ward of court, out of its jurisdiction. *Rochford v. Hackman*, Kay, 308; acc. *Agar-Ellis v. Lascelles*, 24 Ch. D. 317. But it has been held, that although the father may be living in adultery, he will be allowed to have the custody even of his daughters, unless he brings them into contact with the female with whom he is living. *Ball v. Ball*, 2 Sim. 35. A father has a legal right to control and direct the education and bringing up of his children until they attain the age of twenty-one years, even although they are wards of court, and the court will not interfere with him in the exercise of his paternal authority, except (1) where by his gross moral turpitude he forfeits his rights, or (2) where he has by his conduct abdicated his paternal authority, or (3) where he seeks to remove his children, being wards of court, out of the jurisdiction without the consent of the court. *In re Agar-Ellis*, 24 Ch. D. 317. Since the passing of the Judicature Act, 1873, the courts of common law and equity have concurrent jurisdiction with regard to the care and custody of infants; but, in the exercise of that jurisdiction, the rules of equity are to prevail. To deprive a father of the guardianship of his children, the court must be satisfied that he has so conducted himself as to render it not merely better for the children but essential to their safety or welfare in some very important respect that his rights should be interfered with. Mere incontinence, or habits of intemperance, will not of itself justify the interference of the court. *In re Goldsworthy*, 2 Q. B. D. 75.

Formerly by the 2 & 3 Vict. c. 54, where infants were in the sole custody of the father, or his agent or guardian after his death, the

court could order the mother (not being guilty of adultery, s. 4) to have access to such infants, and if they are under seven years of age, to be delivered to her until they attained that age (s. 1). See *Warde v. Warde*, 2 Ph. 786. The court refused to make an order where the character of the mother was such as, in the opinion of the court, to justify the refusal. *Re Winscom*, 2 H. & M. 540; see *Re Taylor*, 11 Sim. 178. To give the court jurisdiction, it was not necessary that the wife should have obtained or be entitled to a divorce. *Ex parte Bartlett*, 2 Coll. 661. The 2 & 3 Vict. c. 54, is repealed by the 36 Vict. c. 12 (24th April, 1873), which enacts, that the Court of Chancery may order that the mother may have access to and the custody or control of an infant *not exceeding sixteen*, and that such custody or control shall be subject to the regulations of the court as regards access by the father or guardian of the infant and otherwise (s. 1).

Agreements in separation deeds are not to be void merely because they provide for the mother having the custody and control of the infants. But the court is not to give effect to such agreements if not for the benefit of the infants (s. 2). Where a husband having abandoned his wife and kidnapped the only child of the marriage, a boy three years of age, and being co-respondent in a pending divorce action charging him with adultery, the court, upon the wife's petition under this act, ordered immediate delivery of the child to her, with liberty of access by the father and paternal grand-parents, and liberty to apply as to the maintenance and education of the child on his attaining seven years of age. *In re Taylor*, 4 Ch. D. 157. In *Re Besant*, 11 Ch. D. 508, by a covenant in a separation deed executed after the passing of the act, a father agreed that his infant daughter should remain in her mother's custody during eleven months in each year. The mother held and promulgated atheistical opinions, and refused to allow the child to receive any religious instruction. She also published and circulated an obscene book. The child was made a ward of court, being then about eight years old: it was held that to bring up the child in the religion of her father was a duty which the court owed to its ward, and was unaffected by the covenant in the separation deed; and also that the refusal of religious instruction to the child and the publication of the obscene book were in themselves sufficient grounds for removing her from the custody of the mother. In determining whether the custody of an infant child ought to be given to or retained by the mother, the court will take into consideration three matters—the paternal right, the marital duty, and the interest of the child. *Re Elderton*, 25 Ch. D. 220; see *In re Agar-Ellis*, 24 Ch. D. 317.

General Rights and Duties of the Father.] The father is the natural guardian of his children during their minority (*Stileman v. Ashdown*, 2 Atk. 480; see *Wellesley v. D. of Beaufort*, 2 Russ. 21), and if they are not in his custody he has a right to have them restored to it in the case of boys who are under fourteen, in the case of girls who are under sixteen (*Reg. v. Howes*, 3 E. & E. 332; *Mallinson v.*

Mallinson, L. R., 1 Pr. & M. 221). Where the children, being minors, are in his custody, the court will not interfere with his control up to their age of twenty-one years. *Re Agar-Ellis*, *sup.* This is out of considerations of public policy; and he cannot divest himself of his duties by contracting to give up their custody, even to his wife; and such contracts will not in general be enforced, though he has been guilty of adultery, and cruelty to his wife (*Hope v. Hope*, 8 D., M. & G. 731; *Vansittart v. Vansittart*, 2 D. & J. 249; see *Walrond v. Walrond*, Johns. 18), unless in the cases mentioned *ante*, p. 321.

It has been held, that a father who, in consideration of benefits from a stranger, allows his children to be brought up and educated by him, will afterwards be prevented from setting up his parental rights, to the detriment of his children, in order to resume the custody of them. *Potts v. Norton*, 2 P. W. 110 n. (1); *Blake v. Leigh*, Amb. 306; *Powel v. Cleaver*, 2 B. C. C. 499; *Lyons v. Blenkin*, Jac. 245; *Colston v. Morris*, *ib.* 257.

An express agreement by the husband before the marriage that the children shall be brought up in his wife's religious faith and not his own is not binding upon him. *Re Browne*, 2 Ir. Ch. Rep. 160; *In re Meades*, Ir. L. R., 5 Eq. 98; *Andrews v. Salt*, L. R., 8 Ch. 622; *In re Agar-Ellis*, *Agar-Ellis v. Lascelles*, 10 Ch. D. 49.

CHAPTER III.

INFANTS WARDS OF COURT.

<i>How Infants constituted Wards of Court</i>	323	<i>Marriage without Consent, a Contempt of Court</i>	325
<i>In respect of Property</i>	323	<i>Invalid Marriage</i>	325
<i>Payment of Money into Court</i> .	324	<i>Valid Marriage</i>	325
<i>Removing Ward out of Jurisdiction</i>	324	<i>Court retains Property until Settlement made</i>	326
<i>When Ward allowed to reside Abroad</i>	324	<i>Husband guilty of Contempt wholly excluded</i>	326
<i>Subject to the Regulations of the Court</i>	324	<i>Where Contempt not wilful</i> ...	326
<i>Marriage of Ward—Consent of Court</i>	324	<i>Ward being a Male, Wife not excluded</i>	326
<i>Though Parents living</i>	324	<i>Husband discharged on executing Settlement</i>	326
<i>Improper Marriage</i>	324	<i>Ward attaining Majority</i>	326
<i>Settlement directed</i>	325	<i>Husband cannot defeat Settlement approved by Court</i>	326
<i>What settled on her</i>	325	<i>Settlement approved by Court not executed</i>	327
<i>Court cannot bind Infant except under 18 & 19 Vict. c. 43</i>	325	<i>Not reformed to prejudice of Incumbrancers</i>	327

How constituted Wards.] Although the court has a general jurisdiction over infants, whether possessed of property or not (*ante*, p. 320), an infant is made a ward of court in respect of property, and a contingent right to property is sufficient. *Russell v. Nicholls*, 16 L. J., N. S.,

Ch. 47. The payment into court of a legacy bequeathed to an infant will not make him a ward of court (*Re Hillary*, 2 Dr. & S. 461; see *Wilts, &c. R. Co., Ex parte Brewer*, 13 W. R. 959), but otherwise where there is a payment into court of money belonging to an infant, the interest of which is directed to be paid for his benefit. *Hodge's Settlement*, 3 K. & J. 213. The mere filing of a bill, the infant being a party, is in general sufficient to make him a ward of court. *Butler v. Freeman*, Amb. 301.

Removing Ward out of Jurisdiction.] It is a contempt of court to remove an infant ward of court out of its jurisdiction without consent (*Wellesley v. D. of Beaufort*, 2 R. & My. 639; *Rochford v. Hackman*, Kay, 308; *Harrison v. Goodall*, *ib.* 310; see *Burton v. E. of Darnley*, L. R., 8 Eq. 576 n.), and a solicitor is bound to give to the court any information which may lead to the discovery of the residence of the ward, though communicated to him by his client in the course of his professional employment. *Ramsbotham v. Senior*, *ib.* 575. In general the court will not give consent (see *De Manneville v. De Manneville*, 10 Ves. 52; *Stuart v. M. of Bute*, 9 H. L. C. 440), unless under special circumstances, as where the parent or guardian receives an appointment abroad (*Anon.*, Jac. 265 n.), and in such case an undertaking must be given to bring the ward back. *ib.*; see *Stephens v. James*, 1 M. & K. 627. But in *Elliott v. Lambert*, 28 Ch. D. 186, leave was given to take a ward out of the jurisdiction without a case of necessity being shown, the court having only to be satisfied that the step is for the benefit of the ward, and that there is sufficient security that future orders will be obeyed. A child, also, will be allowed to visit a parent resident abroad (*Biggs v. Terry*, 1 M. & C. 675; see *Lethem v. Hall*, 7 Sim. 141), or to reside abroad if the state of his health requires it (*Wyndham v. Ennismore*, 1 Ke. 467; *Campbell v. Mackay*, 2 M. & C. 31); but in cases of this description, where the residence is intended to be permanent, the court will lay down regulations as to the education, &c., of the child, which must be strictly complied with (*ib.*; see *Anon.*, Jac. 265 n.); and if a ward, being out of the jurisdiction, becomes involved in difficulties, it is the duty of the guardian to apply to the court for advice and assistance. *Kay v. Johnson*, 21 Bea. 538.

The court will never *compel* the removal of a ward out of the jurisdiction. *Dawson v. Jay*, 3 D., M & G. 764; see *Stuart v. M. of Bute*, 9 H. L. C. 440.

Marriage of Ward—Consent of Court.] Some of the principal matters relating to the jurisdiction of the Court of Chancery over its wards have already been noticed; the most important of all, that, viz. as to the marriage of the ward, remains to be considered. It is necessary to obtain the consent of the court to the marriage of infant wards, though they may have parents or guardians living. *Pearce v. Crutchfield*, 14 Ves. 206; *Wellesley v. D. of Beaufort*, 2 Russ. 29.

The court on being satisfied that an improper marriage of the ward

is in contemplation, either with the concurrence of the parents or guardians of the ward (*Tombes v. Elers*, Dick. 88; *Ld. Shipbrook v. Ld. Hinchinbrook*, *ib.* 547), or without such concurrence (*Ld. Raymond's Case*, Ca. t. Tal. 58), will make such orders for preventing the marriage as from the nature of the case may be requisite.

When a female ward marries with the consent of the court, a settlement is always required for the benefit of herself and her children. *Halsey v. Halsey*, 9 Ves. 471; see *Field v. Moore*, 7 D., M. & G. 691—710.

The children of a *future marriage* will, in general, be provided for. *Millet v. Rowse*, 7 Ves. 419; *Halsey v. Halsey*, 9 Ves. 471. As a rule, when the husband is not in a position to make a settlement, the court will require the whole of the wife's property to be settled on her and her children. *Like v. Beresford*, 3 Ves. 506; see *Pearce v. Crutchley*, 16 Ves. 48; *Rudge v. Winnall*, 11 Bea. 98. But the court has no power to bind an infant ward by a settlement made on the ward's marriage (*Field v. Moore*, 7 D., M. & G. 691, 709), except under the 18 & 19 Vict. c. 43 (*post*, tit. "MARRIAGE SETTLEMENTS"), though it may confirm a proper ante-nuptial settlement of personal property made on a female infant ward, if on attaining her majority she consents to it in court or under a commission, and the fund will be ordered to be transferred to the trustees of the settlement. *Leeds v. Barnardiston*, 4 Sim. 538; *Day v. Day*, 11 Bea. 35. But the confirmation of a settlement of her real estate must be by a duly acknowledged deed. See tit. "MARRIAGE SETTLEMENTS."

Marriage without Consent a Contempt of Court.] The mere fact that a marriage with a ward is solemnized without the court's consent is a contempt of court. If the marriage is invalid and the ward is a male, the practice of the court seems to be to direct proceedings to be instituted in the proper court for declaring the marriage void. *Warter v. Yorke*, 19 Ves. 451. If the ward is a female, a valid marriage will be ordered, all intercourse being in the meantime restrained until a settlement approved of by the court is executed. *Bathurst v. Murray*, 8 Ves. 74. See *Hodgens v. Hodgins*, 4 Cl. & F. 323, overruling on this point *Winch v. James*, 4 Ves. 386.

If the marriage of a ward takes place without the consent of the court, not only the person to whom the ward is married, but those who have assisted in bringing the marriage about are guilty of contempt (*More v. More*, 2 Atk. 158), and are liable to be committed; and it makes no difference as regards the question of contempt, whether the marriage was in fact valid or invalid (*Salles v. Savignon*, 6 Ves. 572; *Warter v. Yorke*, 19 Ves. 453), or whether the parties knew of the infant being a ward of court or not. *Herbert's Case*, 3 P. W. 116; *Nicholson v. Squire*, 16 Ves. 259; *Martin v. Foster*, 7 D., M. & G. 98.

Lapse of time is no bar to the exercise of the jurisdiction of the court to commit for contempt, though that and other circumstances, for instance, ignorance that the infant was a ward of court, will

naturally influence the court in awarding punishment. See *Ball v. Coutts*, 1 V. & B. 292, 302; *Cave v. Cave*, 15 Bea. 227.

The mere fact of marrying a female ward without consent being a contempt, the court will retain the wife's property until a satisfactory settlement of it is made. *Salles v. Savignon*, 6 Ves. 572; *Millet v. Rowe*, 7 Ves. 419; *Martin v. Foster*, 7 D., M. & G. 98; see the settlement approved of in that case, *ib.* p. 103, and that in *Birkett v. Hibbert*, 3 M. & K. 230. In *Dawson v. Thompson*, 12 L. T., N. S. 178, money was settled on an infant (who was about to contract an improper marriage), in order to make the infant a ward of court, a bill was then filed to administer the trusts of the settlement, and thereupon an injunction was granted to restrain the marriage. Where a wilful contempt has been committed the almost invariable modern practice has been to cause the settlement to be framed so as to exclude from it altogether all marital estate and interest. *Wade v. Hopkinson*, 19 Bea. 619; see *Kent v. Burgess*, 11 Sim. 361; *Re Walker*, L. & G. t. Sug. 325. But if the husband was ignorant of his wife being a ward, the court will not exclude him altogether from an interest in her property. In one case the court approved of a settlement under which the husband took a life interest after the wife's death in a moiety of her property, determinable on his marrying again, or on his bankruptcy or insolvency. *Richardson v. Merrifield*, 4 De G. & Sm. 161. But in the converse case, where the ward is a male, he cannot be compelled to execute a settlement on attaining his majority, by which his wife will be excluded from all interest in his property. *Re Murray*, 3 Dr. & War. 83. Generally, upon the marriage of a ward without leave of the court, when the husband has executed the settlement approved of by the court and paid the costs, he is discharged. *Field v. Brown*, 17 Bea. 146; see *Baseley v. Baseley*, *cit.* 4 Cl. & F. 378. The wife ought not to be prevented from exercising in favour of her husband the power of testamentary appointment in default of issue, and it is desirable not to appoint trustees with whom she is on unpleasant terms. *In re Sampson and Wall, Infants*, 25 Ch. D. 482. The wife being willing to execute the settlement, the court declined to decide whether she could be compelled to do so. *Ib.*

Where a female ward marries after she has attained her majority, the court will still retain a certain degree of control over the property remaining under its jurisdiction. *Long v. Long*, 2 S. & S. 119; *Austen v. Halsey*, *ib.* 123 n. And the husband will not be allowed to defeat the settlement which the court has approved of, where the marriage has been delayed until the majority of the lady, with the view of a fresh settlement being entered into. *Hobson v. Ferraby*, 2 Coll. 412; see *Martin v. Foster*, 7 D., M. & G. 98. It has even been held that the court will in some cases, if necessary, rectify a settlement prepared and executed after her majority, so that it may contain those provisions which the court would itself have directed to be inserted. *Money v. Money*, 3 Drew. 256. But this jurisdiction will be very cautiously exercised. In *White v. Herrick* (L. R., 4 Ch.

345), when a ward of court, entitled to a small fund to her separate use, married on the day after she became of age, the fund was ordered to be transferred to her, on her separate examination, and not settled. And see *Biddles v. Jackson*, 3 D. & J. 544; *Longbottom v. Pearce*, *ib.* 545, n. In *Leeds v. Barnardiston* (4 Sim. 538), a female ward married under twenty-one with her father's consent, but without the consent of the court. Prior to the marriage a settlement was made of her property, which consisted of personal estate in possession. On her attaining twenty-one, the court allowed the property to be transferred to the trustees of the settlement, the wife being examined separately and consenting. A settlement approved of by the court is binding, though not actually executed, if it has been treated as subsisting, and has been acted upon by several subsequent orders of the court. *Hodgens v. Hodgins*, 4 Cl. & Fin. 323; see *Re Hoare*, 4 Giff. 254.

A settlement will not be reformed to the prejudice of incumbrancers. Thus, where property was settled to the wife's separate use, but there was no clause against anticipation, it was held that the settlement could not be rectified as against the wife's mortgagees. *Blackie v. Clark*, 15 Bea. 595.

HUSBAND AND WIFE.

CH. 1.—PRELIMINARY, p. 329.

CH. 2.—OF REPRESENTATIONS FORMING AN INDUCEMENT TO THE MARRIAGE, p. 331.

CH. 3.—OF SETTLEMENTS OR CONVEYANCES IN FRAUD OF THE MARRIAGE, p. 333.

CH. 4.—EFFECT OF MARRIAGE ON THE CONTRACTS OF THE WIFE BEFORE AND DURING THE MARRIAGE, p. 335.

CH. 5.—OF THE INTEREST ACQUIRED ON THE MARRIAGE BY THE HUSBAND IN HIS WIFE'S PROPERTY, p. 337.

SEC. 1.—FREEHOLDS, p. 337.

SEC. 2.—COPYHOLDS, p. 341.

SEC. 3.—CHATTELS REAL IN POSSESSION BELONGING TO WIFE AT THE TIME OF OR DURING THE MARRIAGE, p. 343.

SEC. 4.—CHATTELS REAL, CONTINGENT, AND REVERSIONARY, p. 345.

SEC. 5.—SPECIFIC CHATTELS, p. 346.

SEC. 6.—CHOSSES IN ACTION IN POSSESSION, OR REDUCIBLE INTO POSSESSION, AT THE TIME OF OR DURING THE MARRIAGE, p. 347.

SEC. 7.—CHOSSES IN ACTION IN REVERSION, p. 353.

SEC. 8.—WIFE'S LIFE INTERESTS IN PERSONAL ESTATE, p. 355.

CH. 6.—THE ACTS OF 1870 (33 & 34 VICT. C. 93), AND 1874 (37 & 38 VICT. C. 50), p. 357.

CH. 7.—THE ACT OF 1882 (45 & 46 VICT. C. 75), p. 360.

CH. 8.—MORTGAGES OF AND PAYMENTS IN RESPECT OF WIFE'S PROPERTY, p. 365.

CH. 9.—OF THE WIFE'S INTEREST IN THE HUSBAND'S PROPERTY, p. 368.

SEC. 1.—DOWER AND FREEBENCH, p. 368.

SEC. 2.—PARAPHERNALIA AND PERSONAL ESTATE OF THE HUSBAND, p. 374.

CH. 10.—WIFE'S EQUITY TO A SETTLEMENT, p. 376.

CH. 11.—SEPARATE USE AND RESTRAINT ON ANTICIPATION, p. 386.

SEC. 1.—SEPARATE USE, p. 386.

SEC. 2.—RESTRAINT ON ANTICIPATION, p. 396.

CH. 12.—SEPARATION DEEDS, p. 400.

CH. 13.—PROTECTION ORDERS, JUDICIAL SEPARATION, DISSOLUTION OF MARRIAGE, p. 405.

CHAPTER I.

PRELIMINARY.

<i>Statutory Alterations</i>	329	<i>Clandestine Marriage of Ward</i>	330
<i>Valid Marriage pre-supposed</i>	329	<i>False Notices of Marriages</i>	330
<i>Marriage of Infants without Consent</i>	330	<i>Marriage Abroad</i>	330
		<i>No Settlement fore-supposed</i>	330

MOST important statutory alterations have been made during the last few years in the Law of Husband and Wife. For some time to come, however, the law existing prior to these alterations will have to be considered by the practitioner, as the several statutes only take effect from the time of their coming into operation. I propose in dealing with these enactments to state the previous law and decisions, referring to the alterations made by the statutes as affecting the different kinds of property mentioned, and to state the statutes themselves in a separate chapter. The reader will note the dates of the acts coming into operation, as the application of the law in most cases depends upon whether the case is governed by the decisions prior to the acts or by the acts, or one of them. In treating of the effect of marriage upon property a *valid* marriage is pre-supposed. The property of the parties will remain quite unaffected by the mere marriage ceremony unless it constitutes a valid marriage. In *Sturge v. Starr* (2 M. & K. 195), the marriage ceremony was performed between a man already married and a female who was entitled to a life interest in property. Afterwards they both joined in assigning her life interest to a purchaser. It was held that the assignment was valid, as, in point of fact, it was an assignment by a *feme sole*, and that the fraud practised upon her was no answer to a bill at the suit of the purchaser. And where property of the intended husband was settled in trust for himself *until the marriage*, followed by other trusts to take effect afterwards, and the marriage was invalid by reason of the consanguinity of the parties, it was held that the trust for the intended husband was alone operative. *Chapman v. Bradley*, 4 D. J. & S. 71; *Parson v. Brown*, 13 Ch. D. 202. Comp. *Ayerst v. Jenkins*, L. R. 16 Eq. 275.

There are a few cases in which marriage will not be attended by its

usual legal consequences as regards property. Thus, if the marriage takes place between persons who are under age, or one of whom is under age, without the proper consent of parents or guardians (if living) being obtained, on an information being filed by the attorney-general, the Court of Chancery may declare a forfeiture of the property which accrued by the marriage to the offending party. 4 Geo. 4, c. 76, s. 23. The 24th section avoids agreements, &c., made on such marriages. The property is to be secured and settled as directed by the court, which has no discretionary power to mitigate the penalty. *Att.-Gen. v. Mulla*, 4 Russ. 329; *Att.-Gen. v. Lucas*, 2 Ph. 753; see also *Att.-Gen. v. Severne*, 1 Coll. 313. Cases of marriage with a minor in fraud of the Marriage Act (4 Geo. 4, c. 76), must be distinguished from cases of clandestine marriage with a ward of the court. In *The Att.-Gen. v. Lucas* (2 Ph. 756), Lord Cottenham observed that in cases of marriage with a ward the discretion of the court was unfettered, whereas the act (4 Geo. 4, c. 76) certainly meant to punish the husband, and it was impossible not to see that the directions there given as to the settlement furnished the rule by which the court was to be regulated. See the settlement directed in this case, *ib.* 757. But in *Att.-Gen. v. Read* (L. R. 12 Eq. 38), Bacon, V.-C., stated that though he was bound to follow *Att.-Gen. v. Lucas*, he did so with the greatest reluctance, considering that decision to be contrary to the spirit of the act. The settlement approved of in *Att.-Gen. v. Read* gave the wife a general power of appointment in default of children, but not exclusive of the husband. See *Att.-Gen. v. Clements*, L. R. 12 Eq. 32. Again, if a marriage be solemnized under the Registration of Marriages Acts (6 & 7 Will. 4, c. 85; amended by 19 & 20 Vict. c. 119, s. 19) by means of any wilfully false declaration, notice or certificate, the like penalties will be incurred as in the case of a marriage contracted without proper consent, under the 4 Geo. 4, c. 76, s. 23. The same penalties will attach where a marriage is celebrated abroad under the 12 & 13 Vict. c. 68, by means of any false notice, oath, affirmation, or declaration (s. 15). These, however, are only exceptions to the general rule.

In this title, too, it is assumed that there is no settlement or existing trust affecting the property; for, if so, of course the effect of the marriage is to be taken in connection with such settlement or trust. Thus, to put a familiar case, if, prior to the marriage, property has been given or settled to the separate use of the wife, and the marriage takes place with the property still subject to the same restriction, the husband will be bound by it notwithstanding the marriage. *Tullett v. Armstrong*, *Scarborough v. Borman*, 1 Bea. 1; 4 M. & Cr. 377; see *Ashton v. M'Dougall*, 5 Bea. 56.

CHAPTER II.

OF REPRESENTATIONS FORMING AN INDUCEMENT TO THE MARRIAGE.

<i>Party making, bound by them</i> 331 <i>Express Representation</i> 331 <i>By Husband or Wife to each other</i> . 331 <i>By Infant</i> 331, 332 <i>Form of, immaterial</i> 332	<i>Covenant against Incumbrances, &c.</i> 332 <i>Representation or Promise</i> 332 <i>Acquiescence equivalent to Representation</i> 332 <i>Admission of adverse right</i> 333
---	--

IN *Erans v. Bicknell* (6 Ves. 182), Lord Eldon observed, that it was a very old head of equity, that if a representation were made by one person to another going to deal in a matter of interest upon the faith of that representation, the former should make it good if he knew it to be false. And such representations are equally binding where the contract is one of marriage, as in the case of other contracts. *De Manneville v. Crompton*, 1 V. & B. 356; *Hammersley v. De Biel*, 12 Cl. & F. 45; *Bold v. Hutchinson*, 20 Bea. 256—9; *Prole v. Soady*, 2 Giff. 1; *Alt v. Alt*, 4 Giff. 84; see the cases, *ante*, p. 95 *et seq.* In *Hammersley v. De Biel* (12 Cl. & F. 45), it was held, that in proposals of marriage, if the parent or his agent deliberately holds out inducements to the suitor to celebrate the marriage, and he consents, and celebrates it believing it was intended that he should have these benefits, a court of equity will give effect to the proposals. See also *Bold v. Hutchinson*, 20 Bea. 256, 259, as to the general principle. Thus, where on a treaty for marriage a person untruly represents a debt as not being due, he is bound by his representation, and cannot enforce payment of the debt. *Neville v. Wilkinson*, 1 B. C. C. 543. But whether, under such circumstances, the mere concealment (though wilful) of a debt, will be a bar to its being enforced, may be doubtful. *Scott v. Scott*, 1 Cox, 366; see *Cross v. Sprigg*, 6 Ha. 552; *Ex parte Carr*, 3 V. & B. 111; *Eastabrook v. Scott*, 3 Ves. 461. Upon the same principle, payment of a security, given for a debt pretended to be due to the husband, such security forming an inducement to the marriage, can be enforced. *Montefiori v. Montefiori*, 1 W. Blac. 363; *Pitcairn v. Ogbourne*, 2 Ves. sen. 375. So where a representation is made that a certain sum is engaged in trade, part of which it is agreed shall be settled on the wife, this will constitute a debt provable against the estate of the husband if he become bankrupt. *Ex parte Gardner*, 11 Ves. 40.

A representation made, during the marriage treaty, by either the intended husband or wife to the other will be equally binding as if made by some third person. *Ib.*; *England v. Downs*, 2 Bea. 528. A false representation, however, by an infant that he is of age will

not be binding on him if those to whom it is made know it is false (*Nelson v. Stocker*, 5 Jur. N. S. 751), but otherwise if they do not. See the judgment of Turner, L.J., *ib.* 753. It is necessary to show that the marriage took place on the faith of the representation. *Jameson v. Stein*, 21 Bea. 5; see *De Manneville v. Crompton*, 1 V. & B. 354; *Goldicutt v. Townsend*, 28 Bea. 445; see *Caton v. Caton*, L. R., 2 H. L. 127. It would seem not to be necessary that the representation should be made by a person knowing it to be untrue, it is sufficient if he makes it without knowing whether it be true or not. See the cases, *ante*, p. 95. But in *Merewether v. Shaw* (2 Cox, 134), Lord Thurlow observed that he knew of no case, either in law or equity, where a man making an honest representation, when called upon to give an account of the circumstances of another, had been made liable in this respect to answer what he had so represented. In *Ainslie v. Medlycott* (9 Ves. 13), there was a recital in a settlement that the intended wife was entitled to a certain sum, when in fact, from a fall in the funds, the amount was less; this was held not to amount to a binding representation, the statement being the result of a mere mistake. See *Evans v. Wyatt*, 31 Bea. 217. The representation may be in any form, for instance, in that of a covenant or the like. Thus, where a father, who had an interest in property, covenanted, on his son's marriage, that it was free from incumbrances, his covenant was held to postpone him to the parties taking under the settlement. *Gower v. Gower*, 1 Cox, 53. And where real estate, subject to a mortgage, was settled with remainder after life estates to the first and other sons of the settlor in tail, and he covenanted against incumbrances, the effect in equity of such a covenant, as between *the settlor and the parties beneficially interested* under the settlement, was held to be, to charge the mortgage debt on the other estates of the settlor; though of course this would not be to the prejudice of the rights of the mortgagee. *Hughes v. Williams*, 3 Mac. & G. 683.

The representation, if verbal, must not be of such a kind that it is in point of fact, or can be resolved into, a mere *promise*; for in such a case the promise, being in consideration of marriage, must be in writing by the Statute of Frauds. Nor must it be a representation of *intention*, but of some matter of *fact*. This was the principal point decided in the case of *Jordan v. Money* (15 Bea. 372; 2 D., M. & G. 318; and 5 H. L. C. 185), after much conflict of opinion between the highest judicial authorities. In this case the chief question was, whether a representation made on a marriage treaty that a particular bond should never be enforced against the intended husband, and that it had been abandoned, was binding on the party making it, and it was held that it was not, Lord St. Leonards, *diss.* See *Pulsford v. Richards*, 17 Bea. 87; *Hutton v. Rossiter*, 7 D., M. & G. 9; *Maddison v. Alderson*, L. R., 8 App. C. 467, 473. A person will be bound although he may make no actual express representation, if there be on his part a consent to or acquiescence in some act which can only be rendered effectual by means of his interest as a consenting or acquiescing party. These are strictly cases in which one party

acquiesces in his rights being affected or dealt with by another person. In *D. of Leeds v. Amherst* (2 Ph. 123), Lord Cottenham observed, that if a party having a right stood by and saw another dealing with property in a manner inconsistent with that right, and made no objection while the act was in progress, he could not afterwards complain. Thus, a person having an interest in an estate who stands by and on a marriage allows it to be settled or otherwise affected, cannot set up this interest against parties claiming by virtue of the marriage (*Hunsden v. Cheyney*, 2 Ver. 150; *Beverley v. Beverley*, *ib.* 133; *Scott v. Scott*, 1 Cox, 366); and where the father of the intended wife, having a claim or right to curtesy out of her estate, allowed the marriage to take place upon the footing of waiver of his right and acquiescence in her absolute right, it was held, that he could not afterwards allege that such acquiescence was occasioned by mistake. *Stone v. Godfrey*, 5 D., M. & G. 76.

CHAPTER III.

SETTLEMENTS OR CONVEYANCES IN FRAUD OF THE MARRIAGE.

<i>General Principle</i>	333	<i>Doctrine of the Court</i>	334
<i>Settlement before Treaty good</i>	333	<i>Exception to Rule</i>	334
<i>Communication to Husband</i>	334	<i>Assent of or Notice to Husband</i>	334
<i>Settlement after Treaty bad</i>	334	<i>Acquiescence by Husband</i>	335
<i>Unless for Value</i>	334	<i>Improper Settlement</i>	335

By marriage formerly the husband acquired a considerable interest in his wife's property when not settled. If she was in possession of this property at the commencement of his courtship, it was not unreasonably supposed to form some inducement to his proposal of marriage. There was, in effect, a sort of tacit representation that the husband would become entitled to it on the marriage, if not settled. See *Lance v. Norman*, 2 Rep. in Ch. 79; *Howard v. Hooker*, *ib.* 81.

In most of the following decisions the principle upon which they rest would not apply in many cases where the marriage took place after the Act of 1870 (*post*, Ch. 6), and scarcely perhaps in any when it took place after that of 1882 (*post*, Ch. 7). This principle being that but for the settlement the husband would take an interest in his wife's property. Since these acts the husband's rights are no longer the same as formerly. A very brief statement of the cases applicable to the previous state of the law, will, however, still be useful. A female was always at liberty prior to the commencement of any marriage treaty to settle her property, for this was not done in contemplation of a marriage following on the settlement and was not a

fraud on the marital right (*Cotton v. King*, 2 P. W. 358, 674; *Strathmore v. Bowes*, 2 B. C. C. 345; 1 Ves. jun. 22; *Ball v. Montgomery*, 2 Ves. jun. 193; *England v. Downs*, 2 Bea. 522); and unless a power of revocation was reserved, such settlements were in general irrevocable. *M'Donnell v. Hesilrige*, 16 Bea. 346; see *ante*, p. 311. In *Strathmore v. Bowes* (*sup.*), the disposition by the wife was during the marriage treaty with *one person*, which went off, and she afterwards married *another*, and the settlement was upheld. Nor was it necessary that it should be communicated to the intended husband unless made during his courtship and in contemplation of a marriage with him.

But a settlement or conveyance by the intended wife after the commencement of the treaty for marriage, which afterwards took place, was in general void so far as it was not in favour of a purchaser for value. See *Lance v. Norman*, 2 Rep. in Ch. 79; *Blithe's case*, Fr. Ch. 91; *Goddard v. Snow*, 1 Russ. 485. For if the disposition by the wife rested upon a *valuable consideration*, it could not be impeached, though concealed from the husband. See *Blanchet v. Foster*, 2 Ves. sen. 264; *Lewellin v. Cobbold*, 1 Sm. & G. 376.

That which appears to be the true rule on the subject has been thus stated by Mr. Roper (Law of Husband and Wife, vol. 2, p. 162, and see Mr. Jacob's note):—"Deception will be inferred if *after the commencement* of the treaty for the marriage the wife should attempt to make any disposition of her property without her intended husband's knowledge or concurrence." This rule was adopted in *Taylor v. Pugh* (1 Ha. 614), and see *Downes v. Jennings*, 32 Bea. 290; *Chambers v. Crabbe*, 34 Bea. 457; although it was questioned in *St. George v. Wake* (1 M. & K. 623), and to a certain extent departed from in *De Manneville v. Crompton* (1 V. & B. 354); as to which case, however, see *Taylor v. Pugh*, *sup.*; *Lewellin v. Cobbold*, 1 Sm. & G. 376. In *Taylor v. Pugh* (*sup.*), the court, while adopting the rule above stated, considered that it was not applicable where a female had been seduced by and was living *under the protection* of the person she afterwards married, and that under such circumstances she was justified in making a secret settlement upon herself. But a settlement by the wife, though in fraud of the marriage treaty, would not have been void at law, nor under the 27 Eliz. c. 4 (*ante*, p. 295), as the husband did not take as a purchaser. And after the husband's death, nothing having been done to set it aside in equity, it would probably have been valid in all respects. See *Doe v. Lewis*, 11 C. B. 1035. There could be no presumption of fraud where the husband assented to the disposition or settlement by the wife, or was cognizant of it. In *Hunt v. Matthews* (1 Ver. 408, see n. (1), ed. Raith.), the husband expressly assented to the settlement, and was held bound by it. So even if he were an infant. *Slocombe v. Glubb*, 2 B. C. C. 545; *Strathmore v. Bowes*, 1 Ves. jun. 28. And upon this principle the decision in *St. George v. Wake* (1 M. & K. 610) seems to rest. In that case the husband sought to set aside a settlement made by his wife before marriage, and did not by his bill allege ignorance of it. The court presumed that

he had notice of it, and therefore that he had no equity for relief. See *Ashton v. M'Dougall*, 5 Bea. 56; and *Wrigley v. Swainson*, 3 De G. & S. 458. But he must have been correctly informed as to the nature of the settlement, and it must have been understood by the lady herself. *Griggs v. Staplee*, 2 De G. & Sm. 572; *Prideaux v. Lonsdale*, 1 D., J. & S. 433. Acquiescence by the husband was also, in general, a bar to relief. *Loader v. Clarke*, 2 Mac. & G. 382. But if the settlement was an improper one, executed by the lady without due caution and in the absence of proper advice, it would have been set aside after her death at the instance of the husband, wholly irrespective of the question whether it was or was not in fraud of his marital right. *Prideaux v. Lonsdale*, 1 D., J. & S. 433.

CHAPTER IV.

EFFECT OF MARRIAGE ON THE CONTRACTS OF THE WIFE BEFORE AND DURING THE MARRIAGE.

<i>In general determines Contracts between themselves</i>	335	<i>Wife's liability—Prior debts</i>	335
<i>Prior Contracts of Wife with others</i>	335	<i>Acts of 1870 and 1871</i>	336
		<i>Her Contracts during Marriage</i> ...	336

WHERE the recent acts, *post*, Ch. 6 and 7, do not apply, marriage, as a general rule, extinguishes all prior obligations and contracts between husband and wife (Co. Lit. 264 b), and obligations of the husband vesting absolutely in the wife after the marriage (*Price v. Price*, 11 Ch. D. 163), unless made on the occasion of and in consideration of the marriage or the obligation is of a *continuing nature*, for instance, a covenant by the husband to pay his wife an annuity for her life. This is only *suspended* during the coverture, and is capable of being enforced by her for arrears accrued after his death. *Cage v. Acton*, 1 Ld. Raym. 522; *Milbourne v. Ewart*, 5 T. R. 381; *Fitzgerald v. Fitzgerald*, L. R., 2 P. C. 83; see *Bonfield v. Hassell*, 32 Bea. 217. And if the obligation or contract be entered into by the husband with his wife acting not in her own right, but as executrix or administratrix, it will only be suspended at law during the coverture. See Co. Litt. 351 b; *Richards v. Richards*, 2 B. & Ad. 452.

Formerly, by the marriage the husband became responsible for his wife's prior debts and contracts. The wife, however, was not discharged from them by reason of her marriage. During the coverture her separate estate, if she had any, was liable, and this liability was not affected by the bankruptcy of the husband, and his discharge, though

the debt was proved in the bankruptcy, but there were no assets available for payment of it. *Chubb v. Stretch*, L. R., 9 Eq. 555. After the coverture, if she survived, she again became responsible personally as she was prior to the marriage. If her husband was the survivor, her estate (if any, including her choses in action unrecovered at the time of her death) was liable to such debts. *Heard v. Stamford*, 3 P. W. 409; see *Norton v. Turvill*, 2 P. W. 144. On the other hand, the husband's liability for his wife's debts incurred prior to the marriage ceased with the coverture, unless he survived and administered to her estate, when he was liable to the extent of her assets. *Heard v. Stamford*, *sup.*; *Ld. Thomond v. Ld. Suffolk*, 1 P. W. 461. By the 33 & 34 Vict. c. 93, s. 12, the husband was not liable for his wife's ante-nuptial debts, but her separate property was where the marriage took place after the act. This section was repealed by the Amending Act of 1874, 37 & 38 Vict. c. 50 (30 July, 1874), which enacted that as regards marriages taking place after the latter act, they should be liable jointly for her ante-nuptial debts (s. 1). But he was held not to be liable for such debts after her death. *Bell v. Stocker*, 10 Q. B. D. 129. The remaining sections of the Act of 1874 provide to what extent and in respect of what assets the husband shall be liable where he and his wife are sued jointly. See *Fear v. Castle*, 8 Q. B. D. 380; *Williams v. Mercier*, 9 Q. B. D. 337. Both of these acts are now repealed by the Act of 1882, but are still applicable to cases arising under them while they were in force as to the wife's ante-nuptial debts under the last-mentioned act. See *post*, Ch. VII.

Questions as to the husband's liability for necessities, &c. supplied to his wife usually arise at law. See the cases collected, Ch. on Contracts, 11th ed. 162 *et seq.* It has been held, however, in equity, that a person who has advanced money to a married woman, deserted by her husband, for the purpose of her maintenance, and which has been actually so applied, is entitled in equity, though not at law, to recover such sums from the husband. *Deare v. Soutten*, L. R., 9 Eq. 151; see *Harris v. Lee*, 1 P. W. 482; *Jenner v. Morris*, 3 D., F. & J. 45, overruling *May v. Skey*, 16 Sim. 588. It has been mentioned that as a general rule a married woman cannot contract except in respect of her separate estate, *ante*, p. 68. As her capacity to hold separate estate is now considerably enlarged, so there is a corresponding increase in her power to enter into contracts. These matters will be considered hereafter. See *post*, Chaps. VI. and VII.

CHAPTER V.

OF THE INTEREST ACQUIRED ON THE MARRIAGE BY THE HUSBAND IN HIS WIFE'S PROPERTY.

SEC. 1.—*Freeholds.*

<i>Generally</i>	337	<i>Conveyance of</i>	339
<i>In Fee</i>	337	3 & 4 Will. 4, c. 74	339
<i>Husband's Interest</i>	337	<i>Husband's Consent</i>	339
<i>Acts of 1870 & 1882</i>	337	<i>Acknowledged Deed</i>	339
<i>Husband's Interest not affected</i> <i>by his Misconduct</i>	338	<i>Dispensing with Consent</i> ...	339, 340
<i>Tenancy by the Curtesy</i>	338	<i>Estates Tail</i>	340
<i>Nature of Estate</i>	338	<i>Husband's Interest</i>	340
<i>Separate Use</i>	338	<i>Barring Entail</i>	340
<i>Seisin</i>	338, 339	<i>Act of 1870</i>	341
<i>Issue capable of inheriting</i>	339	<i>Estates for Life</i>	341
		<i>Acts of 1870 and 1882</i>	341

Generally.] The interest acquired by the husband in the property belonging to the wife much depends upon the particular nature of it. In treating of each species of the wife's property in which the husband takes an interest, I have briefly referred to the changes made by the recent acts, reserving a more particular consideration of them for a separate chapter.

In Fee.] Formerly the husband acquired by the marriage a freehold interest during the coverture in his wife's estates in possession at the time of the marriage (see Co. Lit. 67 a, 351 a; and *Robertson v. Norris*, 11 Q. B. 916), and in such estates as during the marriage vested in her. But great alterations have been effected by the acts of 1870 (in force 9th August, 1870), s. 8, and 1882 (in force 1st January, 1883). By the former act the rents of property descending upon any woman married after the act as heiress of an intestate shall, subject to any settlement, belong to her for her separate use (s. 8): qu. if "rents" do not apply to *corpus*, as they are not limited to her for *life*. See *King v. Voss*, Ch. D. 13, 504. By the act of 1882 every woman marrying *after the commencement of the act* shall hold and dispose of as her separate property all real and personal property belonging to her at the time of, or acquired or devolving after her marriage (ss. 1, 2). Every woman married *before the act* shall hold and dispose of as her separate property all real and personal property, her title to which, vested or contingent, &c., shall accrue after the commencement of the act (s. 5), and see *post*, Chapters VI. & VII. Subject, however, to the operation

of these acts where they apply, the prior law is in force, and the husband will be entitled to an estate during the coverture. The husband and wife are seised in her right and not as joint tenants. *Polyblank v. Hawkins*, Doug. 329. But the husband alone may convey the estate or interest which is co-extensive with *the coverture*. *Robertson v. Norris*, *sup.*

It may perhaps not be unimportant to observe, as the point sometimes arises in practice, that whatever rights the husband acquires by law in his wife's property will not be affected even by his gross misconduct—for instance, adultery and desertion; further than this, that they give the wife certain rights which may be made available either in the Divorce Court or by means of protection orders, *and also*, that where the property is of such a nature that the wife, according to the practice of the court, is entitled to a settlement out of it, the conduct of the husband will be taken into consideration in estimating what the wife shall receive. See *Aubrey v. Brown*, 2 Jur., N. S. 879; and Chapter X.

Tenancy by the Curtesy.] On the birth of issue *capable of inheriting*, the husband will become entitled to an estate *for his life* in her freeholds of inheritance as tenant by the curtesy of England. Lit. s. 35; see *Voller v. Carter*, 4 E. & B. 173. He is tenant by the curtesy initiate on the birth of issue, which estate becomes consummate on the wife's death. Co. Lit. 30 a; *Jones v. Davies*, 7 H. & N. 507. This right extends to money agreed to be laid out in land (*Sweetapple v. Bindon*, 2 Ver. 536; *Cunningham v. Moody*, 1 Ves. sen. 176), and to the equitable inheritance of the wife (*Watts v. Ball*, 1 P. W. 108); and although she takes a *life interest* to her separate use, and the remainder in fee or in tail, he will be entitled. *Morgan v. Morgan*, 5 Madd. 408; *Follett v. Tyrer*, 14 Sim. 125; see *Roberts v. Dixwell*, 1 Atk. 607. But it has been held, that if the *whole interest* in the entire estate is vested in the wife for her *separate use*, the husband will not be tenant by the curtesy. *Hearle v. Greenbank*, 3 Atk. 716; *Moore v. Webster*, L. R., 3 Eq. 267. In *Appleton v. Rowley* (L. R., 8 Eq. 139), however, it was decided that curtesy attached in such a case, and the rule is now settled in accordance with this decision. *Cooper v. Macdonald*, 7 Ch. D. 288. Where a testator died in 1875, having by his will, dated in 1872, devised a freehold estate to his daughter in fee for her separate use, and the daughter died in 1874, in the lifetime of the testator, leaving an only child, who was her heiress at law, the daughter's husband was held entitled for his life to the property devised as tenant by the curtesy. *Eager v. Furnivall*, 17 Ch. D. 115. There is no *contingent right* to curtesy capable of passing to the husband's assignees before the wife becomes entitled to an estate of inheritance *in possession*. *Gibbins v. Eyden*, L. R., 7 Eq. 371. For the husband's right to attach, there must be actual seisin by the wife or possession of the lands or receipt, or right to the receipt, of the rents and profits (Co. Lit. 29 a, n. 3; *De Grey v. Richardson*, 3 Atk. 471); a momentary seisin, however, is sufficient (*Parker v. Carter*,

4 Ha. 400), and it will not affect the right although the issue die *before* the seisin of the wife. Co. Lit. 29 b. There can be no curtesy of an estate *pur autre vie* (*Stead v. Platt*, 18 Bea. 50): and the wife must be seised solely or as co-parcener or tenant in common, and not as joint tenant. Co. Lit. 183 a. But now the possession of one co-parcener or tenant in common is not the possession of another co-parcener or tenant in common (3 & 4 Will. 4, c. 27, s. 12), and cannot therefore confer the right to curtesy on the husband of the latter. There can be no curtesy of a remainder or reversion unless the particular estate be determined during the coverture (Co. Lit. 29 a); but this does not apply to the case of a mere subsisting lease or tenancy, which will not at all affect the right. See *De Grey v. Richardson*, 3 Atk. 469. The issue must be capable of inheriting. Therefore, where the estate is limited to the issue in tail male, the birth of a daughter does not confer the right. Co. Lit. 29 b. But the existence of issue of the wife by a former husband will not prevent the right of a second husband attaching, if the children of the second husband are capable of inheriting. Cr. Dig. tit. 5, s. 20, citing 8 Rep. 34 b (*Paine's case*). The issue must be born *alive*, but the child need not have been heard to cry. Co. Lit. 29 b; *Jones v. Ricketts*, 10 W. R. 576.

Conveyance of.] Subject to the rights which marriage and the birth of issue give to the husband in his wife's freehold estates in fee, the ultimate estate is in the wife, and, if undisposed of, will descend to her heirs. She cannot, however, alone dispose of this interest, except by deed or will under a *power*, or by virtue of an agreement with her husband before marriage (*Wright v. Englefield*, Amb. 468; *Rippon v. Dawding*, ib. 565; see *Field v. Moore*, 7 D., M. & G. 691, 703), which must be in writing and signed by the husband and wife. *Dye v. Dye*, 13 Q. B. D. 147. Any other disposition, without the concurrence of her husband (unless it is dispensed with), is inoperative. *Post*, p. 340. With his concurrence, however, she may convey her estate, when it is not separate estate by the operation of the acts of 1870 or 1882, by deed duly acknowledged under the 3 & 4 Will. 4, c. 74, the Fines and Recoveries Abolition Act. Before this act a married woman could have conveyed her interests in freehold estates only by fine or recovery. Now, a married woman, with her husband's concurrence, may dispose of lands and money subject to be invested in the purchase of lands, and of any estate therein; and to release and extinguish powers as a *feme sole* (*Re Durrant and Stonor*, 18 Ch. D. 106). The husband must concur in the deed, which must be acknowledged by her as directed by the act. The act does not extend to copyhold lands which she and her husband could convey by surrender into the hands of the lord (s. 77). See further as to the acknowledgment of deeds by married women, 45 & 46 Viet. c. 39, s. 7. As to a disposition by a married woman *tenant in tail*, see Act of Will. 4, s. 40, *ante*, p. 214. A husband who became bankrupt (under the act of 1861), and obtained his discharge, was held not to be precluded

from concurring. *Re Jakeman's Trusts*, 23 Ch. D. 344. See *Cooper v. Macdonald*, 7 Ch. D. 288. The powers of disposition given to a married woman by this act are not to interfere with any other powers, 3 & 4 Will. 4, c. 74 (s. 78). Every deed by a married woman, not executed by her as protector, is to be acknowledged by her before a judge, who shall, before receiving such acknowledgment, examine her apart from her husband (ss. 79, 80). If, by reason of residence beyond seas, or ill-health, or any other sufficient cause, a married woman shall be prevented from making the acknowledgment, commissioners may be appointed (s. 83). The Court of Common Pleas, in the case of a husband being lunatic, &c., may dispense with his concurrence, except where the Lord Chancellor or others entrusted with the care of lunatics, or the Court of Chancery, shall be the protector of a settlement in lieu of the husband (s. 91). If an order for the conveyance of a married woman's interest in property bequeathed to her has been obtained by fraud or the suppression of facts which ought to have been disclosed at the time, the court will set it aside; but a clear case must be made out. *Ex parte Alice Cockerell*, 4 C. P. D. 39. Where a husband and wife were living apart, and the wife being devisee under a will of real property on trust for sale, the husband refused to concur in a conveyance of such property upon a sale under the trusts of the will, unless he received a sum of money for doing so, the court granted an order dispensing with his concurrence. *Re Caine*, 10 Q. B. D. 284. If a married woman has, under this section, obtained an order of the Court of Common Pleas dispensing with her husband's concurrence, she may dispose of her real estate by a deed which is not acknowledged by her. *Goodchild v. Dougal*, 3 Ch. D. 650. The power of disposition by a married woman under this act now embraces contingent, executory and future interests, possibilities and rights of entry, immediate or future, and vested or contingent (8 & 9 Vict. c. 106), (s. 6); and estates may be disclaimed (s. 7).

The interest of a married woman in the proceeds of real estate directed to be sold can only be disposed of by an acknowledged deed. *Franks v. Bollans*, L. R., 3 Ch. 717.

These provisions apply where the property is not separate estate by virtue of the act of 1870 (s. 8) or 1882 (ss. 1, 2, and 5), *post*, Ch. VI., VII. Where the property of the wife is separate estate it may be disposed of as if she were a *feme sole* without the intervention of a trustee (act of 1882, s. 1, sub-s. (1)).

Estates Tail.] Subject to the act of 1882, *post*, Ch. VII., the husband takes the same interest in his wife's estates tail during the coverture as in her estates in fee (see *ante*, p. 337), and on the birth of issue capable of inheriting he becomes tenant by the curtesy, and will take an interest as *tenant by the curtesy* in her estates of inheritance, though limited to her separate use (*ante*, p. 338). As to her disposition of her estate tail (see *ante*, p. 214). The husband of a female tenant in tail, who pays off and takes an assignment of a charge on the entailed property, will have no claim against the remainderman for

interest on the charge accrued in the lifetime of his wife. *Amesbury v. Broun*, 1 Ves. sen. 477.

The act of 1870 does not, it would seem, apply to the case of a female tenant in tail, for an estate tail cannot properly be said to descend upon her as heiress or co-heiress of an *intestate*. *Post*, Chapter VI. This means, it is apprehended, such an estate as the person dying intestate could by will, had he made one, have disposed of, and he could not so have disposed of his estate tail, which devolves according to the instrument creating the entail.

Estates tail are within the act of 1882, ss. 2, 5 (*post*, Ch. VII.), but must be disposed of according to the provisions of the Fines and Recoveries Abolition Act, under the first part of s. 40 (*ante*, p. 197), as if she were a *feme sole*, and not under the latter part as a married woman.

Estates for Life.] The husband acquired by the marriage a freehold interest during the coverture in his wife's life estates, belonging to her at the time of the marriage, or devolving upon her afterwards. See Co. Lit. 67 a. And this will be so still, unless the case comes within one or the other of the acts presently noticed.

Under sec. 8 of the act of 1870 (*post*), any freehold estate descending upon a woman married after the passing of the act as heiress, &c., will belong to her as separate estate. This would apply to an estate *pur autre vie* coming to her as special occupant by descent. See *Reynolds v. Wright*, 2 D., F. & J. 590. But this seems to be the only case in which the act could apply to an estate for life, no other estate for life being capable of *descending*.

Under the act of 1882 (*post*) an estate for life of a woman married after the act, and such an estate if acquired after the act by a woman married before, would be hers as if she were sole. Secs. 2, 5, *post*, Ch. VII.

SEC. 2.—Copyhold Estates.

<i>Of Inheritance</i>	341	<i>Conveyance of</i>	342
<i>Husband and Wife are seised by</i>		<i>Legal Interests</i>	342
<i>entireties</i>	341	<i>Equitable Interests</i>	342
<i>Curtesy—Gavelkind Lands</i>	342	<i>Estates Tail—Barring</i>	342

Where the acts of 1870 and 1882 do not apply, the husband on the marriage becomes seised during the coverture with his wife and in her right, of her copyhold estates of inheritance vested in her at the time of, and formerly vested in her *during*, the marriage. But now estates devolving on the wife as heiress or co-heiress of an intestate are subject to the act of 1870, where that applies. They are also within the act of 1882, where that applies (ss. 2, 5, *ante*, p. 337, and Chapters VI. and VII., *post*). The husband and wife are seised by entireties. 2 Watk. Cop. 152. On his death in her lifetime the seisin remains in her. *Ib.* On her death in his lifetime he will not be entitled to

curtesy unless by special custom, which also regulates the extent of the right. *Ib.* 92. And under this custom he may be entitled, though there has been *no issue* of the marriage. *Ib.* 93. In gavelkind lands the curtesy consists of a *moiety*, although there is no issue, but ceases on his re-marriage. Bac. Abr. Gavelkind (A).

The husband and wife may convey her interest (*unless equitable*) in her copyholds without the formalities prescribed by the Fines and Recoveries Abolition Act (3 & 4 Will. 4, c. 74). That act does not apply to those legal estates in copyhold lands in fee, which the wife with her husband could before the act have conveyed by surrender. See s. 77, *ante*, p. 339. For the general custom of copyholds is, and was prior to the act, for the steward to examine the wife separately on a surrender of her *legal interests*. 1 Watk. Cop. 63. But surrenders were not as a rule considered applicable to the conveyance of the *equitable* estates of married women, although frequently used for this purpose. See *Cooper v. Greene*, 3 D., F. & J. 58. It was necessary, when fines and recoveries were abolished, and married women were enabled to dispose of their equitable interests in copyholds by surrender, to introduce provisions for their separate examination in such cases, and for rendering valid prior conveyances of equitable estates of married women by surrender. This has accordingly been effected by the following section of the Fines and Recoveries Abolition Act, providing that a married woman should be separately examined on the surrender of an equitable estate in copyholds, as if such estate were legal; and all *surrenders theretofore made* of lands similarly circumstanced, where the wife shall have been separately examined, were declared valid (s. 90). As to a conveyance *by deed* under s. 77, *ante*, p. 339.

Subject to the recent acts (*post*, Ch. VI, VII.), when they apply the wife is under the same disabilities as to the disposal of her copyholds without her husband's concurrence, or by will, as she is with respect to her freeholds, unless settled to her separate use or she has a power to dispose of them. See as to the conveyance of contingent interests, &c., 8 & 9 Vict. c. 106, ss. 6, 7 (*ante*, p. 340).

As regards estates tail belonging to the wife, the husband acquired, in general, the same interest as in her freehold estates tail. Where the estate is legal it must be barred either by a surrender (*ante*, p. 339), in which the husband must concur, where there is a custom under which the legal estate tail of a married woman can be effectually barred with her husband's consent; or by a surrender, in which he concurs, under the 40th section of the 3 & 4 Will. 4, c. 74 (*ante*, pp. 197, 198). Where the estate is equitable, the mode of barring it is, under this act, by deed or surrender in which the husband must concur. *Ib.* ss. 50, 53, 77, 90.

SEC. 3.—*Chattels Real in Possession at, or resting during the Marriage.*

<i>Belonging to Wife at the Time of</i>		<i>Survivorship to Wife</i>	344
<i>or coming during Marriage</i>	343	<i>Survivorship to Husband</i>	344
<i>Vest in Husband</i>	343	<i>Husband taking jure mariti or as</i>	
<i>Reduction into Possession</i>	343	<i>Administrator</i>	344
<i>Lease—Mortgage</i>	343	<i>Devolving during Marriage—</i>	
<i>Conveyance to Husband</i>	343	33 & 34 Vict. c. 93, <i>Act of 1870</i> ...	344
<i>Agreement to sell or lease</i>	344	<i>Act of 1882</i>	344
<i>Judgment—Forfeiture</i>	344	<i>Wife's Will</i>	344

The effect of marriage on the wife's chattels real, in possession, legal (Co. Lit. 351 a), or equitable (*Packer v. Wyndham*, Pr. Ch. 412, 418; *Turner's case*, 1 Ver. 7; *Pitt v. Hunt*, *ib.* 18), belonging to her *at the time of*, or coming to her *during the marriage*, where the acts of 1870 and 1882 do not apply (see *post*, Chapters VI. and VII.), is to vest them in her husband, subject to the wife's equity to a settlement where such equity exists. *Post*, Chapter IX. It seems, indeed, to have been held at one time, in one or two early cases (*Turner's case*, 1 Ver. 7; see 4 M. & C. 394), that a term conveyed to the wife's *separate use* could be disposed of by the husband unless he assented or was a party to the trust. This was probably a case of separate use, as also *Pitt v. Hunt* (*ib.* 18), and *Tudor v. Samyne* (2 Ver. 270), which, as reported (but see 4 M. & C. 389, n. (c)), was clearly a case of separate use, and was decided upon the authority of *Turner's case*. See *Sanders v. Page*, 3 Rep. Ch. 223; *Davies v. Thornycroft*, 6 Sim. 420. But it is clear now that a husband cannot deal with property settled to his wife's separate use. The husband must dispose of his wife's chattels real to which he becomes entitled by the marriage by some assurance taking effect in his lifetime, not by his will. Co. Lit. 351 a. The assignment may be with or without consideration. *Mitford v. Mitford*, 9 Ves. 99. A partial disposition of the term or part of it by lease will also be effectual to the extent of the disposition, but no further. Thus, a lease for twenty years out of a term of forty by the husband alone is valid for the twenty years, and the wife surviving will take the residue. The husband's executors will be entitled to the rents during the twenty years' lease (Co. Lit. 46 b; see *Druce v. Denison*, 6 Ves. 385, 389), unless the husband and wife have joined, when the rent will, it has been said, be incident to the reversion, and belong to the wife surviving. 1 Prest. on Abs. 345. So a partial disposition by the husband by mortgage will also be effectual to the extent of it. *Pitt v. Pitt*, T. & R. 180; *Clark v. Burgh*, 2 Coll. 221; Co. Lit. 351 a; see further as to mortgages, Chapter VIII.

It often happens that the husband does not wish either to sell or mortgage the property, but to possess himself of it absolutely. In such case an assignment by the husband to a trustee for himself will

exclude the title of the surviving wife. See 9 Byth. Conv. Ed. Sw., p. 13. Whether the husband's mere *agreement* to sell, lease or mortgage will be as binding as an actual disposition has not been settled authoritatively. In *Stead v. Cragh* (9 Mod. 43), an agreement by the husband to grant a lease of his wife's leaseholds was held binding against the wife surviving. In *Druce v. Denison* (6 Ves. 385), a similar question was raised before Lord Eldon, but not decided, though his opinion was in favour of the agreement being binding. *Ib.* 395. There are other things which are equivalent to an actual disposition by the husband. Thus a judgment in ejectment for her term in his favour will bar her right. Co. Lit. 46 b; but see *ib. n.* (6). And the term may be forfeited as by the waste, outlawry, or attainder for felony of the husband (Co. Lit. 351 a), or be taken in execution for his debt. *Wildman v. Wildman*, 9 Ves. 177. If the wife's chattels real have not been reduced into possession, and have not been affected by any matter or proceeding which would be equivalent to a disposition by him, the wife surviving will be entitled to them. *Ib.* On the other hand, the husband surviving will be entitled in his marital right without being obliged to administer to her estate. Co. Lit. 46 b. But if the wife be *dispossessed of her term*, he must administer. Co. Lit. 351 a. The distinction between property which the husband takes in his marital right and that which he takes as administrator to his wife is in some cases important. The former will not be liable to her debts prior to the marriage, the latter will. *Heard v. Stamford*, 3 P. W. 409.

The act of 1870 made an important alteration in the law as regards the personal property of married women. So far, indeed, as regards leasehold property coming to a woman, married since the act, in *any other way* than as next of kin or one of the next of kin of an intestate, the law would seem to be unaltered by this act, but if they do so come then the seventh section of this act (*post*, Ch. VI.) would seem to apply, and she will be entitled to them (subject to the trusts of any settlement) for her separate use. This is upon the assumption that the words "personal property" in this section are used in their strict legal sense and include chattels real. It will be observed that there is no limit in respect of *value* to the "personal property" coming to the wife under this section, but any "sum of money" to which she becomes entitled under any *deed* or *will* is not to exceed 200*l.* *King v. Voss*, 13 Ch. D. 504.

By the act of 1882 where it applies the wife takes chattels real as her separate estate in the cases mentioned in ss. 2 and 5 (*post*, Ch. VII.), and may dispose of them as mentioned in s. 1, sub. (11), as separate property, but unless under these acts the wife cannot bequeath her chattels real, or personal estate, unless by virtue of a power or an agreement with her husband, or he assents (*D. of Marlborough v. Ld. Godolphin*, 2 Ves. sen. 75), or unless the property is separate estate under the recent acts.

As to her equity to a settlement, see Ch. X.

SEC. 4.—*Wife's Chattels Real, Contingent and Reversionary.*

<i>Husband's Interest</i>	345	<i>Wife's Equity—Survivorship</i>	345
<i>Act of 20 & 21 Vict. c. 57</i>	345	<i>Husband surviving must administer</i>	345
<i>Acts of 1870 and 1882</i>	345	<i>Where administration not necessary</i>	346

Formerly, by the marriage the husband became entitled to his wife's reversionary and contingent interests in chattels real belonging to her at the time of, or coming to her during, the marriage, of which he might have disposed, subject to the same rules which prevail in the case of her interests in possession (*Donne v. Hart*, 2 R. & My. 360; *Box v. Jackson*, Dr. t. Sug. 84; *Hanson v. Keating*, 4 Ha. 1), unless the interest was such that it could not possibly vest in him. *Duberley v. Day*, 16 Bea. 33. The act of 20 & 21 Vict. c. 57 (Malins' Act), the substance of which is stated hereafter (*post*, Section 7), is large enough in its terms to comprise chattels real. It applies to reversionary and contingent interests in *any personal estate whatsoever*. As regards such interests in chattels real, however, the husband could, prior to the act of 1870, in general have disposed of them; there seems in these cases, therefore, no necessity for the application of the act of 20 & 21 Vict. c. 57. The acts of 1870 and 1882, where they apply, have made important alterations as regards the husband's interest in such cases. The seventh section of the act of 1870 (see Ch. VI., *post*) applies to personal property to which, during the marriage, the wife *shall become* entitled. This gives rise to the question whether the section applies where the interest is *reversionary* or *contingent* at the time of the marriage and becomes *absolute* during the marriage. If it does apply to such a case the wife will take it, on its so becoming absolute, to her separate use. If it does not apply, the husband will take the same interest as heretofore in her property, reversionary or contingent, at the time of the marriage, notwithstanding it becomes absolute during the coverture. See tit. "MARRIAGE SETTLEMENTS," as to the effect of similar words in covenants to settle future property. By the act of 1882, where it applies, the wife takes the property mentioned in this section as her separate estate in the cases mentioned in ss. 1, 2, and 5 (*post*, Ch. VII.), and may dispose of it as mentioned in s. 1, sub. (1). These reversionary and contingent interests, if they vest in the husband, and are of an equitable nature, or equity has a control over them, are subject to the same rules with regard to the wife's equity to a settlement as equitable interests in possession. *Post*, Ch. X., "Wife's Equity to a Settlement." The same rule also, as to survivorship, is as applicable to such interests as to legal interests in possession, except that where the interest never vested in possession in the husband, in his wife's lifetime, his right is not *absolute* where he is the survivor; but he takes as *administrator* to his wife's estate. Co. Lit. 351 a; Wms. Exors. 8th Ed., 701. This rule, however, would seem only to apply to a mere right of action and

not to an interest in reversion or remainder which vests in the husband at the wife's death. Thus where a wife was entitled to a term subject to a life estate therein, and predeceased her husband during the subsistence of the life estate, it was held that it was not necessary for the husband to take out letters of administration to her in order to complete his title to the leaseholds. *In re Bellamy; Elder v. Pearson*, 25 Ch. D. 620.

SEC. 5.—*Specific Chattels.*

<i>Husband's Interest</i>	346	<i>Distinction between Chattels and</i>	
<i>Belonging to Wife at Time of Marriage</i>	346	<i>Choses in Action</i>	346
<i>Vest absolutely in Husband</i>	346	<i>Reversionary Interest in Specific Chattels</i>	347

The personal estate of the wife, other than leaseholds, may consist either of specific chattels, as furniture and moveables of every description, or it may consist of what are usually called *choses in action*. *Post*, Section 6.

Marriage, under the old law, is an absolute gift to the husband of the goods, personal chattels and effects of which the wife in her own right is possessed at the time of the marriage, or of which she became possessed during the coverture. Co. Lit. 351 b; *Coomes v. Elling*, 3 Atk. 679. This general rule is now, however, subject to s. 7 of the act of 1870, and ss. 2 and 5 of the act of 1882. *Post*, Chapters VI. and VII.

The distinction between the wife's specific chattels and her *choses in action* is material, the right to specific chattels belonging to the wife at the time of marriage, or (when not subject to the recent act) devolving upon her during the marriage, so absolutely vests in the husband, that he may bring an action for them in his own name; and, if he survive his wife, he will be entitled to them *without administering* to her estate, and if he die in her lifetime they will not survive to her, but devolve on his executors. 1 Bac. Ab. tit. "BARON & FEM. (C.);" 1 Rep. Hus. & W. 169, ed. Jac.; see *Bird v. Peagram*, 13 Com. B. 639. With respect, however, to *choses in action* belonging to her at the time of, or coming to her during, the marriage, the husband must reduce them into possession in his lifetime, otherwise she will be entitled to them by survivorship. Co. Lit. 351 b; *Richards v. Richards*, 2 B. & Ad. 447, *post*, Section 6. If, however, he be the survivor, he will take them, not in his own right, but as administrator of her estate. *Grosvenor v. Lane*, 2 Atk. 180. As to the *specific chattels* of the wife, which are reversionary at the time of the marriage, and are not affected by the recent acts, they do not vest absolutely like her specific chattels in possession. If they fall into possession, or the right to the actual possession of them accrues during his lifetime, his right would probably become absolute, not otherwise. See *Widgery v. Tepper*, 7 Ch. D. 423. It was stated by

Blackburn, M.R.I., in *Box v. Jackson* (Dr. t. Sug. 55), as the result of *Mitford v. Mitford* (9 Ves. 87), and other cases, that they had established the right of a married woman surviving her husband to her *choses in action* not reduced by him into possession, and to her reversionary and contingent interests in *personal chattels* not vesting in possession during the coverture, against her husband's general and particular assignee.

SEC. 6.—*Wife's Choses in Action in Possession or Reducible into Possession at the Time of or during the Marriage.*

<i>Effect of Marriage</i>	347	<i>Reduction into Possession—contd.</i>	
<i>Formerly—Recent Acts</i>	347	<i>Transfer to Trustees</i>	350
<i>What are Choses in Action</i>	348	<i>Transfer to Wife</i>	350
<i>Debts—Fund in Court</i>	348	<i>Transfer to Husband</i>	350
<i>Rents—Legacies</i>	348	<i>Appropriation to Husband</i> ...	350
<i>Income—Bills and Notes, &c.</i> .	348	<i>Judgments—Decrees—Awards</i>	350, 351
<i>Earnings of Wife—Custom of</i>		<i>Bringing Action</i>	351
<i>London</i>	348	<i>Assignment of</i>	351
<i>Reduction into Possession</i>	348	<i>Bills—Bonds—Mortgages</i>	351
<i>During Marriage or go to Wife</i> ..	348	<i>Transfer of Mortgage</i>	351
<i>Survivorship</i>	348	<i>Choses in Action</i>	351
<i>Unless Husband a Purchaser</i> ..	348, 349	<i>Mortgage by Husband</i>	351
<i>What requisite to</i>	349	<i>Assignment of Mortgage</i>	352
<i>Receipt of Interest—Part</i>		<i>Agreement to assign</i>	352
<i>Principal</i>	349	<i>Confirmation by Wife</i>	353
<i>Transfer of Stock, &c.</i>	350	<i>Release</i>	353
		<i>Against whom Wife's Right</i>	
		<i>prevails</i>	353

Effect of Marriage.] As in the case of other personal property, marriage formerly operated as a gift of *choses in action* belonging to the wife at the time of the marriage or devolving upon her afterwards. Co. Lit. 351 b. The condition, however, was attached as it was to leaseholds, that they should be reduced into possession by the husband during the marriage, otherwise they went to the wife surviving (*ib.*), and this rule is unaffected as regards such *choses in action* as still vest in the husband on or during the marriage. It will be seen, however, in Ch. VI., that as regards the earnings mentioned in the 1st section of the act of 1870, and the deposits and annuities mentioned in the 2nd section, they do not vest in the husband at all; and that as regards the several kinds of property mentioned in the 3rd, 4th and 5th sections of the act, they are now subject to the wife's control during the marriage, though she may take no steps prior to the marriage to make them her own; and that as regards the "personal property" mentioned in sec. 7, if it consists of *choses in action* coming within the operation of that section, the wife will be entitled to them for her separate use. As regards the act of 1882, see *post*, Ch. VII., where the sections which affect the wife's *choses in action* which are subject to that act are stated. The rules, however (presently stated), which were generally applicable to *choses in action* in all cases prior

to these acts will be so still in many cases, but every case now arising must be considered carefully with reference to their operation. See Ch. VI. and VII.

What are Choses in Action.] The term, *choses in action*, comprises in general all property which is recoverable by action or suit. Thus, debts by obligation or contract (see *Coppin v. —*, 2 P. W. 496; *Meredith v. Wynn*, Pr. Ch. 312), and mortgage debts secured by a mortgage in fee or for years are *choses in action*. *Bates v. Dandy*, 2 Atk. 207; *Honner v. Morton*, 3 Russ. 72, n. The case of *Packer v. Wyndham* (Pr. Ch. 412) is *contra* as to mortgages in fee, but there is no distinction now between mortgages in fee and mortgages for years; the mortgage debt is considered as the principal, the land the mere security. It is immaterial that there is no covenant for payment. *King v. King*, 3 P. W. 358. So rents (1 Rep. Hus. & Wife, 205, ed. Jac.), legacies (*Blount v. Bestland*, 5 Ves. 515), residuary personal estate (*Baker v. Hall*, 12 Ves. 497), costs of a suit (*Coppin v. —*, 2 P. W. 496), a fund in court (*Johnson v. Johnson*, 1 Jac. & W. 472, 475; *Heath v. Lewis*, 10 Jur., N. S. 1093), the income of property and arrears of such income (*Salwey v. Salwey*, Amb. 692; *Wilkinson v. Charlesworth*, 10 Bea. 324), money in the hands of third persons appropriated to the use of the wife (*Twisden v. Wise*, 1 Ver. 161; *Fleet v. Perrins*, L. R., 4 Q. B. 500), bills and promissory notes (*Connor v. Martin*, 3 Wils. 5; *Mason v. Morgan*, 2 A. & E. 30; *Gaters v. Madeley*, 6 M. & W. 427; *Hart v. Stephens*, 6 Q. B. 937; *Scarpellini v. Atcheson*, 7 Q. B. 864; *Dawson v. Prince*, 2 D. & J. 41), and, generally, all property of the like kind not actually in possession, but recoverable by action or suit are *choses in action*. See Wms. Exors., 8th Ed., 854; *Fleet v. Perrins*, L. R., 4 Q. B. 500. Formerly the wife's earnings belonged to the husband, and if they were invested, the stock or other security also belonged to him, and no agreement by the wife in respect of such security was binding on him. *Lamphir v. Creed*, 8 Ves. 599. A partial alteration was made in the law by the 20 & 21 Vict. c. 85, s. 21, and 21 & 22 Vict. c. 108, s. 6, under which protection orders could be obtained in certain cases. But the provisions under these acts will be rendered unnecessary by the larger measure of protection afforded by the acts of 1870 and 1882, *post*, Ch. VI. and VII. With respect to those special cases where the wife carries on trade on her own account by virtue of the custom of London, see Pulling's Customs of London, 179, 484, 485; *Langham v. Bewett*, Cro. Car. 68.

Reduction into Possession.] These and all other *choses in action* belonging to the wife at the time of the marriage and which then vest in the husband must be reduced into possession during the marriage, or the right to them will survive to the wife on his death or after the marriage has been dissolved (*Heath v. Lewis*, 10 Jur., N. S. 1093), unless he has become a purchaser of them, as, for example, by an ante-nuptial settlement. *Norbone's case*, Fr. Ch. 282. The

case of *Rudyard v. Nerne* (*ib.* 262) is *contra*; but it is clear that the husband may become a purchaser of his wife's *choses in action* if the settlement be so framed. But the husband cannot become a purchaser of his wife's *choses in action* by a post-nuptial settlement. *Lanoy v. D. of Athol*, 2 Atk. 448. Where the *chose in action* is in the nature of a charge on the husband's property at the time of the marriage, it will, it has been held, merge absolutely, and there will be no right of survivorship in the wife (*Scys v. Price*, 9 Mod. 220), unless the charge is of a continuing nature, as an annuity to her for her life, in which case the payments accruing due to her after his death may be recovered. See *Fitzgerald v. Fitzgerald*, L. R., 2 P. C. 83. If the husband survive, he will be entitled, as administrator of his wife, to her *choses in action* (*Humphrey v. Bullen*, 1 Atk. 458); but they will be liable to the payment of her debts (*Heard v. Stanford*, Ca. t. Tal. 173); and if he die intestate without administering, his next of kin must administer to *his* and *her* estate. *Att.-Gen. v. Partington*, 10 Jur., N. S. 825. In *Fleet v. Perrins* (L. R., 4 Q. B. 500), where money was in the hands of a third person belonging to the wife, who died leaving her husband surviving, the money being still outstanding, and he also died without having become possessed of it, and without having in any way interfered with it, it was held that the wife's representatives, and not the husband's, were the proper parties to sue for it.

In order that the act of the husband may operate as a reduction into possession, there must be an intention to that end, coupled with some act giving effect to the intention. Also, as in the case of a reduction into possession of a wife's chattels real, the act must be complete in his lifetime; his will is ineffectual. Co. Lit. 351 a; *Scrutton v. Pattillo*, L. R., 19 Eq. 369. When a *chose in action* has actually been received by the husband, it, of course, would be very strong, if not conclusive, evidence of reduction into possession. See *Rees v. Keith*, 11 Sim. 388. But the receipt of the interest only of a debt is no reduction of the debt into possession. *Hart v. Stephens*, 6 Q. B. 937; *Howman v. Corie*, 2 Ver. 190; see n. (1) ed. Raith. And reduction of part is no reduction of the residue. *Nash v. Nash*, 2 Madd. 133. If the wife's stock has been transferred into his sole name, this will be a reduction into possession, unless the husband is acting as *executor* or *trustee*. *Baker v. Hall*, 12 Ves. 497; *Wall v. Tomlinson*, 16 Ves. 413. The receipt by an agent, appointed by husband and wife, of money forming part of the estate of an intestate of which the wife is administratrix, amounts to a reduction into possession by the husband of the wife's distributive share of the money. *Huntley v. Griffith* (F. Moore, 452; Goldsborough, 159); *Dardier v. Chapman*, 11 Ch. D. 442. Where the husband was a lunatic, and entitled to stock standing in the name of his wife, a transfer of the stock into the name of the accountant-general in the matter of the lunacy was held to be a reduction into possession. *Re Jenkins*, 5 Russ. 183. But if the husband permits the stock to be transferred into the name of the wife, described as the "wife of

A. B.," it will not be a reduction into his possession. *Wildman v. Wildman*, 9 Ves. 174; see *Shuttleworth v. Greaves*, 4 M. & Cr. 35. Nor where he is a party to the payment of money to her account at a banker's, she drawing on it. *Parker v. Lechmere*, 12 Ch. D. 256. Nor where shares in a joint stock company are transferred into their joint names. *Nicholson v. Drury & Co.*, 7 Ch. D. 48. If money standing in the wife's name has been transferred into the names of husband and wife, with a direction from him to keep it separate from his other money, this will be no reduction into possession. *Scrutton v. Pattillo*, L. R., 19 Eq. 369.

Where banking accounts were kept in the joint names of husband and wife, and investments in railway stock were made in their joint names, and the wife survived her husband a short time, and then died, having executed a will *during coverture*, it was held that the balances of the joint accounts and the joint investments survived to the wife, but did not pass under her will. *In Re Young; Trye v. Sullivan*, 28 Ch. D. 705. In *Ryland v. Smith* (1 M. & Cr. 53), the wife was entitled to stock and money, and the husband directed the stock to be transferred into the names of trustees for her separate use, and received the money himself, purchasing fresh stock with part of it; it was held that there was no reduction into possession of the original stock, but that the purchased stock belonged to the husband's representatives. And, as a general rule, a settlement of the wife's *choses in action* is binding on her right by survivorship where the fund has been transferred to trustees and invested upon the trusts of the settlement. *Hansen v. Miller*, 14 Sim. 22; *Burnham v. Bennett*, 2 Coll. 254; *Anderson v. Abbott*, 23 Bea. 457; see *Hamilton v. Mills*, 29 Bea. 193. And this rule applies although she is *an infant* at the time of the settlement, if, on attaining her majority, she allows the fund to remain in the names of the trustees. *Cunningham v. Antrobus*, 16 Sim. 436. As to an agreement made by *an infant* at the time of the marriage where the fund is not reduced into possession before the husband's death, see *Ellison v. Elwin*, 13 Sim. 309; *Borton v. Borton*, 16 Sim. 552.

Where a legacy to the wife consisted of a sum of money secured by a mortgage, a mere appropriation to the husband of the mortgage debt was held to be no reduction of the legacy into possession. *Blount v. Bestland*, 5 Ves. 515; *Ex parte Norton*, 8 D., M. & G. 258. Nor is an agreement to set off the legacy against money due to the testator from the husband, though the husband and wife sign a receipt for the legacy, there must be a *release*. *Harrison v. Andrews*, 13 Sim. 595. A judgment recovered by the wife must be reduced into possession. *Fitzgerald v. Fitzgerald*, 8 C. B. 611. If the husband recovers judgment for a debt due to the wife and dies before execution, the wife is entitled and not the executors of the husband, where she is a party to the action (*Oglander v. Baston*, 1 Ver. 396; *Bond v. Simmons*, 3 Atk. 21), but otherwise where he may, and does, sue alone. *Garforth v. Bradley*, 2 Ves. sen. 676; *Oglander v. Baston*, *sup.*; *Richards v. Richards*, 2 B. & Ad. 452. The benefit of a suit

by *both* for money due in her right survives to her if he dies before a decree (*Anon.* 3 Atk. 726), and the benefit of a decree in a suit for payment of the fund to them both survives to her. *Nanny v. Martyn*, Freem. Ch. 172. There are even cases to the effect that where the husband dies after a decree for an account, or for an account and payment of interest to him, and before actual payment, this will not bar the wife's right by survivorship. *Adams v. Lavender*, 1 M'Clel. & Y. 41; *Hore v. Woulfe*, 2 Ba. & Be. 424. But it is settled now that, at all events after a decree declaring that the money belongs to the husband or his assignee, the wife will not be entitled by survivorship though the husband may die before payment. *Forbes v. Phipps*, 1 Ed. 502; *Heygate v. Annesley*, 3 B. C. C. 362; *Tidd v. Lister*, 10 Ha. 140; 3 D., M. & G. 857. But merely carrying over a fund in court to the account of the husband and wife is no reduction into possession. *Prole v. Soady*, L. R., 3 Ch. 220. It has been held that an award for payment of a sum of money to the husband in right of his wife changes the nature of the property, and his death before payment gives her no right by survivorship. *Oglander v. Baston*, 1 Ver. 396. In *Gaters v. Madeley* (6 M. & W. 427; see *Sherington v. Yates*, 12 M. & W. 855—865), it was said by Parke, B., that if an action were brought by the husband in his own name for the recovery of a promissory note, this would amount to an election to take it. As to bonds, it was laid down in an early case that they could not be assigned *so as to bind the wife* surviving. *Burnett v. Kinaston*, Pr. Ch. 118, 121.

And with reference to the assignment of *choses in action* generally, it has been observed that it would be strange if a man should in any way be able to transfer to another a larger or better interest than he had in himself. *Mitford v. Mitford*, 9 Ves. 87, 99. In several subsequent cases, indeed, the doctrine of the court was considered to be that an assignment of the wife's *present chose in action* was equivalent to a reduction of it into possession, where made for a valuable consideration. See *Johnson v. Johnson*, 1 Jac. & W. 472, 476. And in *Honner v. Morton* (3 Russ. 65, 86), Lord Lyndhurst observed that an assignment of the wife's *present chose in action*, which the husband can immediately reduce into possession, operates as a reduction into possession, but that the assignment of any other *chose in action* operates only *from the time* when he can reduce the subject-matter of the assignment into possession. This doctrine, however, might be difficult to support, and has not been acted upon in later cases (*Ellison v. Elwin*, 13 Sim. 309, 317; *Elwin v. Williams*, 12 L. J., Ch. 440; *Lecasseur v. Scrutton*, 14 Sim. 116; *Ashby v. Ashby*, 1 Coll. 553), which rest upon the principle laid down in *Mitford v. Mitford* (9 Ves. 87). Consider now the effect of an assignment of a *chose in action* under the Judicature Act, *ante*, p. 84. But although the mere assignment will not pass the interest in the property so as to defeat the wife's right by survivorship, yet if the assignee afterwards receives the fund assigned or otherwise reduces it into possession in the lifetime of the husband, the wife's right by

survivorship will be barred. See *Allday v. Fletcher*, 1 D. & J. 82. But the assignee must not be guilty of laches. If he allows an order of the court to be made directing a transfer of the *chose in action* to the wife, he will be without remedy. *Hutchings v. Smith*, 9 Sim. 137. Cases may arise in which, although there is no actual proof of payment to the assignee, yet a presumption of payment may arise, as where the assignee of the fund (a legacy) is himself the party liable to pay it. *Allday v. Fletcher*, 1 D. & J. 82.

As to the assignment of mortgages, it was held in *Burnett v. Kinaston* (Pr. Ch. 118), that an assignment by the husband of the wife's mortgage in fee was inoperative against her administrator *de bonis non*, though the husband survived and administered to her estate, but died before the mortgage debt was paid. And in *Michelmores v. Mudge* (2 Giff. 183), it was held that a deposit by the husband of his wife's deeds, which she held as equitable mortgagee, was not a reduction into possession of the money due to her as such mortgagee. But in *Williams v. Cooke* (4 Giff. 343), where the husband transferred the deed which had been deposited with his wife by way of equitable mortgage and the debt thereby secured, and the wife joined in the transfer and acknowledged the deed, she was held to be barred. With respect to an assignment *by way of mortgage*, by the husband of his wife's present *chose in action*, which he can immediately reduce into possession if he think fit, for instance, stock, Wood, V.-C., observed in *Pigott v. Pigott* (L. R., 4 Eq. 560), that "as regards the dealing with it by way of mortgage, I do not know that any such case has arisen, or what would be the result of such a dealing." In the case before the vice-chancellor, the question arose as to the effect of a mortgage by the husband of his wife's interest in land tax redeemed under the 38 Geo. 3, c. 60. The husband had registered his marriage under sect. 78 of the act. The vice-chancellor held that by so doing he might under that section have absolutely disposed of the whole, but that as he had not done so, but only to the extent of the mortgage, she was entitled to it, subject, however, to the mortgage, as in the case of *Clark v. Burgh* (2 Coll. 221), where the mortgage was of the wife's leaseholds.

Where an actual assignment would be inoperative to bar the wife's right by survivorship, of course a mere agreement to assign would be so. Thus, an agreement by the husband to sell his wife's legacy contingently charged upon land to the devisee of the land, is no reduction of the legacy into possession where the purchase-money is not paid. *Harwood v. Fisher*, 1 Y. & C., Eq. Ex. 110. In *Bates v. Dandy* (2 Atk. 207) indeed, and some early cases, an agreement to assign the wife's mortgage was held to bar her right by survivorship; but this was before the doctrine laid down in *Mitford v. Mitford* (9 Ves. 87), *ante*, p. 351, was established. In *Rees v. Keith* (11 Sim. 388), the husband agreed to transfer the mortgage and received payment of the amount of the mortgage debt; it was held to be reduced into possession, though the mortgaged property had not been actually transferred. The case seems to have been put by the court upon the same ground

as if the mortgagor had paid; cons. *Michelmore v. Mudge*, 2 Giff. 183, ante, p. 333. It would seem, that a *recognition* by the wife after her husband's death, of an assignment by him, will not bind her, as a confirmation of it, at all events, without a *fresh consideration*. In *Honner v. Morton* (3 Russ. 65), an assignment of a *choses in action* by the wife after her husband's death, reciting a previous assignment by him, and purporting to be made subject to it, was held to be no confirmation of such assignment binding upon her. A release by the husband of his wife's *choses in action* immediately recoverable, will bar her right by survivorship. *Rogers v. Acaster*, 14 Bea. 445, 450. Where the wife is not barred, her right will prevail against assignees under the husband's bankruptcy (*Saddington v. Kinsman*, 1 B. C. C. 44, n. 1; *Gayer v. Wilkinson*, ib. 50, n.; *Mitford v. Mitford*, 9 Ves. 87), or (formerly) insolvency (*Hornsby v. Lee*, 2 Madd. 16), or against a particular assignee for value. *Ib.*

As to the wife's equity to a settlement, see Chapter X.

SEC. 7.—Reversionary Choses in Action.

<i>Prior to 20 & 21 Vict. c. 57</i>	353	<i>20 & 21 Vict. c. 57</i>	354
<i>Husband could not dispose of</i> ..	353	<i>Disposition and release of Re-</i>	
<i>Against Wife surviving</i>	353	<i>versionary Interests</i>	354
<i>Though for her separate use</i> ...	353	<i>By acknowledged Deed</i>	355
<i>Effect of release</i>	354	<i>Not where Restriction imposed</i>	355
<i>Proceeds of Realty</i>	354	<i>Or Settled on Marriage</i>	355
<i>Money to be laid out</i>	354	<i>Acts of 1870 & 1882</i>	355

Law prior to 20 & 21 Vict. c. 57.] Although the wife's reversionary *choses in action* at the time of the marriage, and (prior to the Act of 1870), accruing during the marriage, like her other personal estate, vested in her husband subject to her right by survivorship if not reduced into possession; yet, until the 20 & 21 Vict. c. 57, the husband and wife could not together, nor could either separately release (*Kemp v. Kelsey*, Pr. Ch. 544), assign or otherwise dispose of her reversionary *choses in action* legal or equitable, so as to bar her right by survivorship (*Purdew v. Jackson*, 1 Russ. 1; *Box v. Jackson*, Dr. t. Sug. 42, in which all the earlier cases are cited). Nor could the reversionary fund be disposed of, although the tenants for life or other persons entitled to the interests prior to the reversion assigned such interests to the wife, or to the husband and wife. *Whittle v. Henning*, 2 Ph. 731 (overruling *Hall v. Hugonin*, 14 Sim. 595; *Creed v. Perry*, ib. 592, and other cases). And where the fund was settled to the wife's separate use for life, with restraint on anticipation, remainder to the survivor of the husband and wife, the remainder could not be disposed of. *Ritchie v. Broadbent*, 2 J. & W. 456. And even where it was settled to her separate use for life without restraint on anticipation, the capital being reserved to her absolutely if she survived her husband, she had no power of disposition over the capital during the

coverture. *Lee v. Muggeridge*, 1 V. & B. 123; see *Duberly v. Day*, 16 Bea. 33; 5 H. L. C. 388. The earlier case of *Ellis v. Atkinson*, 3 B. C. C. 565, is *contrà*, as to which, see *ib. n. (1)*, Belt's ed. And the court would not take the wife's consent to the payment of the fund to the husband on its falling into possession. *Box v. Box*, *Box v. Jackson*, Dr. t. Sug. 42; *Whittle v. Henning*, 2 Ph. 731, 734. The husband therefore could not, nor could the wife in any way deal with, or dispose of, her reversionary *chose in action*, so as to defeat her right by survivorship, but as against every one but the wife surviving his disposition was valid. *White v. St. Barbe*, 1 V. & B. 405.

With respect to the effect of a release on the wife's reversionary *chose in action*, it was laid down in an early case (*Thompson v. Butler*, Moor. 522), that the husband could not release his wife's annuity for life. But in *Hore v. Becher* (12 Sim. 465), where a bond had been given before the marriage to a trustee to secure an annuity to the wife, it was held that the husband might release the bond, and that the security, being released, the annuity was gone. The later case of *Rogers v. Acaster* (14 Bea. 445), however, decided that a husband could not release his wife's reversionary *chose in action*; and see *Fitzgerald v. Fitzgerald* (L. R., 2 P. C. 83), in which it was observed that *Hore v. Becher* could scarcely be reconciled with the doctrine of equity as to the inalienable character of a wife's reversionary interest. It is sometimes a question whether the property is pure personalty, or in the nature of land which the wife can convey by deed duly acknowledged. Upon this point it has been held that a married woman can dispose of her reversionary interest in the proceeds arising from the sale of real estate by an acknowledged deed. *May v. Roper*, 4 Sim. 360; *Briggs v. Chamberlain*, 11 Ha. 69; *Tuer v. Turner*, 20 Bea. 560; *Franks v. Bollans*, L. R., 3 Ch. 717; *Hobby v. Collins*, 4 De G. & S. 289, is *contrà*, but is not followed. Where, conversely, the fund consists of money to be laid out in land, it may also be conveyed by an acknowledged deed (*Forbes v. Adams*, 9 Sim. 462); but not money to be laid out in land, or otherwise, advantageously. *Smithwick v. Smithwick*, 5 L. T., N. S. 23. As to mortgages and mortgage debts, see *Williams v. Cooke*, 4 Giff. 343; *Newton's Trusts*, 23 Ch. D. 181.

20 & 21 Vict. c. 57.] By the 20 & 21 Vict. c. 57 (Malins' Act), which came into operation on the 1st January, 1858, after the 31st day of December, 1857, every married woman may by deed dispose of every future or reversionary interest, whether vested or contingent of herself or her husband in her right, in any personal estate whatsoever to which she shall be entitled under any instrument made after the said 31st day of December, 1857, except such a settlement as after mentioned, and may also release or extinguish any power which may be vested in or limited or reserved to her in regard to any such personal estate, as effectually as if she were a *feme sole*, and may also release and extinguish her right or equity to a settlement out of any personal estate to which she and her husband in her right may be

entitled in possession under any such instrument as aforesaid, save and except that no such disposition, release or extinguishment shall be valid unless *the husband concur in the deed* by which the same shall be effected, nor unless the deed be acknowledged by her. Nothing therein contained shall extend to any reversionary interest to which she shall become entitled by virtue of any deed, will or instrument by which she shall be restrained from alienating or affecting the same (s. 1). The deed is to be acknowledged pursuant to the 3 & 4 Will 4, c. 74 (s. 2).

The power of disposition given by the act is not to interfere with the exercise of any power vested in the wife independently of the act, unless such power shall be suspended or extinguished by some disposition made under the act (s. 3). The act does not apply to interests in personalty settled upon her by any *settlement*, or agreement for a settlement, made on the occasion of *her marriage* (s. 4). See *Clarke v. Green*, 2 H. & M. 474.

Acts of 1870, 1882.] The question as to the true construction of the 7th section of the act, as regards the general personal property to which the wife is entitled in reversion at the time of the marriage, and which vests *absolutely* in possession afterwards, has already been adverted to. *Ante*, p. 345.

With respect to the several kinds of property mentioned in sects. 1 2, 3, 4 & 5 of the Act of 1870, the law was materially altered by that act, as already in part pointed out, *ante*, p. 347, and as will be seen in Ch. VI.

As regards such *choses in action* of the wife devolving during the marriage, and while this act was in force, as are not subject to the operation of it, they will vest in the husband, as they would have done prior to the act, and the same rules will apply to them as have already been stated with regard to *choses in action* in possession at the time of the marriage. *Ante*, p. 347 *et seq.*

As to the Act of 1882, see *post*, Ch. VII., where the sections which affect the wife's reversionary *choses in action* will be found stated.

SEC. 9.—*Wife's Life Interests in Personal Estate.*

<i>In Possession at Time of Marriage...</i>	355		<i>Wife's Rights by Survivorship</i>	356
<i>Assignment by Husband</i>	355		<i>Life Interest in Reversion</i>	356

The wife's life interest in possession, in pure personal estate, like her absolute interest, when not affected by the Acts of 1870 or 1882, vests in her husband on the marriage, subject, however, to the wife's right by survivorship. For although the husband may assign it to the extent of the income accruing *during the coverture*, he cannot do so beyond it. In *Elliott v. Cordell* (5 Madd. 149) and *Stanton v.*

Hall (2 R. & My. 175), it was held that an assignment of the wife's life interest to an assignee for value was valid, and that she had no equity to a settlement out of it. In this case the husband and wife were both living, and no question was raised as to the operation of the assignment on the income which might accrue after the death of the husband if his wife survived him. In *Stiffe v. Everitt* (1 M. & C. 37) the court refused to allow a fund in which the wife had a life interest to be absolutely transferred to her husband, for as she might outlive him her interest as to the income accruing *after his death* would be reversionary. See *Harley v. Harley*, 10 Ha. 325. In *Nixon v. Nixon* (2 J. & L. 416), it was observed that the life interest of a married woman to arise *after the determination of the coverture* could not during the coverture be in any manner affected. *Ib.* 421; and see *Tidd v. Lister*, 3 D., M. & G. 857, 874. The rule laid down in *Elliott v. Cordell* and *Stanton v. Hall*, therefore, is still applicable, subject to the qualification that any interest accruing to the wife after her husband's death cannot be affected by his assignment, unless such assignment be made under the 20 & 21 Vict. c. 57.

As regards the life interest of the wife, when of that nature that it would fall within the 7th section of the Act of 1870 (*post*, Ch. VI.), but is reversionary at the time of the marriage (which has taken place since the act), and afterwards and during the marriage falls into possession, see the observations *ante*, p. 345. When it does not exist at the time of the marriage, but devolves, whether in possession or reversion, during the marriage, and is of the description specified in that section, it is separate property of the wife, and may be disposed of accordingly.

As to the effect of the Act of 1882 see *post*, Ch. VII.

CHAPTER VI.

THE ACTS OF 1870 (33 & 34 VICT. c. 93) AND 1874 (37 & 38 VICT. c. 50).

<i>Earnings of Married Women (s. 1).</i>	357	<i>Husband's Liability on Wife's Ante-</i>	
<i>Deposits in Savings Banks (s. 2) ...</i>	357	<i>nuptial Contracts (s. 12).....</i>	358
<i>Property in the Funds (s. 3).....</i>	357	<i>Liability to Parish for Husband</i>	
<i>In Joint Stock Company (s. 4)</i>	357	<i>and Children (ss. 13, 14)</i>	359
<i>In Friendly, &c., Society (s. 5).....</i>	358	<i>Commencement (9th Aug., 1870) (s. 15)</i>	359
<i>Fraud of Creditors (s. 6)</i>	358	<i>Real Property subject to the Act ...</i>	359
<i>Personalty—or Money accruing</i>		<i>Section 8, Freehold Rents, &c.</i>	359
<i>during Marriage (s. 7)</i>	358	<i>Estates Tail</i>	359
<i>Realty descending (s. 8)</i>	358	<i>Estate pur autre vie.....</i>	359
<i>Questions as to Ownership (s. 9) ...</i>	358	<i>Personal Property subject to the Act</i>	359
<i>Policy of Insurance (ss. 10, 11).....</i>	358	<i>Distinction as to Real Property ...</i>	359
<i>Actions (s. 11)</i>	358	<i>Fraud on Husband's Creditors</i>	359

THE statute 33 & 34 Vict. c. 93, 1870 (amended by the 37 & 38 Vict. c. 50 (1874)), previously referred to in several places, made very considerable alterations in the law of husband and wife. These have been in part pointed out. These acts were repealed by the 45 & 46 Vict. c. 75 (1882), the present act relating to the property of married women. The Acts of 1870 and 1874, however, were in force for some time and the repeal of them (Act of 1882, s. 22) is not to affect any act done or right acquired while either of such acts were in force, or any right or liability of any husband or wife, married before the commencement of this act, to sue or be sued under the provisions of the said repealed acts or either of them, for or in respect of any debt, contract, wrong, or other matter or thing whatsoever, for or in respect of which any such right or liability shall have accrued to or against such husband or wife before the commencement of this Act.

The earnings, &c., of a married woman are to be deemed property settled to her separate use (s. 1). See *Lovell v. Newton*, 4 C. P. D. 7. This section is similar to s. 2 of the Act of 1882, *post*, Ch. VII. Deposits in savings banks by a married woman are to be deemed her separate property (s. 2). See Act of 1882, s. 6, *post*, Ch. VII. Where a married woman's property in the funds is to be deemed her separate property (s. 3). See Act of 1882, ss. 6, 7. Where a married woman's property in a joint stock company is to be deemed her separate property (s. 4). See Act of 1882, ss. 6, 7. Under this section on application by

a married woman to a joint stock or incorporated company to register stock in her name as a "married woman entitled to her separate use," the company must investigate the title; and if they refuse to register, the court, unless a flaw in the title be shown, will compel them by mandamus to register. *The Queen v. Carnatic R. Co.*, L. R. 8 Q. B. 299. Where a married woman's property in a society is to be deemed her separate property (s. 5). See Act of 1882, ss. 6, 7. Deposit of moneys in fraud of creditors invalid (s. 6). Personal property coming to a woman married after the act during the marriage as next of kin, or money under a deed or will not exceeding 200*l.* so coming to her is to be for her separate use (s. 7).

This section does not empower a married woman, entitled under it to a sum of stock for her separate use, to transfer such stock without the concurrence of her husband, unless and until the stock has been placed, under sect. 3, in her name as a married woman entitled for her separate use. *Howard v. Bank of England*, L. R. 19 Eq. 295.

Freehold rents, property, &c., descending upon a woman married after the act are to be for her separate use (s. 8). See *King v. Voss*, 13 Ch. D. 504. Questions between husband and wife as to ownership of property are to be settled in Court of Chancery or County Court (s. 9). Married woman may effect policy of insurance on her own or her husband's life (s. 10). Insurance of a husband for benefit of his wife or wife and children, to be a trust for wife's separate use and children (*Ib.*). See Act of 1882, s. 11. This section modifies the 91st section of the Bankruptcy Act of 1869, *Holt v. Everall*, 2 Ch. D. 266. Thus if under an insurance effected after the act the husband pays out of his own money or his wife's separate income the money payable under the policy will not go to his trustee in bankruptcy but to his widow (*Ib.*) In *Re Mellor's Policy Trusts*, 6 Ch. D. 127; 7 Ch. D. 200; it was held that the moneys received under a policy effected by a husband for the benefit of his wife and children under this section might be distributed as in the case of an intestacy. But in *Re Adams Policy Trusts*, 23 Ch. D. 525, Chitty, J., considered that the wife took a life interest with remainder to her children.

A married woman may maintain an action in her own name for the recovery of any wages and property by the act declared to be her separate property, or belonging to her before marriage, and which her husband shall by writing have agreed shall belong to her as her separate property (s. 11).

A husband married after the act shall not be liable for the debts of his wife contracted before marriage, but the wife shall be liable, and any separate property shall be liable (s. 12). See the Act of 1874, *ante*, p. 336. It has been held that the income of property settled to her separate use with *restraint on anticipation* will be liable under this section. *Sanger v. Sanger*, L. R. 11 Eq. 470; *London & Provident Bank v. Boyle*, 7 Ch. D. 773, and see Conveyancing and Real Property Act, 1881, 44 & 45 Vict. c. 41, s. 39, stated, *post*, Ch. X., sec. 2. She may be sued alone. *Williams v. Mercier*, L. R. 9 Q. B. D. 337.

A married woman having separate property is to be liable to the parish for the maintenance of her husband (s. 13) and her children (s. 14).

The Act came into operation 9th Aug. 1870, s. 15.

The section in the Act of 1870 applicable to real property is the 8th.

It will be seen that the operation of sect. 7 is limited to the property therein mentioned to which a woman, married after the passing of the act, shall *during her marriage* become entitled (subject to the trusts of any settlement). The words in italics are not in the 8th section, relating to real property. But the words "shall descend upon any woman married after the passing of the act," might seem to imply descent *during the marriage*, notwithstanding the want of express reference to descent during that period. But this point is not quite clear, and it may be contended that the section applies where the property descends, after the passing of the act, at any time and not only *during the marriage*, upon a woman married after the passing of the act.

It has already been stated that it is considered that this section cannot apply to an estate tail. *Ante*, p. 320. An estate *pur autre vie* is, however, an estate capable of descending (*Reynolds v. Wright*, 7 Jur., N. S. 246), and as such would come within the operation of this section.

As to personal property, the first six sections of the Act of 1870 apply to the property mentioned in those sections, quite irrespective of the time when the marriage took place, whether before or after the passing of the act. At the end of the 2nd, 3rd, 4th and 5th sections, there is a proviso that if the husband's money has, without his consent, been applied in the procuring of the deposit, annuity, investment, shares, stock, debentures, &c., therein respectively mentioned, they shall be transferred and paid to him; and by sec. 6, as against creditors of the husband, his money so applied in fraud of them may be followed. The sections preceding the 7th relate to property of a specified description. Sec. 7 is more general. Several important questions which may arise under this section have already been adverted to. For this section to apply, the wife must have married *after* the passing of the act, and she must have become entitled *during the marriage*.

CHAPTER VII.

MARRIED WOMEN'S PROPERTY ACT, 1882 (45 & 46 VICT. CH. 75. IN OPERATION JANUARY 1, 1883).

<i>Capability of holding Property and Contracting (s. 1)</i>	360	<i>Questions decided in a summary way (s. 17)</i>	363
<i>Property held as feme sole (s. 2)</i> ...	361	<i>Married Woman Executrix or Trustee (s. 18)</i>	363
<i>Loans by Wife to Husband (s. 3)</i> ...	361	<i>Existing, and Future Settlements (s. 19)</i>	363
<i>Execution of General Power (s. 4)</i> .	361	<i>Liability to Parish for Husband and Children (ss. 20, 21)</i>	363
<i>Property acquired after Act (s. 5)</i> .	361	<i>Repeals (s. 22)</i>	363
<i>As to Stock, &c. (ss. 6, 7)</i>	361	<i>Legal Representatives (s. 23)</i>	363
<i>Investments in names of Married Women and others (ss. 8, 9)</i>	362	<i>Interpretation of Terms (s. 24)</i>	363
<i>Fraudulent Investments (s. 10)</i>	362	<i>Commencement of Act (s. 25)</i>	364
<i>Policy Monies (s. 11)</i>	362	<i>Extent of (s. 26)</i>	364
<i>Protection and Security of Property (s. 12)</i>	362	<i>Marriage before Act</i>	364
<i>Ante-Nuptial Debts and Liabilities (s. 13)</i>	363	<i>Contracts</i>	364
<i>Husband's Liability (s. 14)</i>	363	<i>Property while under Coverture</i> ...	364
<i>Suits for ante-Nuptial Liabilities (s. 15)</i>	363	<i>Actions between Husband and Wife</i>	
<i>Criminal Proceedings (s. 16)</i>	363	<i>Property in Reversion</i>	364
		<i>Power of Attorney Act</i>	364, 365

As this act will henceforth regulate the interests of married women in their property, the important sections have been stated verbatim, and the substance of the others.

1. (1.) A married woman shall, in accordance with the provisions of this act, be capable of acquiring, holding, and disposing by will or otherwise, of any real or personal property as her separate property, in the same manner as if she were a *feme sole*, without the intervention of any trustee.

(2.) And shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued, either in contract or in *tort*, or otherwise, in all respects as a *feme sole*, and her husband need not be joined with her; and any damages or costs recovered by her shall be her separate property; and any damages or costs recovered against her shall be payable out of her separate property, and not otherwise.

(3.) Every contract by her shall bind her separate property, unless the contrary be shown.

(4.) Not only property which she is possessed of or entitled to at the date of contract, but also which she may thereafter acquire. This is not retrospective, and does not apply to contracts made before the act, *Turnbull v. Forman*, 15 Q. B. D. 234.

(5.) If carrying on a trade separately from her husband she shall,

in respect of her separate property, be subject to the bankruptcy laws as if she were a *feme sole*. As to this section see *post*, p. 364.

2. "Every woman who marries *after* the commencement of this act, Jan. 1, 1883, shall be entitled to have and to hold as her separate property and to dispose of in manner aforesaid all real and personal property which shall belong to her at the time of marriage, or shall be acquired by or devolve upon her after marriage, including any wages, earnings, money, and property gained or acquired by her in any employment, trade, or occupation, in which she is engaged, or which she carries on separately from her husband, or by the exercise of any literary, artistic, or scientific skill."

3. "Any money or other estate of the wife lent or entrusted by her to her husband for the purpose of any trade or business carried on by him, or otherwise, shall be treated as assets of her husband's estate in case of his bankruptcy, under reservation of the wife's claim to a dividend as a creditor for the amount or value of such money or other estate after, but not before, all claims of the other creditors of the husband for valuable consideration in money or money's worth have been satisfied."

4. "The execution of a general power by will by a married woman shall have the effect of making the property appointed liable for her debts and other liabilities in the same manner as her separate estate is made liable under this act."

5. "Every woman married *before* the commencement of this act shall be entitled to have and to hold and to dispose of in manner aforesaid as her separate property all real and personal property, her title to which, whether vested or contingent, and whether in possession, reversion, or remainder, *shall accrue after* the commencement of this act, including any wages, earnings, money, and property so gained or acquired by her as aforesaid." See *post*, p. 364.

6. All deposits in savings or other banks, all annuities, public or other funds in the books of the Bank of England, or any other bank, which at the commencement of this act are standing in the sole name of a married woman, and all shares or other interests of or in any corporation, company, or public body, or of or in any industrial, &c., society, which *at the commencement of this act* are standing in her name, shall be deemed, until the contrary be shown, to be her separate property; and the fact of standing in her sole name shall be sufficient *primâ facie* evidence that she is beneficially entitled thereto for her separate use, and to authorise her to receive or transfer the same, and to receive the dividends thereof, without the concurrence of her husband, and to indemnify all managers, and trustees of every such bank, &c., in respect thereof,

7. All such sums, deposits, and annuities, and all such shares and interests as are mentioned in the last section, which *after the commencement of this act* shall be placed or made to stand in the sole name of any married woman shall be deemed, unless and until the contrary be shown, to be her separate property, in respect of which as to any liability her separate estate shall alone be liable, whether so expressed

in the document of title or in the books wherein it is entered or not, but no corporation or company shall be required or authorised to admit any married woman to be a holder of any shares or stock therein to which any liability may be incident, contrary to the provisions regulating such corporation or company.

8. All the provisions hereinbefore contained shall apply, so far as relates to the title of the married woman, to the investments aforesaid which, *at the commencement of this act, or at any time afterwards*, shall be standing in, or made to stand in, her name jointly with any persons or person *other than her husband*.

9. It shall not be necessary for her husband in respect of her interests to join in any transfer of any such investments as aforesaid, which is now or shall at any time hereafter be standing in the sole name of any married woman, or in the joint names of her and any other person or persons *not being her husband*.

10. If any investment in any such securities as aforesaid shall have been made by a married woman with her husband's money, without his consent, the court may, upon an application under section seventeen of the act, order such investment, and the dividends thereof, to be transferred and paid to her husband; gifts by a husband to his wife shall have no validity as against his creditors, which shall continue to be in his reputed ownership, deposits or other investments of his moneys made by or in the name of his wife in fraud of his creditors, may be followed as if the act had not passed.

11. A married woman may effect a policy upon her own life or the life of her husband for her separate use. A policy of assurance effected by any man on his, or a woman on her, life, and expressed to be for the benefit of the wife or husband or children, shall create a trust in favour of the objects therein named, and the moneys payable shall not, so long as any object of the trust remains unperformed, form part of the estate of the insured, or be subject to his or her debts: if proved that the policy was effected with intent to defraud the creditors of the insured, they shall be entitled to receive, out of the moneys payable under the policy, a sum equal to the premiums paid. The insured may appoint from time to time trustees of the moneys payable. In default of a trustee, such policy shall vest in the insured and his or her legal personal representatives, in trust for the purposes aforesaid. If, at the death of the insured, or afterwards, there shall be no trustee, or it shall be expedient to appoint a new trustee or trustees, he or they may be appointed under the Trustee Acts, whose receipts or those of the legal personal representative of the insured shall be a discharge.

12. Every woman, *whether married before or after the act*, shall have in her own name against all persons whomsoever, including her husband, the same civil remedies for the protection and security of her own separate property, as if such property belonged to her as a *feme sole*, but, except as aforesaid, no husband or wife shall be entitled to sue the other for a tort. The rest of this section relates to criminal proceedings.

A woman after her marriage is to be liable to the extent of her separate property for all her ante-nuptial debts, contracts and wrongs for which she may be sued, her separate property being liable, and which as between her husband and herself, unless there is a contract between them, shall be primarily liable, s. 13. A husband shall be liable for such ante-nuptial debts, &c., to the extent of his wife's property acquired by him through her after certain deductions, but nothing in the act shall increase or diminish the liability of any husband married before the act in respect of such debts, &c., as aforesaid, s. 14. Husband and wife may be jointly sued in respect of such debts, &c. The remainder of this section relates to the effect of judgments obtained in such suits, s. 15.

Sec. 16, relates to the liability of the wife to criminal proceedings.

17. Questions between husband and wife as to property are to be decided in a summary way by a judge of the High Court of Justice in England or Ireland, or (at the option of the applicant irrespectively of the value of the property in dispute) in England by the judge of the county court of the district, or in Ireland by the chairman of the civil bill court of the division in which either party resides.

18. A married woman who is an executrix or administratrix alone or jointly with any other person or persons of the estate of any deceased person, or a trustee alone or jointly as aforesaid of property subject to any trust, may sue or be sued, and may transfer or join in transferring any such annuity or deposit or investment as aforesaid in that character, without her husband, as if she were a *feme sole*, s. 18.

Saving as to existing settlements, and future settlements. No restriction against anticipation contained in any settlement of a woman's own property made by herself shall have any validity against debts contracted by her before marriage, or any greater validity against her creditors than a like settlement made by a man would have against his creditors. S. 19. See *post*, p. 364.

A married woman is to be liable to the parish for the maintenance of her husband, s. 20, and her children, s. 21.

Sec. 22 repeals The Married Women's Property Acts, 1870 and 1874.

"For the purposes of this act the legal personal representative of any married woman shall in respect of her separate estate have the same rights and liabilities and be subject to the same jurisdiction as she would be if she were living," s. 23.

"The word 'contract' in this act shall include the acceptance of any trust, or of the office of executrix or administratrix, and the provisions of this act as to liabilities of married women shall extend to all liabilities by reason of any breach of trust or devastavit committed by any married woman being a trustee or executrix or administratrix either before or after her marriage, and her husband shall not be subject to such liabilities unless he has acted or intermeddled in the trust or administration. The word 'property' in this act includes a thing in action," s. 24.

The date of the commencement of this act shall be the first of January one thousand eight hundred and eighty-three. S. 25.

This act shall not extend to Scotland. S. 26.

The cases decided since the passing of the act will now be stated. In the case of a woman married *before* the commencement of the act, sect. 1 of the act applies only as to property acquired by her after the commencement of the act. *In re Harris' Settled Estates*, 28 Ch. D. 171. Sect. 1 (3) and (4) of the act have not a retrospective operation, so as to include contracts entered into by a married woman before the date of the commencement of the act. *Conolan v. Leyland*, 27 Ch. D. 632. Sect. 1, sub-sect. 1, of the act gives a married woman power to dispose by will only of property of which she is seised or possessed while she is under coverture. Consequently, notwithstanding sect. 24 of the Wills Act, her will made during coverture is not, unless it is re-executed after she has become discoverd, effectual to dispose of property which she acquires after the coverture has come to an end. *In re Price; Stafford v. Stafford*, 28 Ch. D. 709.

A husband is entitled to maintain an action against his wife, and to charge her separate property for money lent by him to her *after* their marriage, and for money paid by him for her after their marriage at her request made before or after their marriage, but he is not entitled, even since the act, to maintain any action against her for money lent to her or money paid for her *before* their marriage at her request. *Butler v. Butler*, 14 Q. B. D. 831. Property to which a married woman was, at the commencement of the act, entitled in reversion or remainder, and which since the act has fallen into possession, was held to be within sect. 5, and might be transferred and paid to her upon her separate receipt. *Baynton v. Collins*, 27 Ch. D. 604. This was followed in the case of *In Re Thompson and Curzon*, 29 Ch. D. 177. But in *Re Tucker—Emanuel v. Parfitt*, W. N., 1885, p. 148, it was held that sect. 5 did not apply to property the reversionary title to which accrued before the passing of the act to a married woman; and in *Re Adames' Trusts*, W. N., 1855, p. 153, this was followed by Kay, J., according to his own view of the section, he in *Thompson v. Curzon*, *sup.*, having merely followed the previous decision of *Baynton v. Collins*, *sup.* See *In re Queades' Trusts*, W. N., 1884, p. 225; 1885, p. 99; *In re Hughes' Trusts*, *ib.*, p. 62. Where a marriage settlement made in 1862 contained an agreement for the settlement of any future acquired property of the wife to a specified amount, and after the commencement of the acts he became entitled absolutely to a bequest above the specified amount, it was held, that by the 19th section the marriage settlement was exempted from the fifth and other sections; and that the bequest to the wife came within the covenant to settle future acquired property, and must be dealt with as if the act had never been passed. *In re Stonor's Trusts*, 24 Ch. D. 195.

It may here be mentioned that by the 44 & 45 Vict. c. 41, s. 40, a married woman, whether an infant or not, shall have power, as if she were unmarried, and of full age, by deed, to appoint an attorney on her behalf for the purpose of executing any deed, or doing any other

act which she might herself execute or do; and the provisions of this act relating to instruments creating powers of attorney shall apply thereto. (1.) This section applies only to deeds executed after the commencement of the act. (Jan. 1, 1882) (2.)

CHAPTER VIII.

MORTGAGES OF AND PAYMENTS IN RESPECT OF WIFE'S PROPERTY.

<i>Wife's Equity of Redemption in Realty—Exoneration</i>	365	<i>Wife's Equity of Redemption in Realty—Exoneration—contd.</i>	
<i>Belongs to Wife</i>	365	<i>Money raised for both</i>	366
<i>Reconveyance to Husband</i>	365	<i>Payments by Husband in respect of Wife's Estate</i>	367
<i>Intention to vest in him beneficially</i>	365	<i>Mortgages—Intention</i>	367
<i>Mortgage for Husband's Debt</i> ..	366	<i>Paying for Wife's Estate</i>	367
<i>Wife's separate Estate</i>	366	<i>Wife's Leaseholds</i>	367
<i>Parol Evidence of Intention</i> ...	366	<i>Wife's Right by Survivorship</i> .	367
<i>Wife's Debt before Marriage</i> ...	366	<i>Husband taking Reconveyance.</i>	367

Wife's Equity of Redemption in Realty.] The property which is referred to in this section is, as a general rule, property either freehold or leasehold, in which the husband has acquired a certain interest by the marriage. In mortgages of the wife's estates of inheritance, the equity of redemption is always *primâ facie* in the wife and her heirs, although it may be in terms reserved to the husband and his heirs. *Jackson v. Innes*, 1 Bligh, 104; *Ruscombe v. Hare*, 6 Dow, 1; *Stansfield v. Hallam*, 5 Jur., N. S. 1334; and if there has been no intention to vest the equity of redemption in the husband, a mere reconveyance to him and his heirs will be immaterial, for they will be trustees for the wife. *Stansfield v. Hallam*, 5 Jur., N. S. 1334. But if it clearly appears that the intention was to reserve the equity of redemption to the husband and his heirs *beneficially*, in fact, to make a new settlement, effect will be given to such intention accordingly (*Ib.*; *Heather v. O'Neil*, 2 D. & J. 399; see *Atkinson v. Smith*, 3 D. & J. 186; *Jones v. Davies*, 8 Ch. D. 205), as if a limitation to the husband and his heirs be superadded to the mortgage, having no necessary connexion with it. *Innes v. Jackson*, *supra*; *Eddleston v. Collins*, 3 D., M. & G. 1; *Reeve v. Hicks*, 2 S. & S. 403. If the husband and wife mortgage her estate for his debt, she is considered as a surety, and is entitled, after his death, to have her estate exonerated out of his assets real and personal. *Tate v. Austin*, 1 P. W. 264; *Lewis v. Nangle*, Amb. 150; *Aguilar v. Aguilar*, 5 Madd. 414; *Lancaster v. Erors*, 10 Bea. 154. The presumption is that such a mortgage is for the benefit of the husband, and this presumption will not be rebutted by

the mere fact that the deed expresses that the money was paid to herself and her husband. *Hudson v. Carmichael*, Kay, 613, Where the mortgage is of the wife's separate estate for the husband's benefit, she is entitled, as a surety, to stand in the place of the mortgagee who is paid off, and her right is paramount to that of her husband's simple contract creditors, if the debt is a specialty debt. *Hudson v. Carmichael*, *sup.* This case is cited for the principle, though the mortgage was of leasehold property. And it would seem the rule would be the same, although the mortgage is not of separate estate. *Ib.* The dicta in *Tate v. Austin* (1 P. W. 264) and *Clinton v. Hooper* (1 Ves. jun. 187) are *contra*, but disapproved of in *Hudson v. Carmichael*. See now, *ante*, p. 31, as to specialty and simple contract debts. As to the effect of the husband's bankruptcy after a mortgage of the wife's estate of inheritance, see *Gleaves v. Paine*, 1 D., J. & S. 87. But where the intention of the wife is clear, that the husband shall have the mortgage money as a gift, this equity against his estate will not arise (*Clinton v. Hooper*, 3 B. C. C. 201), nor will it if she receive the money for her separate use. *Thomas v. Thomas*, 2 K. & J. 79.

Evidence is admissible to show the nature of the transaction, and the evidence may be by parol; thus it may be admitted to show that the money was not paid to the husband, but applied in some other way (*Clinton v. Hooper*, 3 B. C. C. p. 214; *Hudson v. Carmichael*, Kay, 613; *Thomas v. Thomas*, 2 K. & J. 79), or to show that the debt was that of the wife (*Gray v. Dowman*, 27 L. J. Ch. 702), but not to contradict the deeds or other instruments. The wife may waive her right to exoneration, and parol evidence of her declaration to that effect to her husband's executor is admissible. *Clinton v. Hooper*, *sup.* If the mortgage debt existed before the marriage, and the husband on a transfer of the mortgage covenanted for payment of the debt, his estate will not be liable to indemnify that of his wife (*Bagot v. Oughton*, 1 P. W. 347; *Lewis v. Nangle*, Amb. 150), and if the debt was originally that of the wife, and her estate was mortgaged to a person who afterwards inherited it as her heir, he will have no right as against the husband in respect of the mortgage debt, where the estate is sufficient to pay it. *Gee v. Smart*, 8 E. & B. 313. Where the money is raised partly for the purpose of paying the wife's debts and partly for the husband, it seems that a reference will be directed to ascertain how much was received by him, and for this alone he will be liable to his wife's estate. *E. Kinnoul v. Money*, 3 Sw. 208, n. There is no equity to exoneration where the money is raised under a joint power vested in the husband and wife of mortgaging the husband's property and the power *precedes* the limitations in favour of the wife. *Scholefield v. Lockwood*, 9 Jur., N. S. 1258; see *Thomas v. Thomas*, 2 K. & J. 79. The marginal note of the former states the limitation to the wife as *preceding* the joint power, but this is not in accordance with the facts as stated (*ib.* 738), nor with the judgment of the Lord Chancellor.

Payments by Husband in respect of Wife's Real Estate.] Where the husband pays off a mortgage on his wife's estate of inheritance, the question arises with what intention he did so (*Pitt v. Pitt*, T. & R. 180, 183); whether, with the intention of discharging the estate absolutely, or of placing himself in the situation of the mortgagee who was paid off, and effect will be given to the intention accordingly. Where the husband paid the purchase-money and took the conveyance of an estate, the purchase having been contracted for by his wife before the marriage, it was held that he had, as against her heir, a lien on the estate for the purchase-money, and, as it would seem, for money expended in lasting improvements. *Neesom v. Clarkson*, 4 Ha. 97; *Maddison v. Chapman*, 1 J. & H. 470. It may be observed, however, that a husband who lays out money on his wife's property and is afterwards divorced from her in consequence of her adultery, has no equity to be recouped the sums he has expended. *Hamer v. Tilsley*, Johns. 486.

Wife's Leaseholds.] It has been already stated that a mortgage of the husband alone of his wife's leaseholds will be effectual. *Ante*, p. 343. The extent to which the mortgage will operate, whether as a complete or partial alienation of the property, will depend upon the intention. As to this the rule would seem to be, that if nothing more is intended than to effect a mortgage, the alienation will not be absolute in equity against the wife surviving, but only to the extent of the mortgage, but otherwise if the intention be to mortgage, and *in addition* to appropriate the right of redemption to the husband alone. *Clark v. Burgh*, 2 Coll. 221; see *Pigott v. Pigott*, L. R., 4 Eq. 549. When a term is mortgaged and the husband pays off the mortgage and takes an assignment to himself, the property will be altered and the wife's right excluded. 1 Preston on Abstracts, 346. Mr. Preston observes, that a re-assignment gives the husband the term at law under a new title, and the wife cannot assert any equity to control the legal title.

CHAPTER IX.

OF THE WIFE'S INTEREST IN THE HUSBAND'S PROPERTY.

SEC. 1.—*Dower and Freebench.*

<i>Nature of Interest</i>	368	<i>Election</i>	370
<i>Generally</i>	368	<i>Express Declaration in Will</i> ...	370
<i>In Copyholds — Gavelkind</i>		<i>Or necessary Implication</i>	370
<i>Lands</i>	368	<i>Devise of part</i>	371
<i>Aliens—What Estates subject</i>		<i>Bequest of Rent-charge</i>	371
<i>to</i>	369	<i>Devise in Trust for Sale</i>	371
<i>Corporeal and Incorporeal</i>		<i>Property given to Wife and</i>	
<i>Hereditaments</i>	369	<i>others</i>	371
<i>Shares in Companies</i>	369	<i>Time of Election</i>	371
<i>Reversionary Estates</i>	369	<i>Statute of Limitations</i>	371
<i>Power preceding Reversion</i> ...	369	<i>Dower Act, 3 & 4 Will. 4, c. 105</i> ...	372
<i>Partnership Property</i>	369	<i>Widow entitled out of Equitable</i>	
<i>Trust or Mortgage Estates</i>	369	<i>Estates</i>	372
<i>Equity of Redemption</i>	369	<i>Seisin unnecessary</i>	372
<i>Seisin—In Deed or Law</i>	369	<i>Disposition or Declaration by</i>	
<i>Seisin as Joint Tenant or Tenant</i>		<i>Husband is a bar</i>	372
<i>in Common—Effect</i>	369	<i>Devise of Realty to Widow</i> ...	372
<i>Legal Seisin necessary</i>	370	<i>Bequest of Personality</i>	373
<i>Bar—Extinguishment—Forfeiture.</i>	370	<i>Agreement not to bar</i>	373
<i>Jointure</i>	370	<i>Priority of Legacies in bar</i> ...	373
<i>Other Provision</i>	370	<i>Operation of Act</i>	373
<i>Conveyance to Uses to bar</i>		<i>Old Limitations to bar Dower.</i>	373
<i>Dower</i>	370	<i>Execution of Conveyance by</i>	
<i>Assignment of Satisfied Term</i> .	370	<i>Husband</i>	373
<i>Custom of London, &c.</i>	370	<i>Does not apply to Copyholds</i> ...	373
<i>Fine and Recovery</i>	370	<i>Gavelkind Lands</i>	373
<i>3 & 4 Will. 4, c. 74</i>	370	<i>Fee with Executory Devise over</i>	373
<i>Forfeiture—Divorce—Adultery</i>	370	<i>Mortgages—Debts</i>	374
		<i>Assignment—Payment—Arrears</i> ...	374

Nature of Interest.] Where a man is seised of lands *in fee or tail* and marries, his wife, after his death, shall be endowed of the third part of such lands or tenements as were his at any time during the coverture, for her life, whether she hath issue by her husband or no (Lit. s. 36); provided the issue, if born, would have been capable of inheriting. *Ib.* s. 53. Though dower is usually one-third, the wife in some cases is entitled *by custom* to the whole or a moiety (Lit. s. 166; Co. Lit. 111 a), as in some copyhold lands. The wife is entitled to freebench out of her husband's copyhold lands by special custom only (2 Watk. Cop. 72), which, where it exists, also determines what part she is to take, whether one-third, one-half, or in some cases the whole. *Ib.* 87. The right usually attaches only upon the lands of

which the husband dies *seised*, so that his wife's freebench is in general subject to his disposition. *Ib.* 73. In some manors, freebench attaches to lands of which the husband is *at any time* seised. *Ib.* 74. Dower in gavelkind lands consists of *one-half*, but continues only so long as the widow remains chaste and unmarried. Bac. Abr. Gavel. (A.).

The wife was not entitled if she was an alien. *Walls' Case*, 6 Moo. P. C. 216. See now 7 & 8 Vict. c. 66, by which it is enacted that any woman married to a natural-born subject or person naturalized shall be deemed to be naturalized (s. 16). As to an alien wife of an alien, see now 33 Vict. c. 14. Dower attaches on all corporeal hereditaments, and all incorporeal hereditaments that savour of the realty (1 Rop., Hus. & Wife, by Jac. 342), and on such shares in companies possessed of land as are *real estate* (*Drybutter v. Bartholomew*, 2 P. W. 127); but there are very few companies whose shares are real estate. Dower also attaches on mines opened in the husband's lifetime; but not, it would seem, on mines unopened, though in lease. *Stoughton v. Leigh*, 1 Taun. 402. But, in *Dickin v. Hamer* (1 Dr. & S. 284), it seems to have been considered that a widow would be entitled to one-third of the *income* of the royalties of mines, though opened after her husband's decease; but not to one-third of the royalties as corpus.

There is no right to dower where the husband has merely a reversion or remainder after a life estate. The old mode of conveyance to uses to bar dower is founded upon this doctrine. *Duncomb v. Duncomb*, 3 Lev. 437. Under a general power of appointment, vested in the husband prior to his *estate of inheritance*, he could defeat his wife's dower by exercising the power; but if he did not do so the right attached. *Doe v. Martin*, 4 T. R. 39; *Maundrell v. Maundrell*, 10 Ves. 265; *Ray v. Pung*, 5 B. & Al. 561. An estate purchased with partnership property for partnership purposes is not subject to dower (*Phillips v. Phillips*, 1 M. & K. 649), unless there is a distinct agreement that it shall be the separate property of one partner, to whom it is conveyed, and that he shall be a debtor to the partnership for the purchase-money. *Smith v. Smith*, 5 Ves. 189. At law the wife was dowable out of the estate of a trustee or mortgagee; but not in equity. *Noel v. Jevon*, Fr. Ch. 43; *Hinton v. Hinton*, 2 Ves. sen. 633; *Flack v. Longmate*, 8 Bea. 420; see *Lloyd v. Lloyd*, 4 D. & War. 356, 370.

Prior to the dower act a wife was not dowable of an equitable estate or equity of redemption. See *Godwin v. Winsmore*, 2 Atk. 525; *Dawson v. Bank of Whitehaven*, 6 Ch. D. 218. It was necessary formerly that the husband should be seised. The seisin might be in deed—*i.e.* perfected by entry or possession, *actual* or *constructive*, by means of a tenant (Co. Lit. 29 a, n. 3)—or in law, as where an estate descends on the heir who dies before entry. Co. Lit. 31 a; see Dower Act, *post*, Sec. 3. But a sole seisin was necessary or as tenant in common with others; seisin as a joint tenant was not sufficient (Lit. s. 45); neither was a momentary seisin. *Sneyd v. Sneyd*, 1 Atk. 442. It was necessary formerly that the estate of the husband

should be *legal*. *Godwin v. Winsmore*, 2 Atk. 525; see now Dower Act, s. 2.

Bar or Extinguishment—Forfeiture.] The right to dower being in many cases an inconvenient one as regards property, several methods were devised for the purpose of barring the right. Thus, a *jointure* properly granted was a bar. And if the wife became entitled under her husband's covenant to a moiety of his estate, she was not entitled to dower out of the other moiety. *Hamilton v. Jackson*, 2 J. & L. 295. In *Willis v. Willis* (34 Bea. 340) it was held that a settlement of some of the husband's copyholds on his wife, to take effect after his death, was no bar to her right of freebench out of other copyholds. The most usual method of barring dower was by the familiar mode of conveyance called the conveyance to uses to bar dower. See *Duncomb v. Duncomb*, 3 Lev. 437. The right to dower was also barred if, on a sale, a purchaser took an assignment, before the Satisfied Terms Act (8 & 9 Vict. c. 112), of a satisfied or attendant term to a trustee for himself (*Radnor v. Vandebendy*, Show. P. C. 69; *Maundrell v. Maundrell*, 10 Ves. 271), where such term was precedent to the right of dower, though such a term could not have been set up by the husband's *heir or devisee* against the widow. *Swannock v. Lifford*, Amb. 7, S. C. nom *Hill v. Adams*, 2 Atk. 208. And, by the custom of London, dower might and may be barred by a bargain and sale acknowledged before the Lord Mayor, or Recorder and an alderman, and enrolled in the Common Pleas of the city; and this custom (in substance) prevails in some other places. See 1 Byth. Conv., ed. Sw., 262 a. If the right attached it could be extinguished, formerly, by fine or recovery, and may be now by deed duly acknowledged pursuant to the Abolition of Fines and Recoveries Act. 3 & 4 Will. 4, c. 74, *ante*, p. 339; see *Dent v. Clayton*, 10 Jur., N. S. 671. A divorce *a vinculo matrimonii* was formerly a bar to dower. Co. Lit. 33 b. Now, by the 20 & 21 Vict. c. 85, amended 21 & 22 Vict. c. 108, a dissolution of the marriage is substituted for a divorce *a vinculo*, and is a bar. *Frampton v. Stephens*, 21 Ch. D. 164. Where the wife commits adultery, elopes and continues to live in adultery, and there is no subsequent reconciliation, her right will be extinguished. 13 Edw. 1, c. 34; *Hethrington v. Graham*, 6 Bing. 135; *Woodward v. Dowse*, 10 C. B., N. S. 722; *Bostock v. Smith*, 34 Bea. 57. If the divorce was *a mensâ et thoro* (for which, by the acts above referred to, a judicial separation is substituted), equity would not assist the wife, but left her to her remedy at law. *Shute v. Shute*, Pr. Ch. 111.

Election.] A widow might, before the Dower Act, have been put to her election between her dower and property given to her by her husband's will, where an intention to that effect was expressly declared (*Boynton v. Boynton*, 1 B. C. C. 445; *Nottley v. Palmer*, 2 Drew. 93), or was *clearly* to be implied (see *Birmingham v. Kirwan*, 2 Sch. & L. 452), from the *will itself*, and not from *acts done* in the testator's life-

time. *Gibson v. Gibson*, 1 Drew. 42. Since the act, however, it is less likely that cases should arise depending upon the doctrine of election, as most of those which, but for the act, would give rise to questions of election fall now within one or other of the sections of the act. It was necessary, in cases under the old law, in order that a case of election might arise, that the gift by the will should be clearly inconsistent with the right to dower. *Lawrence v. Lawrence*, 3 B. P. C. 483. There was no case of election where a rent-charge was devised by the husband to his wife, issuing out of property in which she had a right of dower, and which was devised to others. *Dowson v. Bell*, 1 Ke. 761; *Harrison v. Harrison*, *ib.* 765; *Holdich v. Holdich*, 2 Y. C. C. 18; though the earlier cases of *Arnold v. Kempstead*, Amb. 466; *Jones v. Collier*, *ib.* 730; *Wake v. Wake*, 1 Ves. jun. 335, are *contra*; cons. the act, *post*, particularly ss. 4 and 9. And where the wife was entitled to a jointure rent-charge on an estate, and her husband devised the income (except a small part) of the estate to her for life, it was held that there was no case of election. *Salvin v. Weston*, 12 Jur., N. S. 700. Nor where he devised the *whole* of the lands *in trust for sale*, for this was held not to imply any intention to devise the land otherwise than subject to its legal incident of dower, and this is still the rule. *Ellis v. Lewis*, 3 Ha. 310; *Bending v. Bending*, 3 K. & J. 257. But a general power of leasing was held to be inconsistent with the right to dower, and a case of election arose. *Hall v. Hill*, 1 Dr. & War. 94; *Grayson v. Deakin*, 3 De G. & S. 298; *Pepper v. Dixon*, 17 Sim. 200; *Parker v. Sowerby*, 4 D., M. & G. 321; *Bending v. Bending*, 3 K. & J. 257; *Thompson v. Burra*, L. R., 16 Eq. 592; the case of *Warbuton v. Warbuton*, 2 Sm. & G. 163, appears *contra*. So if the whole of the realty was devised together in general terms, and it was clear that *one* part was not to be subject to dower, a case of election arose. See *Roadely v. Dixon*, 3 Russ. 192. And if a testator devised his real estates equally to be divided between his wife and others, this raised a case of election, as there could be no equality if the wife was to have her dower and, in addition, the same share as the others. *Chalmers v. Storil*, 2 V. & B. 222; *Dickson v. Robinson*, Jac. 503; *Roberts v. Smith*, 1 S. & S. 513; see the act, particularly ss. 4 and 9, and *Rowland v. Cuthbertson*, L. R., 8 Eq. 466. So if part of the property was given to a devisee for life, for this was inconsistent with the widow's right of dower. *Miall v. Brain*, 4 Mad. 119.

Most of the preceding cases must now be considered with reference to the Dower Act. Where the widow's right is not barred under some one of the sections of the act, a case of election may still arise. Where a case of election is raised, the widow may elect even after sixteen years, if she was ignorant of her right to dower. *Sopwith v. Maughan*, 80 Bea. 235. Dower is an interest in hand, within the Statute of Limitations, 3 & 4 Will. 4, c. 27, and will be barred by non-claim within the time limited by that act. *Marshall v. Smith*, 10 Jur., N. S. 1174; *post*, tit. "LIMITATIONS."

Dower Act, 3 & 4 Will. 4, c. 105.] By this act (29 August, 1833) considerable alterations have been made in the law of dower. As the act is very short and important it is given (exclusive of formal headings) entire.

“The word ‘land’ extends to manors, advowsons, messuages, and all other hereditaments, whether corporeal or incorporeal (except such as are not liable to dower), and to any share thereof; and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing” (s. 1).

“When a husband shall die beneficially entitled to any land for an interest which shall not entitle his widow to dower out of the same at law, and such interest, whether wholly equitable, or partly legal and partly equitable, shall be, or be equal to, an estate of inheritance in possession (other than an estate in joint tenancy), then his widow shall be entitled in equity to dower out of the same land” (s. 2).

“When a husband shall have been entitled to a right of entry or action in any land, and his widow would be entitled to dower out of the same if he had recovered possession thereof, she shall be entitled to dower out of the same although her husband shall not have recovered possession thereof; provided that such dower be sued for or obtained within the period during which such right of entry or action might be enforced” (s. 3).

“No widow shall be entitled to dower out of any land which shall have been absolutely disposed of by her husband in his lifetime or by his will” (s. 4). See *Rowland v. Cuthbertson*, L. R., 8 Eq. 466; and *Lacey v. Hill*, L. R., 19 Eq. 346.

“All partial estates and interests, and all charges created by any disposition or will of a husband, and all debts, incumbrances, contracts, and engagements to which his land shall be subject or liable, shall be valid and effectual as against the right of the widow to dower” (s. 5).

“A widow shall not be entitled to dower out of any land of her husband when in the deed by which such land was conveyed to him, or by any deed executed by him, it shall be declared that his widow shall not be entitled to dower out of such land” (s. 6).

“A widow shall not be entitled to dower out of any land of which her husband shall die wholly or partially intestate when by the will of her husband, duly executed for the devise of freehold estates, he shall declare his intention that she shall not be entitled to dower out of such land or out of any of his land” (s. 7).

“The right of a widow to dower shall be subject to any conditions, restrictions, or directions which shall be declared by the will of her husband, duly executed as aforesaid” (s. 8).

“Where a husband shall devise any land out of which his widow would be entitled to dower if the same were not so devised, or any estate or interest therein, to or for the benefit of his widow, such widow shall not be entitled to dower out of or in any land of her said husband, unless a contrary intention shall be declared by his will” (s. 9).

In *Rowland v. Cuthbertson*, L. R., 8 Eq. 466, Lord Romilly, M.R., expressed an opinion on sec. 4, that the testator must point out

the land *specifically*. But in *Lacey v. Hill*, *Lency v. Hill*, L. R., 19 Eq. 346, Jessel, M. R., after commenting upon the former case, held that where a testator devises all his real estate, that is a sufficient devise within secs. 4 and 9 of the act; and further, that a devise in this form upon trust to sell and pay the widow an annuity out of the investments, came within sec. 9, and that the widow was not entitled to dower.

“No gift or bequest made by any husband to or for the benefit of his widow of or out of his personal estate, or of or out of any of his land not liable to dower, shall defeat or prejudice her right to dower, unless a contrary intention shall be declared by his will” (s. 10).

“Nothing in this act contained shall prevent any court of equity from enforcing any covenant or agreement entered into by or on the part of any husband not to bar the right of his widow to dower out of his lands or any of them” (s. 11).

“Nothing in this act contained shall interfere with any rule of equity, or of any ecclesiastical court, by which legacies bequeathed to widows in satisfaction of dower are entitled to priority over other legacies” (s. 12).

“No widow shall hereafter be entitled to dower *ad ostium ecclesiæ*, or dower *ex assensu patris*” (s. 13).

“This act shall not extend to the dower of any widow who shall have been or shall be married on or before the 1st day of January, 1834, and shall not give to any will, deed, contract, engagement, or charge executed, entered into, or created before the said 1st day of January, 1834, the effect of defeating or prejudicing any right to dower” (s. 14).

Operation of the Act.] The old limitations to uses to bar dower, in a conveyance executed *before* the act, will not bar the dower of a wife married since the act, though there is a declaration that she shall not be entitled to dower. *Fry v. Noble*, 7 D., M. & G. 687; *Clarke v. Franklin*, 4 K. & J. 266. It is not necessary that the husband should *execute* the deed of conveyance to him in which there is a declaration against dower. *Fairley v. Tuck*, 3 Jur., N. S. 1089. The act does not apply to copyholds (*Powdrell v. Jones*, 2 Sm. & G. 407; *Smith v. Adams*, 5 D., M. & G. 712), as in most manors the husband has the power of barring his wife's freebench by disposition in his lifetime. 2 Watkins, Cop. 72. Where the husband devises copyholds the same effect is to be given as under the old law, and the widow is not entitled to freebench. *Lacey v. Hill*, *Lency v. Hill*, L. R., 19 Eq. 346, 351. A copyholder must be *admitted* to entitle his wife to freebench. *Smith v. Adams*, *sup.* A surrender by the wife of the vendor to the purchaser will bar her freebench, though the purchaser has not the legal estate at the time of the surrender. *Wood v. Lambirth*, 1 Ph. 8. The act extends to gavelkind lands. *Furley v. Bonham*, 2 J. & H. 177. Upon the second section it has been held that where the husband has an equitable estate in fee subject to an executory devise over, in case he dies without having a child living at his decease his widow

will be entitled, though on his death the executory devise over takes effect. *Smith v. Spencer*, 2 Jur., N. S. 778. Upon the 5th section it has been held that though the widow's right to dower is not affected by the mere debts of her deceased husband not charged upon his lands (*Spyer v. Hyatt*, 20 Bea. 621), yet it is by a mortgage of such lands, and she has no equity as against her husband's heir at law to be indemnified in respect of such mortgage. *Jones v. Jones*, 4 K. & Jo. 361. See 17 & 18 Vict. c. 113.

Assignment—Payment—Arrears.] If the widow obtains judgment, the sheriff assigns the dower by metes and bounds. 2 Wms. Saund. 45 a. The value of the land is estimated at the time of the assignment, and not at the time of the husband's death, if it has increased in value since his death. *Doe v. Gwinnell*, 1 Q. B. 682, 692. Where property is taken by a railway company or other authority similarly authorized, and the purchase-money is paid into court, the widow will be entitled to have the value of her interest paid out to her. *Hall's Estate*, L. R., 9 Eq. 179. By the 3 & 4 Will. 4, c. 27, s. 41, arrears of dower for more than six years are not recoverable. The usual and convenient remedy for the recovery of dower is in equity. *Curtis v. Curtis*, 2 B. C. C. 620; *Mundy v. Mundy*, 2 Ves. jun. 128; see Daniell's Chan. Prac. 6th ed. 1363.

SEC. 2.—Paraphernalia and Personal Estate of Husband.

<i>Nature of Interest</i>	374	<i>Distinguishable from Presents—</i>	
<i>In general subject to Husband's</i>		<i>Heirlooms</i>	375
<i>Debts</i>	374	<i>Right is personal</i>	375
<i>Not to Legacies</i>	374	<i>May be barred—</i>	
<i>If applied in payment of his Debts,</i>		<i>Under the Statute of Distri-</i>	
<i>Wife a Creditor</i>	375	<i>butions</i>	375
		<i>Dower or Thirds</i>	375

The wife surviving is entitled to such articles of wearing apparel, jewelry, &c. as she was in the habit of using during the marriage, although while the husband lives they are absolutely in his power. *Graham v. Londonderry*, 3 Atk. 394. These articles are called her paraphernalia, and were formerly allowed only where the party was noble by birth or marriage. *Ly. Tyrrell's Case*, Fr. Ch. 304. The husband cannot bequeath them (*Tipping v. Tipping*, 1 P. W. 729), but the right of his wife after his death is only a qualified one, being subject to the claims of his creditors. *Boynton v. Boynton*, 1 Cox, 106. And this is the rule, although the paraphernalia were given to her before marriage. *Ridout v. Ld. Plymouth*, 2 Atk. 104. See *Snelson v. Corbet*, 3 Atk. 370. But they are not subject to the claims of legatees, general or specific. *Graham v. Ld. Londonderry, ib.*, 394. If her paraphernalia have been pledged by her husband in his lifetime, and there are sufficient assets remaining after payment of his debts, she is entitled to have them applied to the redemption of the articles

so pledged. *Graham v. Londonderry, sup.* If it has become necessary to resort to the paraphernalia to pay the husband's debts, the wife will be a creditor for their value against the personal estate, and the assets will be marshalled (*Aldrich v. Cooper*, 8 Ves. 397) in her favour against the heir taking by descent (*Snelson v. Corbet*, 3 Atk. 369), and against devisees of land devised for payment of debts (*Boyntun v. Boyntun*, 1 Cox, 106; *Incedon v. Northcote*, 3 Atk. 438), even, it would seem, against devisees of land taking beneficially (*Tynt v. Tynt*, 2 P. W. 543; but *Ridout v. Plymouth*, 2 Atk. 105, and *Probert v. Clifford*, 1 Amb. 6, are *contrà*); at all events since the 3 & 4 Will. 4, c. 104 (J. Williams on Real Assets, 118). The husband's possession of his wife's paraphernalia at the time of his death is immaterial, if the wife was in the habit of wearing them. *Northey v. Northey*, 2 Atk. 79. The right to paraphernalia is distinguishable from that to presents made to the wife during the coverture, for these are gifts to her *separate use*. *Graham v. Londonderry*, 3 Atk. 393. But where the husband makes presents to his wife of ornaments, jewelry, and the like, they are to be considered as paraphernalia *S. C.* 394; *Jerroise v. Jerroise*, 17 Bea. 566. Articles of ornament or jewelry, in the nature of heirlooms in her husband's family, are not paraphernalia, though the wife may have been in the habit of wearing them. *Calmady v. Calmady*, 11 Vin. Ab. 181, Pl. 21; *Jerroise v. Jerroise, supra*. The right of the wife to her paraphernalia is purely personal; if she does not make the claim in her lifetime, no right will vest in her executor or administrator (*Clarges v. Dss. Albemarle*, 2 Ver. 247); and the right may be barred by a provision before marriage in lieu of it. *Read v. Snell*, 2 Atk. 642; *Cholmely v. Cholmely*, 2 Ver. 82.

It may be observed that the wife's interest, under the Statute of Distributions, will be barred by a settlement or bequest expressed to be in lieu or bar of it. Thus, a provision by settlement in lieu, bar or satisfaction of dower or "thirds," is a satisfaction of what the widow would be entitled to under her husband's intestacy, though, by reason of there being no child, this may be one-half. *Druce v. Denison*, 6 Ves. 385; *Colleton v. Garth*, 6 Sim. 19; *Gurly v. Gurly*, 8 Cl. & F. 743; *Thompson v. Watts*, 8 Jur., N. S. 760. As to pin-money, see tit. "MARRIAGE SETTLEMENTS."

CHAPTER X.

WIFE'S EQUITY TO A SETTLEMENT.

<i>Nature of the Equity</i>	376	<i>Waiver and Release of—continued.</i>	
<i>Jurisdiction of Equity</i>	376	<i>Wife Abroad</i>	381
<i>Husband's Legal Title</i>	377	<i>Wife Infant</i>	381
<i>Legal Right of Assignees</i>	377	<i>Consent revoked</i>	382
<i>Fund not paid to Wife</i>	377	<i>Fraudulent Settlement</i>	382
<i>On what Property attaches</i> ...	377	<i>Amount must be ascertained</i> ...	382
<i>Not Property vesting in Husband jure mariti</i>	377	<i>No Settlement</i>	382
<i>Personalty</i>	377	<i>Release, 20 & 21 Viet. c. 57</i> ...	382
<i>Interests in Land</i>	378	<i>Reversionary Fund</i>	382
<i>Trust Term of Years</i>	378	<i>Amount settled</i>	382
<i>Estates Tail—In Fee</i>	378	<i>Formerly one half in general</i> ...	382
<i>Legacy charged on Land</i>	378	<i>Considerations now influencing Court</i>	383
<i>Absolute Interests capable of being assigned</i>	378	<i>Conduct of Husband</i>	383
<i>Life Interest</i>	378, 379	<i>Conduct of Wife</i>	383
<i>Not on Reversionary Interests in pure Personalty</i>	379	<i>Wife's Adultery</i>	383
<i>Equity arises on Bill by Husband, Assignee or Wife</i>	379	<i>Whole Fund sometimes given</i> ...	383
<i>Where Equity does not arise</i>	380	<i>Equity attaches on small Fund</i>	384
<i>Fund subject to Settlement</i>	380	<i>What Settlement directed</i>	384
<i>Foreign Law contra</i>	380	<i>Depends on circumstances of each Case</i>	384
<i>Wife having adequate Provision</i>	380	<i>The Children have no independent Equity</i>	384
<i>Wife having separate fund</i>	380	<i>From what time Order binds</i> ...	384
<i>Wife joining in Husband's Assignment</i>	380	<i>Husband when bound</i>	384
<i>Wife's Adultery</i>	381	<i>Wife when bound</i>	385
<i>Living apart</i>	381	<i>Waiver by Wife</i>	385
<i>Wife indebted before Marriage</i>	381	<i>Husband refusing to make Settlement</i>	385
<i>Waiver and Release of</i>	381	<i>Husband's Insanity</i>	385
<i>Consent to payment to Husband</i>	381	<i>Orders for Maintenance</i>	385
		<i>Wife deserted</i>	385
		<i>Refusing to live with Husband</i>	386

Nature of the Equity.] At law, as a general rule, the rights of the husband to his wife's chattels real and personal during the marriage, alone were recognised prior to the Act of 1870. Equity, however, in those cases where recourse was had to its assistance, at a very early period interposed, compelling the husband, or those claiming under him, to make a settlement of part of the fund on the wife and children, and directing it to be secured until the settlement was made. *Milner v. Colmer*, 2 P. W. 640; *Brown v. Elton*, 3 P. W. 202. In *Sturgis v. Champneys* (5 M. & C. 103), Lord Cottenham observed, that upon a careful examination of the authorities he did not find the time at which the court did not exercise this jurisdiction in favour of the wife. The right to a settlement is an obligation which the court

fastens, not upon the property, but the right to receive it. *Osborn v. Morgan*, 9 Ha. 432; *Marshall v. Gibbings*, 4 Ir. Ch. Rep. 276; *Knight v. Knight*, L. R., 18 Eq. 487. Equity, however, does not interfere where the husband has the legal title by which he can obtain possession of his wife's personal estate. *Jewson v. Moulson*, 2 Atk. 420; *Att.-Gen. v. Whorwood*, 1 Ves. sen. 538. Nor where the husband and wife take as tenants by entireties. *Ward v. Ward*, 14 Ch. D. 506; *Godfrey v. Bryan*, *ib.*, 516. Though if the husband proceeded in the ecclesiastical courts for a legacy, an injunction would have been granted to stay the proceedings. *Jewson v. Moulson*, *sup.*; see *Duncombe v. Greenacre*, 2 D., F. & J. 509. In *Murray v. Ld. Elibank* (10 Ves. 90), Lord Eldon observed, that the husband, where he can, is entitled to lay hold of his wife's property, and the court will not interfere. Previously to a bill a trustee who has the wife's property, real or personal, may pay the rents and profits, and may hand over the personal estate to the husband; but he cannot do so after a bill is filed. *Macaulay v. Philips*, 4 Ves. 18; *De la Garde v. Lempriere*, 6 Bea. 344, 347; see *Allday v. Fletcher*, 1 D. & J. 82. And where no bill is filed it is still a matter of discretion, and there may be cases justifying the trustees in paying the fund into court under the Trustee Relief Act. *Re Swan*, 2 H. & M. 34; see *Re Bendyshe*, 3 Jur., N. S. 727.

Neither will equity interfere with the legal right of assignees. In *Burdon v. Dean* (2 Ves. jun. 607), it was said that there was no objection to what the assignees could get at law; but if they came into the Court of Chancery, the court would not extend its arm to give them any other part of the wife's property without a consideration for it. See *Oswell v. Probert*, *ib.* 680; *Brown v. Clarke*, 3 Ves. 166. And there is no equity against an assignee for value from the husband where such assignee has the *legal estate*, though he may be compelled to come into equity for some matter collateral to, but arising out of, the assignment to himself. As where the husband possessed of leaseholds in right of his wife, assigned, with her, the premises *and legal estate* in them by way of mortgage, she was held not to be entitled to a settlement on a bill of foreclosure being filed by the mortgagee. *Hill v. Edmonds*, 5 De. G. & S. 603. The wife, however, has an equity for a *settlement only*, and the court will not, as against the husband or his assignee, order the fund to be paid to the wife on her separate receipt, but will direct a settlement. *Re Grant*, 14 W. R. 191. The wife has no equity where the husband only exercises his *legal* right of disposition over her personal estate which vests in him by the marriage (*Warden v. Jones*, 2 D. & J. 76, 87; see the Chapters VI. and VII., *ante*), or over his own interest during their joint lives in her real estate. *Durham v. Crackles*, 32 L. J., Ch. 111. It had long been held, that the equity attached to every species of personal property out of which, from the nature of it, a settlement could be made, and to property to which the wife became entitled before as well as during the marriage. *Barrow v. Barrow*, 5 D., M. & G. 782. But, until the case of *Sturgis v. Champneys* (5 M. &

Cr. 97), it was considered that the doctrine was confined to personalty. *Hanson v. Keating*, 4 Ha. 1, 8. In *Sturgis v. Champneys*, however, it was decided, that estates in land are subject to the wife's equity to a settlement; and the doctrine there laid down has been acted upon in several subsequent cases, and is now well settled. In *Hanson v. Keating* (4 Ha. 1), the wife was entitled to part of a trust term of years, Wigram, V.-C., considered himself to be bound by *Sturgis v. Champneys*, and decreed in favour of the wife's equity. See *Clark v. Cook*, 3 De. G. & Sm. 333; *Fowke v. Draycott*, 29 Ch. D. 996. It attaches to an estate tail, which is subject to a jointure term, such an estate being equitable during the continuance of the term. *Worthington v. Pemberton*, 1 De. G. & Sm. 644; comp. *Re Cumming*, 2 D., F. & J. 376; *Life Ass. of Scotland v. Siddal*, 3 D., F. & J. 271. So to an equitable estate in fee, but so as not to affect the possible estate by the curtesy of the husband. *Smith v. Matthews*, 3 D., F. & J. 139. The wife will also be entitled to a settlement out of a legacy charged on land, though there may be a right of entry with power to raise it by demise, sale or mortgage. *Duncombe v. Greenacre*, 2 D., F. & J. 509. With respect to the nature of the interest in the property or fund, which the wife must possess to entitle her to a settlement, the cases already referred to show that her equity is clear where she has the entire interest in possession capable of being immediately transferred to the husband or his assigns.

As regards the wife's equity out of an estate or interest for life, there was formerly some difficulty as to what the doctrine of the court was. It may now, however, be considered as settled. A married woman has the same equity to a settlement out of property in which she has a life interest only as out of property in which she has an absolute interest, and there ought to be no distinction between the two cases as regards the amount to be settled. *Taunton v. Morris*, 8 Ch. D. 453. The question may arise between the wife and the husband's *general* or *particular* assignees or creditors, or between the husband and wife. In *Pryor v. Hill* (4 B. C. C. 139), the husband assigned the wife's life interest for the benefit of his creditors generally, and the wife was held entitled to a settlement. The same equity was enforced against the assignees of the husband who had become bankrupt or insolvent in *Ex parte Coysegame*, 1 Atk. 192; *Jacobs v. Amyatt*, 1 Madd. 376 n.; *Sturgis v. Champneys*, 5 M. & C. 97; *Koerber v. Sturges*, 22 Bea. 588; *Squires v. Ashford*, 23 Bea. 132; *Barnes v. Robinson*, 9 Jur., N. S. 245; *Taunton v. Morris*, 11 Ch. D. 779. In *Vaughan v. Buck* (13 Sim. 404), the question was between the husband and wife at a time when he was maintaining her, though he was in embarrassed circumstances, and the court refused to allow her a settlement out of the fund. In *Re Ford* (32 Bea. 621), the husband had deserted his wife, and she had obtained a decree for judicial separation. The court excluded the husband entirely from any share in an annuity which had been given to her.

In the following cases the question arose between the wife and the husband's assignee for value. In *Wright v. Morley* (11 Ves. 12), the

husband assigned *part* of his wife's life interest in the funds, and ceased to maintain her. The court adopted a sort of medium course, and held the assignment operative to the extent of the fund assigned, giving the wife the residue, which had not been assigned, and avoided deciding the general question of the effect of a charge of the *whole* fund. *Ib.* p. 22. But in *Elliott v. Cordell* (5 Madd. 149; 1 Russ. 71 n.) and *Stanton v. Hall* (2 R. & My. 175; see *Aguilar v. Aguilar*, 5 Madd. 414), it was expressly held that where the wife's interest for her own or her husband's life was assigned to a purchaser for value, the wife was not entitled to a settlement, though in these cases the husband had afterwards become bankrupt or insolvent, and was unable or less able in consequence to maintain his wife. But in these cases it will be observed that *the assignment* was at a time when the husband was maintaining his wife and had not become bankrupt or insolvent. These cases were followed in *Tidd v. Lister* (10 Ha. 140; aff. 3 D., M. & G. 857); and *Re Duffy* (28 Bea. 386); both the V.-C. and Lord Cranworth, C., seeming however to admit, on the authority of *Stiffe v. Everitt* (1 M. & Cr. 37), this qualification, that the assignment would only operate on the interest during the coverture, and that any interest accruing *after* (which could not happen, of course, in such a case as *Stanton v. Hall*, *sup.*, if the husband predeceased his wife) was reversionary, and unaffected by the assignment as against the wife surviving.

When the interest is in pure personal estate and reversionary, the court cannot direct a settlement to be made. *Osborn v. Morgan*, 9 Ha. 432; see *Taylor v. Austen*, 1 Drew. 459; but can where a fund is in court. In *Re Robinson's Estate*, 12 Ch. D. 188. It was formerly thought necessary, in order to entitle the wife to her equity, that the court should be put in motion by the husband or his assignee, and that then equity would not assist unless provision were made for the wife out of her property. See per Mr. (Sir Samuel) Romilly arg. *Carr v. Taylor*, 10 Ves. 574, 577. The rule, however, is now clearly established, that the wife herself may originate the suit (*Ex parte Coysegame*, 1 Atk. 192; *Elbank v. Montolieu*, 5 Ves. 737; *Sturgis v. Champneys*, 5 M. & Cr. 97), and the court will decree a settlement, although a settlement may not be expressly prayed by the bill. *Wortham v. Pemberton*, 1 De G. & Sm. 644. If a legacy be given to the wife, or she is entitled to a fund as next of kin, out of which she is entitled to a settlement, her equity will not be prejudiced or affected by reason of her husband being indebted to the testator's estate (*Carr v. Taylor*, 10 Ves. 574; *White v. Cordwell*, L. R., 20 Eq. 644). In *Ex parte O'Ferrall*, 1 Gl. & Ja. 347, the husband was a bankrupt, and the executors were allowed, after making a suitable provision for the wife, to set off the remainder of the legacy against the debt due to their testator, so that she was not entitled to a settlement of the entire fund. But in *White v. Cordwell*, *sup.*, where the husband was not bankrupt, but in poor circumstances, the whole fund was settled.

Where the Equity does not arise.] The wife has no equity where the fund has been made the subject of a settlement, or where it is affected by some provision in it. Thus, if there is a covenant to settle the wife's after-acquired property, this covenant is paramount to the wife's equity, and the fund must be settled accordingly. See *Brett v. Forcer*, 3 Atk. 405. The wife has no equity to a settlement out of money covenanted to be paid by her father to her husband as part of her portion; and it makes no difference in such a case that the husband has covenanted for payment of a sum to her if she should survive. This gives her no right to have the sum payable to him held as security for the sum payable by him. *Brett v. Forcer*, 6 Atk. 403. Where it was agreed that the husband should receive whatever the wife might be entitled to during the marriage, his executors repaying the same after his death with interest, the wife was held to have no equity against her husband's assignees, or those claiming under them, in respect of money received in her right. *Basevi v. Serra*, 14 Ves. 313; 3 Mer. 674. This form of settlement is, or was, usual amongst persons of the Jewish persuasion. 14 Ves. 316. The equity will not, however, arise if the disposal of the fund is governed by the law of a foreign country in which it is not recognized. Thus were the husband and wife were domiciled in Prussia, she was held not entitled to a settlement out of a fund in the Court of Chancery here; but it was ordered to be paid to the husband. *Campbell v. French*, 3 Ves. 323. So where the parties were domiciled in Scotland, and there was a contract or settlement according to Scotch law. *Anstruther v. Adair*, 2 M. & K. 513; *Hitchcock v. Clendinen*, 12 Bea. 534; *M'Cormick v. Garnett*, 5 D., M. & G. 278; *Re Todd*, 19 Bea. 582. But, although a wife may have no equity to a settlement by the law of Scotland, a Scotch lady who is a ward of the English Court of Chancery is entitled to have a settlement made upon her. *In re Tweedale*, Johns. 109. As a general rule, if the wife be already well provided for, the court will not, without special grounds, order a further provision. *Spicer v. Spicer*, 24 Bea. 365; *Giacometti v. Prodgers*, L. R., 8 Ch. 338; see *Green v. Otte*, 1 S. & S. 250. But in previous cases it had been held that the fact that there was another provision for the wife's separate use was no bar to her claim to a settlement out of a further and large accession of property to the husband in right of his wife. *Tomkyns v. Ladbroke*, 2 Ves. sen. 595; *Burdon v. Dean*, 2 Ves. jun. 607. And if the wife has herself been a party to the husband's assignment or disposition of the property, so as legally to bind herself, for instance, by an acknowledged deed conveying an interest in real estate, she cannot be allowed to defeat her own act by claiming a settlement out of the property to the prejudice of the assignee or mortgagee. *Williams v. Cooke*, 9 Jur., N. S. 658; comp. *Re Insole*, L. R., 1 Eq. 470; *Wilkinson v. Gibson*, L. R., 4 Eq. 162.

Although the equity of the wife may be, in other respects, clear, the court will sometimes refuse to give effect to it, where she has misconducted herself. Thus, as a general rule, her adultery will bar

her right (*Carr v. Eastbrooke*, 4 Ves. 146), unless, perhaps, she has nothing from him for her maintenance. See *Ball v. Montgomery*, 2 Ves. jun. 191; *Re Lewin*, 20 Bea. 378; and *post*, p. 383. And if both husband and wife are living in adultery, the wife is entitled to a settlement, even as against particular assignees for value. *Greedy v. Lavender*, 13 Bea. 62. In *Ball v. Montgomery* (2 Ves. jun. 192), the fund was ordered to be paid into court, with the view of compelling the parties to enter into an arrangement. In this case the wife had left her husband and was living in adultery. The ground of the refusal either to decree a settlement or order the fund to be paid to the husband was that, by so doing, the wife would continue in a state of adultery or be reduced to beggary. But the mere fact that the wife is living apart from her husband is no bar to her right, if it appears from other circumstances that she has not been guilty of any impropriety of conduct. *Eedes v. Eedes*, 11 Sim. 569. Where the wife was entitled to a fund in court, but was indebted at the time of her marriage to a greater amount, which had been proved under the husband's bankruptcy, his assignees were allowed to retain the fund in court. *Bonner v. Bonner*, 17 Bea. 86. For in such a case she has no equity until her debts, incurred before her marriage, have been provided for. *Barnard v. Ford*, *Carrick v. Ford*, L. R., 4 Ch. 247. Where a testatrix gave her residue among four, and appointed the husband of one of them sole executor, from whom, on the accounts being taken, there was found due a large balance which he was unable to pay, it was held that the husband being indebted to the estate, and therefore disentitled to receive anything, no equity to a settlement arose in favour of the wife. *Knight v. Knight*, L. R., 18 Eq. 487; see *Osborn v. Morgan*, 9 Hare, 432. If she has been guilty of fraud, she has no equity to a settlement. *Re Lush's Trusts*, L. R., 4 Ch. 591.

Waiver and Release of.] The wife may waive her equity and may also waive any agreement made by her in respect of it, though such agreement, if carried out, would be beneficial to the children of the marriage. *Fenner v. Taylor*, 2 R. & My. 190. But the court will not take the wife's consent, if, prior to the marriage, terms of a settlement are agreed to, which would enure for the benefit of the children of the marriage. *Anon. or Ex parte Gardner*, 2 Ves. sen. 671. The wife may also waive her equity and consent in court, or under a commission out of court, to the transfer of the fund to her husband. *Dimmock v. Atkinson*, 3 B. C. C. 195. Where the wife is abroad, a commission will be ordered to take her consent. *Gibbons v. Kibbey*, 7 Jur., N. S. 1298; *Ireland v. Trembath*, 14 W. R. 275. If the husband and wife apply for an order for payment to him, her consent is unnecessary. *Skilleto v. Collett*, 7 Jur., N. S. 385. The court will not take the consent of a wife who is under age (*Stubbs v. Sargon*, 2 Bea. 496; *Abraham v. Newcombe*, 12 Sim. 566, overruling *Gullin v. Gullin*, 7 Sim. 236), nor where, previous to her marriage, she was a ward of court, and married without consent. See *Shipway v. Ball*,

16 Ch. D. 376. In such case a settlement must be made. See *Gynn v. Gilbard*, 7 Jur., N. S. 91. A consent given under a mistake as to the effect of it may be recalled (see *Watson v. Marshall*, 17 Bea. 363), or it would seem, that although there may be no mistake, the wife may recall her consent before actual payment or transfer to the husband. *Penfold v. Mould*, L. R., 4 Eq. 562. Nor will her consent be taken if the amount of the fund remains to be ascertained (*Edmonds v. Townsend*, 1 Anstr. 93; *Sperling v. Rochfort*, 8 Ves. 180), though if this be done, it can be notwithstanding certain costs which are payable out of it may then be unascertained. *Packer v. Packer*, 1 Coll. 92. The court will not make any order as to the fund without being satisfied that there is no settlement, or if there is a settlement, it must be shown what it is. *Rose v. Rolls*, 1 Bea. 270; *Britten v. Britten*, 9 Bea. 143. The court will accept as evidence that there was no settlement on the marriage of a woman resident abroad an affidavit by a solicitor, disclosing facts which make it unlikely that there was a settlement, and stating positively that he was told by the lady and her husband that there was none. *Woodward v. Pratt*, L. R., 16 Eq. 127.

As regards the operation of a release, by the first section of the 20 & 21 Vict. c. 57, the wife may release her equity to a settlement out of any personal estate to which she may be entitled *in possession* by virtue of such instruments as are mentioned in that section. See *ante*, p. 353. Formerly, where the fund was reversionary, the court would not take the wife's consent to the transfer of her interest in it to her husband. *Box v. Box*, Dr. t. Sug. 42, and see *ante*, p. 354; *Osborn v. Morgan*, 9 Ha. 434. Now, by the above-mentioned statute, she may, in cases to which the act applies, assign her reversionary interest with her husband's consent, but there is no express provision giving her power to consent to the payment of a reversionary fund to her husband when it falls into possession, or to release such a fund to him.

Amount settled.] With reference to the amount settled it was considered formerly that as a general rule one half of the fund was a proper proportion to be settled for the benefit of the wife, or wife and children (see *Brown v. Clark*, 3 Ves. 166; *Ex parte Pugh*, 1 Drew. 202, 203), and that amount is now frequently given, particularly where the husband is maintaining his wife (*Re Grove*, 3 Giff. 575), and in the absence of special circumstances leading the court to give a larger portion of the fund. *Spirett v. Willows*, L. R., 1 Ch. 520; *Re Suggitt's Trusts*, L. R., 3 Ch. 215. There is not, however, any settled rule upon the subject, and the court takes into account not only all moneys of the wife previously received by the husband, but conversely all moneys which have been settled on the wife (*Green v. Otte*, 1 S. & S. 250; *Re Erskine's Trust*, 1 K. & Jo. 302), and property derived under the will or by the gift of third persons. *Aubrey v. Brown*, 2 Jur., N. S. 879; see *Spirett v. Willows*, L. R., 1 Ch. 520. The court also considers whether the husband is living with and

maintaining his wife (*Barrow v. Barrow*, 5 D., M. & G. 782), or capable of doing so. *Re Grove*, 3 Giff. 575; *White v. Cordwell*, L. R., 20 Eq. 644. So the conduct of the husband weighs with the court. "If he has so conducted himself that his wife cannot live with him, that circumstance must be taken into account in determining the provision to be made for her." *Per* Turner, L. J., *Barrow v. Barrow*, 5 D., M. & G. 794. The circumstances of each particular case therefore must determine the amount to be settled. Sometimes the wife will be allowed the whole of the fund as against assignees in bankruptcy, or a particular assignee for value of the husband, or the husband himself. In *Gilchrist v. Cator* (1 De G. & Sm. 188), the husband had abandoned his wife, the fund she claimed formed her sole means of support, and the whole of it was given to her. So in *Dunkley v. Dunkley* (2 D., M. & G. 390), the husband had also abandoned his wife and two children, and the fund formed a material source of their income. In *Scott v. Spashett* (3 Mac. & G. 509), the whole fund was given. This was a strong case, inasmuch as the husband and wife were living together, and the assignee, a purchaser, had given something, though not an equivalent, for the fund. See *Taunton v. Morris*, 11 Ch. D. 779; *Foulke v. Draycott*, 29 Ch. D. 996.

In *Barrow v. Barrow* (5 D., M. & G. 794), the husband had committed adultery, and there were also other very strong circumstances in the case, which, in the opinion of the court, weighed considerably against him, and the entire income was given to her. In *Gent v. Harris* (10 Ha. 383), the wife was an infant at the time of the marriage, and was afterwards abandoned by her husband, and the court allowed the whole fund to be settled upon her. And in many other cases the whole fund has been settled on the wife where the husband is unable to maintain her or has deserted her. *Re Cutler*, 14 Bea. 220; *Marshall v. Fowler*, 16 Bea. 249; *Watson v. Marshall*, 17 Bea. 363; *Layton v. Layton*, 1 Sm. & G. 179; *Re Kincaid's Trusts*, 1 Drew. 326; *Francis v. Brooking*, 19 Bea. 347; *Smith v. Smith*, 3 Giff. 121; *Duncombe v. Greenacre*, 29 Bea. 578; *Re Ford*, 32 Bea. 621; *White v. Cordwell*, L. R., 20 Eq. 644. In one case even, where the circumstances were very special, the court allowed the whole fund to be settled on the wife though she had committed adultery. *Re Lewin's Trusts*, 20 Bea. 378. An income payable to the wife *for life* has also been directed to be paid to her where her husband has become bankrupt or (formerly) insolvent; in cases where, though the husband and wife were living together, the fund was small, and the wife and children wholly dependent upon it as a permanent source of support. *Gardner v. Marshall*, 14 Sim. 575; *Koeber v. Sturges*, 22 Bea. 588; *Squires v. Ashford*, 23 Bea. 132. As a general rule, however, the whole fund will not be settled, unless the husband is in insolvent circumstances, or has been guilty of gross misconduct, such as adultery, cruelty, or desertion. *Re Suggitt*, L. R., 3 Ch. 215. The court formerly dispensed with the consent of the wife, and ordered the fund to be paid to the husband where it was less than 200*l.*, not

recognizing the wife's equity in respect of such a fund. *Elworthy v. Wickstead*, 1 Jac. & W. 69; *Foden v. Finney*, 4 Russ. 428. The rule, however, now is, that a married woman has an equity to a settlement, however small the fund may be (*Re Cutler*, 14 Bea. 220; *Re Kincaid*, 1 Drew. 326), and in such cases the court will insert the trusts in the order. *Chamberlain v. Chamberlain*, 1 Sm. & Giff., App. 28; *Watson v. Marshall*, 17 Bea. 363.

There is no general rule as to the provisions which the court will direct to be inserted in the settlement. In one case (*Carter v. Taggart*, 1 D., M. & G. 286), Ld. Cranworth, L. J., observed, that the court must make such a settlement as it thought just and reasonable under the circumstances of each particular case. See *Croxton v. May*, L. R., 9 Eq. 404; *Spirett v. Willows* and *Re Suggitt's Trusts*, *post*; *Harpur v. Ball*, 2 Jo. & Lat. 599. In recent cases (*Spirett v. Willows*, L. R., 1 Ch. 520, and 4 Ch. 407; and *Re Suggitt's Trusts*, L. R., 3 Ch. 215), the principle was laid down that the husband's marital rights should not be interfered with further than was necessary to give effect to the wife's equity for the benefit of herself and children, and in the latter case it was held, that in the absence of special circumstances, the ultimate limitation in default of children should be to the husband or wife, whichever should be the survivor. See the settlement in *Spirett v. Willows*, as finally approved of by the court, the husband having become bankrupt, L. R., 4 Ch. 407. The rule as to giving benefits to the wife's children extends to her children by any marriage. *Croxton v. May*, L. R., 9 Eq. 404. The trust for the issue will in general be for sons at twenty-one, daughters at that age or marriage. *Gent v. Harris*, 10 Ha. 383; see L. R., 4 Ch. 410. It was formerly considered doubtful whether children had any substantive or independent right to claim a settlement after the death of their mother where it had not been directed during her life. See *Murray v. Ld. Elibank*, 13 Ves. 1, 7. It is now, however, settled that they have not. *Lloyd v. Williams*, 1 Madd. 450; *De la Garde v. Lempriere*, 6 Bea. 344; *Hodgens v. Hodgens*, 4 Cl. & Fin. 372. But when once a settlement of the wife's property is directed by the court, provision will be made for the children of the marriage. *Murray v. Ld. Elibank*, *sup.*; *S. C.*, 14 Ves. 496; *Johnson v. Johnson*, 1 Jac. & W. 475; *Groves v. Clarke*, 1 Kee. 132. The husband may be bound by contracts, orders for a settlement, and other proceedings by which the wife will not. It is important to consider, therefore, from what time the husband and wife will respectively be bound, as upon this the rights of their children will in many cases depend. Thus, when the father is bound by an order, or other matter, but the mother is not, the death of the latter will be immaterial so far as the rights of the children are concerned, and their equity against their father will be complete; but in such case if the father were to die, the children would have no equity against their mother. Where the husband sues for the wife's property, and is ordered to make a proposal for a settlement, he is bound from that time, and, notwithstanding his wife's death, must prosecute the order, which will enure to the benefit of the children. *Murray v.*

Id. Elibank, 10 Ves. 84, 91. If there are no children, notwithstanding an order for a proposal for a settlement, if either husband or wife die while it rests in mere proposal, the right by survivorship as between them will not be affected. *Macaulay v. Philips*, 4 Ves. 15, 19; see *Murray v. Ld. Elibank*, *sup.*; *Lloyd v. Williams*, 1 Mad. 450. It was at one time considered that the equity of the children attached on the filing of the bill by the father. *Steinmetz v. Halthin*, 1 Gl. & J. 64. But this case was overruled in *De la Garde v. Lempriere* (6 Bea. 344), and it is now settled that for their equity to arise as against the father there must be a decree, or contract of the parties, which may stand in the place of a decree. *Wallace v. Auldjo*, 1 D., J. & S. 643; see *Lloyd v. Mason*, 5 Ha. 149.

But as regards *the wife*, while the matter is still before the court, she may retire at any time, and thus defeat the inchoate equity of the children, even after a reference for a settlement and after a settlement, so approved, has been approved of by the master, but not after a settlement has been finally ordered. *Barrow v. Barrow*, 4 K. & J. 409, 424; see *Whittem v. Sawyer*, 1 Bea. 593; *Baldwin v. Baldwin*, 5 De G. & Sm. 319. The interests of the children will also be defeated by the wife waiving an agreement, on the part of her husband, to make a settlement, and consenting to the payment of the fund to him. *Fenner v. Taylor*, 2 R. & M. 190. In the event of the refusal of the husband to make a settlement, the court will only direct a suspension of the payment of the principal to him, but giving the interest either to him, if he is maintaining his wife, or to her if he is not, and she is unprovided for. *Sleech v. Thorington*, 2 Ves. sen. 562; *Rishton v. Cobb*, 9 Sim. 615, 620; see *Atcheson v. Atcheson*, 11 Bea. 485. In *Bond v. Simmons* (3 Atk. 20), the husband refusing to make a settlement, the principal was invested subject to the direction of the court, and the dividends were allowed to accumulate. After the husband's death the wife was held entitled to the principal and accumulated interest. In this case it did not appear that the wife was not maintained by her husband. In a case in which the husband was of unsound mind the court ordered a fund bequeathed to the wife to be brought into court and invested, and the annual produce of it to be paid to her. *Steed v. Calley*, 2 M. & K. 52; see *Bishop of Exeter v. Ld. and Ly. Ward*, *ib.* 54.

Orders for Maintenance.] Upon a principle analogous to that on which the court acts in decreeing a settlement for the wife out of property coming to the husband, or those claiming under him, in her right, it will order her maintenance out of her fortune when under its control, though neither settled, nor agreed to be settled, if her husband has deserted her leaving her unprovided for. *Watkins v. Watkins*, 2 Atk. 98; see *Guy v. Pearkes*, 18 Ves. 196; *Coster v. Coster*, 1 Kee. 199. Orders of this description are frequently made by the court. If the husband has deserted his wife, or by his cruelty compelled her to leave him, the court will order maintenance out of the interest of her fortune, which, by the marriage articles, was pay-

able to him for life. *Oxenden v. Oxenden*, 2 Ver. 493; *Williams v. Callow*, *ib.* 752; *Eedes v. Eedes*, 11 Sim. 569; but see 1 Rop. Hus. and Wife, 279, note by Jacob. As to those cases in which the wife sues in the Divorce Court, see *post*, Ch. XII. But where a wife refuses to live with her husband, who is from necessity resident abroad with his regiment, and who is willing to receive her, she is not entitled to maintenance (*Bullock v. Menzies*, 4 Ves. 798), neither is she if she elopes from him. *Watkyns v. Watkyns*, 2 Atk. 97. In one case where the wife was deranged, and had been deserted by her husband, the court allowed part of the capital to be applied for her maintenance. *Peters v. Grote*, 7 Sim. 238.

It may be observed, that the Acts of 1870, 1874, and 1882 do not affect the doctrine of the court with reference to the wife's equity to a settlement out of such property as the husband may take in her right.

CHAPTER XI.

SEPARATE USE AND RESTRAINT ON ANTICIPATION.

SEC. 1.—*Separate Use.*

<i>Generally</i>	387	<i>Receipt by Husband</i>	391
<i>Wife's disability at Law</i>	387	<i>Wife Income Creditor for One Year only</i>	392
<i>A Feme Sole in Equity as to separate Property</i>	387	<i>Capital</i>	392
<i>Trust usually created by means of Trustee</i>	387	<i>Where followed</i>	392
<i>Where none, Husband a Trustee</i>	387	<i>Expended for Family</i>	392
<i>Husband bound by Trust</i>	387	<i>Fund secured on Husband's Estate</i>	392
<i>Reputed Ownership of Husband</i>	388	<i>Wife's Adultery</i>	392
<i>Parol ante-nuptial Agreement</i>	388	<i>Decrees and Orders of Divorce Court</i>	392
<i>Operates on all Covertures unless destroyed</i>	388	<i>What Property subject to—Power of Disposition by Wife</i>	392
<i>Future Coverture</i>	388	<i>In general</i>	392
<i>Where separate Use created</i>	388	<i>Real Estate—Chattels Real</i> ...	392
<i>No particular Words necessary</i>	388	<i>Choses in Action</i>	392
<i>Particular Expressions creating</i>	388	<i>Specific Chattels</i>	392
<i>Clear intention to exclude Husband</i>	388	<i>Disposition by unacknowledged Deed or Will</i>	393
<i>Where Gift of Income, Gift of Corpus</i>	389	<i>Determination of Trust</i>	393
<i>Agreement to live separate</i>	389	<i>Devolution of separate Estate</i> .	393
<i>Renunciation of Marital right</i>	389	<i>Wife's Contracts and Liabilities</i> ...	393
<i>Purchase by Wife</i>	389	<i>Contracts when binding</i>	393
<i>Where separate Use not created</i> ...	389	<i>Express—Implied</i>	393
<i>Particular Expressions</i>	389, 390	<i>Mere verbal engagements</i>	394
<i>Words "Sole use"</i>	390	<i>Future separate Property</i>	394
<i>Gifts—Loans—Savings</i>	390	<i>Where restraint Clause</i>	394
<i>Gifts by Husband</i>	390	<i>Acquiescence in Breach of Trust</i>	395
<i>By third Persons</i>	390	<i>Wife joining in Husband's Security</i>	395
<i>Savings</i>	391	<i>Acting for Husband</i>	395
<i>Undisposed of at her Death</i> ...	391	<i>Equitable Remedy</i>	395
		<i>Statute of Limitations</i>	395
		<i>Acts of 1870, 1882</i>	395

Generally.] As a necessary consequence of the rights acquired by the husband in his wife's property by the common law, her interest in it, where she retained any, and her power over it, were very much restricted. At law what was hers before the marriage became wholly, or to some extent, his, and that property in which she retained an interest could not be disposed of without his concurrence. But in equity this rigid rule was relaxed at an early period. By the introduction of the doctrine of *separate use* the wife was enabled to hold and deal with property so settled, as freely as if she had been a *feme sole*. This rule of equity was originally established for her benefit; but it was not until the introduction of the clause restraining any anticipation of the property so settled that her protection was rendered complete.

We have seen in the acts of 1870 and 1874, and finally in that of 1882, to how great an extent the wife's property coming within their operation has become separate estate. But for some time to come the law prior to these acts will be important. The gift, or settlement to the separate use, is usually effected by means of a trustee; but this is not necessary. If there be none, the husband himself will be considered a trustee for his wife. *Parker v. Brooke*, 9 Ves. 583; see *Newlands v. Paynter*, 4 M. & C. 408; *Gardner v. Gardner*, 1 Giff. 126. This rule applies to that which becomes her separate property by virtue of a marriage contract entered into in a foreign country, and if in his possession at the commencement of his bankruptcy it does not pass to his trustee. *Ex parte Sibeth*, 14 Q. B. D. 417. And although property of the wife consisting of shares in companies (*In re Curtis*, W. N. 1885, p. 29), or shares allotted in respect of them (*ib.* 55), have been transferred into the husband's name, they will nevertheless belong to her. The husband in this case had made entries in his books that the shares were part of his wife's portion of a particular estate. A sale by him of some of the shares will not affect her rights. *Ib.* Where there are trustees, their consent to any dealing with the separate property is not necessary unless made so by the author of the trust. *Essex v. Atkins*, 14 Ves. 547.

Where the intended husband signed a memorandum agreeing that certain bonds which were part of the wife's property, should be transferred to a trustee in trust for her, "neither party having power to dispose of them without consent of both," and after the marriage he obtained possession of some bonds without the consent of the trustee and disposed of them, it was held that the husband was liable to make good the amount of the bonds so disposed of, and that the wife and her trustee were entitled to a lien for the amount upon all other property of the wife which remained in specie, and that the amount must be settled. *Hastie v. Hastie*, 2 Ch. D. 304. The husband will be bound if the property has been settled to the wife's separate use before the marriage (*Tullett v. Armstrong*, 4 M. & C. 377; *Re Gaffee*, 1 Mac. & G. 541), unless prior to the marriage a settlement be executed by which the gift to the separate use is destroyed. *Ib.* The court will

grant an injunction restraining any interference with the wife's separate property. *Green v. Green*, 5 Ha. 400, n.; *Symonds v. Hallett*, L. R., 24 Ch. D. 346; see *Newlands v. Paynter*, 4 M. & C. 408. Such property did not, under the bankruptcy acts prior to the last, pass to the husband's assignees on his bankruptcy, as being in his order and disposition as reputed owner. *Simmons v. Edwards*, 16 M. & W. 838; *Ex parte Killick*, 3 M., D. & D. 480; *Ex parte Massey*, 2 Mont. & A. 173. And the words as to reputed ownership in the Bankruptcy Acts, 1869 and 1883, are similar to those in the previous acts, and would have the same effect as under them. See *post*, tit. "TRUSTS," Ch. 5.

A parol ante-nuptial agreement that the wife's chattels shall be held for her separate use is not binding (see *Warden v. Jones*, 2 D. & J. 84); but if the agreement is acted upon and the chattels are held by trustees upon trust for the wife's separate use, the agreement may be made effectual. *Simmons v. Simmons*, 6 Ha. 352. The trust for the separate use of the wife, like the provision in restraint of anticipation, will operate upon *all* the covertures of a woman unless destroyed while she is discovert. *Tullett v. Armstrong*, *Scarborough v. Borman*, 4 M. & C. 377; *Re Gaffee*, 1 Mac. & G. 547; see *Anderson v. Anderson*, cited 2 M. & K. 427. A gift to the separate use of a married woman, free from the control of any future husband, may nevertheless operate as a gift to her separate use during the then existing coverture. *Steedman v. Poole*, 6 Ha. 193. But this cannot be relied upon as a general rule. In *King v. Lucas*, 23 Ch. D. 712, by a settlement, certain policies were assigned to trustees upon trust to receive the money and pay the income to the wife during her life for her separate use, independently of any future husband whom she might marry, it was held that the trust for separate use did not arise till after the death of the first husband.

Where separate Use created.] The trust must be clearly expressed, but no particular form of words is necessary. *Darley v. Darley*, 3 Atk. 399; *Stanton v. Hall*, 2 R. & My. 175, 180; *In re Peacock's Trusts*, 10 Ch. D. 490. In the following cases the words used were held sufficient to create the gift to the wife's separate use: for her own use independent of her husband (*Wagstaff v. Smith*, 9 Ves. 520); the husband to have no control (*Edwards v. Jones*, 14 W. R. 815); for her own use and benefit independent of any other person (*Margetts v. Barringer*, 7 Sim. 482; see *Glover v. Hall*, 16 Sim. 568); for her own use and at her own disposal (*Pritchard v. Ames*, T. & R. 222; *Inglefield v. Coghlan*, 2 Coll. 247); for her own sole use, benefit and disposition (*Ex parte Ray*, 1 Madd. 199; *Lindsell v. Thacker*, 12 Sim. 178; *Hobson v. Ferraby*, 2 Coll. 412); her receipt to be a sufficient discharge to the executors (*Lee v. Prieaur*, 3 B. C. C. 381; *Cooper v. Wells*, 11 Jur., N. S. 923); to enjoy the profits (*Tyrell v. Hope*, 2 Atk. 561); to be at her disposal, to do therewith as she should think fit (*Kirk v. Paulin*, 7 Vin. Ab. 95, pl. 43); according to her appointment, whether covert or sole (*Lamb v. Milnes*, 5 Ves.

517); solely and entirely for her own use and benefit during her life (*Inglefield v. Coghlan*, 2 Coll. 247); for her sole use and disposal (*Bland v. Davies*, 17 Ch. D. 794; consider now *Massy v. Rowen*, L. R., 4 H. L. C. 288, and the cases *post*, p. 390); to be delivered to her when she should demand it (*Dixon v. Olmius*, 2 Cox, 414); to her absolutely, if living apart from her husband. *Shewell v. Dwarries*, 1 Johns. 172; see *Brooke v. Brooke*, 25 Bea. 342. As to the effect to be given to the word *sole*, see *post*, p. 390. And if the intention of a testator be clearly expressed, that the husband shall take no interest in a legacy bequeathed to the wife, effect will be given to the intention by directing it to be held for her separate use (see *Dawson v. Bourne*, 16 Bea. 29), with restraint on anticipation where requisite. *Goulden v. Camm*, 1 D., F. & J. 146. With reference to some of the cases referred to in this page, and which turn upon the effect of the word "sole," see now *Massy v. Rowen*, L. R., 4 H. L. C. 288, *post*, p. 390. Where trustees have a discretionary power to pay the income of a fund for the maintenance and support of a married woman for life and her children *in such manner* and proportions as they think fit, the trust for the children ceasing when the youngest attained 21, they may pay the income to the wife for her separate use. *Austin v. Austin*, *Austin v. Boyce*, 4 Ch. D. 233.

A bequest of the interest or income of property, without limit, to the separate use of a woman, there being no gift over of the corpus, is a gift of the *corpus* to her separate use. *Humphrey v. Humphrey*, 1 Sim., N. S. 536; see *Gurney v. Goggs*, 25 Bea. 334. But under a gift of an estate in fee and personal estate to a female absolutely, followed by a direction to pay the principal monies, dividends and rents into her own hands for her separate use, the corpus of the real estate is not given to her separate use. *Troutbeck v. Boughey*, L. R., 2 Eq. 534. After an agreement for separation between husband and wife, neither to interfere with the property of the other, the after-acquired property of the wife will be separate estate. *Haddon v. Fladgate*, 1 S. & T. 48. An agreement by the husband to renounce his marital right over a fund during the coverture, and that it shall be settled on the wife, gives by implication an estate to the wife to her separate use (*Byam v. Byam*, 19 Bea. 58; see *Mews v. Mews*, 15 Bea. 529); and if the husband disclaims any interest in a fund, and it is dealt with by his wife as her separate property, it will be so treated (*Rycroft v. Christy*, 3 Bea. 238); and the wife may purchase from her husband property for her separate use. *Arundell v. Phipps*, 10 Ves. 139. A settlement of personalty for the sole and separate use of, and to be at the sole and absolute disposal of, a person, and her receipt or that of the person to whom she should direct the property to be delivered to be a good discharge, enables her to dispose of it by mere *delivery* without writing. *Farington v. Parker*, L. R., 4 Eq. 116.

Where separate Use not created.] In the following cases the words were held insufficient to create the trust for the wife's separate use: into her own hands to and for her, or for her own, or her own proper

use and benefit (*Tyler v. Lake*, 2 R. & M. 183; *Wills v. Sayers*, 4 Madd. 409; *Blacklow v. Laws*, 2 H. 49; *Kensington v. Dollond*, 2 M. & K. 184); to her and her assigns (*Dakins v. Berisford*, 1 Ch. Ca. 194); to pay the interest to her for life (*Lumb v. Milnes*, 5 Ves. 517); to her for life to be applied for the benefit of herself and children (*Wardle v. Claxton*, 9 Sim. 524); only for her (*Spirett v. Willows*, 11 Jur., N. S. 70); to be under her sole control (*Massey v. Parker*, 2 M. & K. 174, which is not overruled on this point, but on another by *Tullett v. Armstrong*, 4 M. & C. 377); for her sole use and benefit. *Gilbert v. Lewis*, 1 D., J. & S. 38; see *Chipchase v. Simpson*, 16 Sim. 485. As to the words "absolute" or "absolute use," see *Ex parte Abbott*, 1 Deac. 338; and comp. *Shewell v. Dwarries*, Johns. 172. The words *sole use*, however, have given rise to great differences of opinion. In several cases it was held or laid down, partly upon the context and partly upon the ground that the word "sole" had a technical meaning equivalent to *separate*, that gifts or limitations to or for the sole use of a female created the separate estate. *Adamson v. Armitage*, 19 Ves. 416; *Ex parte Ray*, 1 Madd. 199; *Ex parte Killick*, 3 M., D. & D. 480. But in *Gilbert v. Lewis* (1 D., J. & S. 38), these words in the gift of a legacy to a widow without the intervention of trustees, were held not to have that effect. But in the later cases of *Green v. Britten* (1 D., J. & S. 649), the words "sole benefit," and *Re Tarsey's Trusts* (L. R., 1 Eq. 561), the words "for her own sole use and benefit absolutely," were held sufficient, and it was considered that the word *sole* was an operative word, in general meaning *separate*; while in *Lewis v. Matthews* (L. R., 2 Eq. 177), the words "sole and absolute use and benefit," were held not to create the separate estate. The point as to the precise *technical* meaning or force of the word "sole," has now been finally reviewed by the House of Lords in *Massy v. Rowen* (L. R., 4 H. L. 288), in which (approving of *Gilbert v. Lewis*, *sup.*) it was held that this word, *per se*, has no fixed technical meaning like the word *separate*, though from the context it may be so construed. It would seem, however, from the language of the Lord Chancellor (p. 297), that in *marriage settlements* it would be held to mean *separate*, or at all events would in such instruments more readily be construed to have that meaning than in wills. In settlements, however, the word *sole* will seldom, if ever, be found used in this sense, without the word *separate*.

Gifts—Loans—Savings.] The wife may give her separate property to her husband for his own use, or the family expenditure (*Gardner v. Gardner*, 1 Giff. 126), or lend it to him, and in such case may, if he become bankrupt, prove as a creditor against his estate (*Woodward v. Woodward*, 9 Jur., N. S. 882); and if he has obtained money belonging to her separate estate, and employed it in the purchase of property, she will have a lien upon the property for what is due to her. *Scales v. Baker*, 28 Bea. 91. The husband also may give property to, or to trustees for, the separate use of, his wife, or declare himself a trustee for her (*Mews v. Mews*, 15 Bea. 529; *Parker v. Lechmere*,

12 Ch. D. 256; *Ashworth v. Outram*, 5 Ch. D. 923; *Ex parte Whitehead*, 14 Q. B. D. 419); but the declaration must be unequivocal and irrevocable (*Grant v. Grant*, 34 Bea. 623; *Re Whittaker*, 21 Ch. D. 657); and the evidence of it very clear (*M'Lean v. Longlands*, 5 Ves. 71; *Rich v. Cockell*, 9 Ves. 369; *Hoyes v. Kindersley*, 2 Sm. & Giff. 197; *Lloyd v. Pughe*, L. R., 8 Ch. 88); and not rest upon the unsupported evidence of the wife after her husband's death (*Re Finch*, 23 Ch. D. 267); and of course such gifts would be liable to be impeached if made with intent to delay or defraud creditors, under the 13 Eliz. c. 5. Gifts by a third person of personal ornaments, jewels and the like to the wife during the marriage, are construed by the court to be gifts to her separate use. *Graham v. Londonderry*, 3 Atk. 393. Money saved by a married woman out of the income of her separate estate, and invested, belongs to her separate estate. *Humphery v. Richards*, 2 Jur., N. S. 432; *Barrack v. M'Culloch*, 3 K. & Jo. 110; see *Muggeridge v. Stanton*, 1 D., F. & J. 107. So money saved out of her separate allowance. *Gage v. Lister*, 2 B. P. C. 4. So also savings accumulated out of money allowed by her husband for her maintenance while living apart from him. *Brooke v. Brooke*, 25 Bea. 342. Land purchased with the wife's savings or profits arising out of separate estate will devolve as real, not as personal estate. *Steward v. Blakeway*, L. R., 4 Ch. 603. The wife's separate estate at her death consisting of arrears of income, money in the funds, bonds or other choses in action, if undisposed of by her will, belong to her husband as *administrator* of her estate. *Proudley v. Fielder*, 2 M. & K. 57; see *Johnstone v. Lumb*, 15 Sim. 308. But the proceeds of the wife's separate estate actually received by her and in her possession at her death (*Molony v. Kennedy*, 10 Sim. 254), or even lent by her, belong to the husband in his *marital right*. *Bird v. Peagram*, 13 C. B. 639; 17 Jur. 577; *Tugman v. Hopkins*, 4 M. & Gr. 389; see *Messenger v. Clarke*, 5 Ex. 388, and consider *Barrack v. M'Culloch*, 3 K. & J. 110. Having regard to the authorities, it is not perhaps easy to determine, in all cases, under what circumstances, and at what particular period, money which has once been, or has been derived from, separate estate, has ceased to become separate estate, so that the husband's marital right attaches. Where the money is secured by bond, or note, or in some other way, so that a *chose in action* is created (see *per Jervis, C.J.*, in *Bird v. Peagram, sup.*), administration will be necessary.

Receipt by Husband.—The wife may expressly authorize or tacitly permit her husband to receive the income of her separate property, and if it be so received and applied for the benefit of the family, she can claim no reimbursement. *Powell v. Hankey*, 2 P. W. 82; *Milnes v. Busk*, 2 Ves. jun. 488; *Caton v. Rideout*, 1 Mac. & G. 599, 603; *Gardner v. Gardner*, 1 Giff. 126; *Rowley v. Unwin*, 2 K. & J. 138; *Payne v. Little*, 26 Bea. 1; comp. *Rowe v. Rowe*, 2 De G. & S. 294. But the court ought, in such a case, to be satisfied that the husband had not in any degree influenced the acts and conduct of the wife (see

Hughes v. Wells, 9 Ha. 749, 773), and if there has been no such permission on her part, she will be entitled to be repaid what he has received. See *Parker v. Brooke*, 9 Ves. 583; *Mawhood v. Milbanke*, 15 Bea. 36, and the cases *ante*, p. 389, as to the husband being a trustee for his wife. The wife cannot, however, in any event be a creditor for more than one year's income of her separate estate which her husband has received. *Parkes v. White*, 11 Ves. 225; *Thrupp v. Harman*, 3 M. & K. 513; see *Lea v. Grundy*, 1 Jur., N. S. 953. But if he place it to his own credit at his bankers, she will have a right to it by survivorship (*Beresford v. Archbp. Armagh*, 13 Sim. 643; see *Gardner v. Gardner*, 1 Giff. 126), and if it can be traced, as where it is invested in a purchase in the name of the husband, it will be followed. *Darkin v. Darkin*, 17 Bea. 578; *Scales v. Baker*, 28 Bea. 91. If the fund be secured by a mortgage on the husband's estate, the trustee must enforce payment, or he will be liable for a breach of trust. *Payne v. Little*, 26 Bea. 1. In *Dixon v. Dixon*, 9 Ch. D. 587, the trustee of stock for the separate use of a married woman improperly transferred it into the joint names of her husband and himself, and the husband for six years received the dividends, after which the trustee died, and the husband, without his wife's knowledge, sold out the stock, and applied the proceeds to his own use, it was held that, though she might have been presumed to have assented to the husband's receipt of the dividends, no such assent could be presumed after the stock had been sold, and that she was entitled to recover, as against her husband and the estate of the deceased trustee, the arrears of dividends which had accrued since that time, as well as to have the trust fund replaced.

The adultery of the wife will not affect her rights to property settled to her separate use (*Seagrave v. Seagrave*, 13 Ves. 443; *Goldsmid v. Heathcote*, 10 L. T., N. S. 811; see *Evans v. Carrington*, 2 D., F. & J. 481), though it will to property in which she has a joint interest with her husband. *Duncan v. Campbell*, 12 Sim. 616; see *Knox v. Wells*, 2 H. & M. 674. As to the effect of decrees and orders of the Divorce Court, see *post*, Ch. 13.

What Property may be subject to—Power of disposition by Wife.] It may be laid down as a general rule that property of every description, real as well as personal, and any interest therein, may be settled to the wife's separate use. And as a married woman is considered in equity, with regard to property settled to her separate use, as a *feme sole*, no examination on any conveyance of such equitable estate or interest, or on payment of money out of court, is necessary. *Lechmere v. Brotheridge*, 32 Bea. 353. So, in equity, she may dispose of an estate in fee (*Adams v. Gamble*, 12 Ir. Ch. Rep. 102; *Taylor v. Meads*, 11 Jur., N. S. 166; *Hall v. Waterhouse*, *ib.* 361; *Pride v. Bubbs*, L. R., 7 Ch. 64; overruling *Lechmere v. Brotheridge*, 32 Bea. 353, on this point), her vested life estates and interests in realty in possession (*Newcomen v. Hassard*, 4 Ir. Ch. Rep. 274), or reversion (*Major v. Lansley*, 2 R. & My. 355), and her interests in chattels real

(*Anderson v. Anderson*, 2 M. & K. 427), choses in action (*Fettiplace v. Gorges*, 1 Ves. jun. 46; *Wagstaff v. Smith*, 9 Ves. 520; *Calvert v. Johnston*, 3 K. & J. 556), and specific chattels in possession (*Ly. Arundel v. Phipps*, 10 Ves. 140), or other personal estate (*Lechmere v. Brotheridge*, 32 Bea. 353), as if she were a *feme sole*. The disposition (so far as it affects such equitable estate or interest), may be by deed, and the deed, though operating on real estate, may be unacknowledged. *Newcomen v. Hassard*, 4 Ir. Ch. Rep. 274; *Adams v. Gamble*, 12 Ir. Ch. Rep. 102; *Taylor v. Meads*, 11 Jur., N. S. 166, overruling on this point *Lechmere v. Brotheridge*, 32 Bea. 353. So she may dispose of such interests by her will, to which her husband's assent is not necessary. *Fettiplace v. Gorges*, *sup.*; *Rich v. Cockell*, 9 Ves. 369; *Hall v. Waterhouse*, 11 Jur., N. S. 361. But this power of disposition without an acknowledged deed does not extend to her interests in realty contingent upon the insolvency of her husband, so long as the interest is contingent (*Bestall v. Bunbury*, 13 Ir. Ch. Rep. 318), nor to a contingent interest in personal estate settled to her separate use upon the like contingency. *Mara v. Manning*, 8 Ir. Eq. Rep. 218.

Where the *legal* estate in lands is vested in a married woman to her separate use, *that* must be conveyed by an acknowledged deed; and if not so conveyed, then, although she may dispose of the *equitable estate* by an ordinary deed or by will during her life, she will be, and after her death her heir will be, a trustee of the legal estate for the person equitably entitled. See J. Williams, R. P., 14th ed., 239; *Hall v. Waterhouse*, 11 Jur., N. S. 361. The trust for the wife's separate use, like the trust restraining anticipation, may be put an end to after the determination of the coverture by subsequent dealings by the wife with the property, as by disposing of it and investing the proceeds in other property. *Wright v. Wright*, 2 J. & H. 647. As to the effect of protection orders, see *post*, Ch. XIII. The wife's separate real estate undisposed of devolves upon her heir, subject to the life interest, if any, of her husband under any settlement, or as tenant by the curtesy; and as administrator he will be entitled to her separate personalty undisposed of in those cases in which he does not take it *jure mariti*. As under the Acts of 1870 and 1882 so much of the wife's property will be separate estate, the husband's rights by survivorship are important.

Wife's Contracts and Liabilities.] A contract for sale (*Grigby v. Cor*, 1 Ves. sen. 517) of the separate estate of the wife is valid and binding on the property (*ib.*), though no decree can be made against her personally. See *Nantes v. Corrock*, 9 Ves. 189; *Aylett v. Ashton*, 1 M. & C. 112. The wife's separate property will also be liable in respect of her contracts under seal, though her husband (*Hulme v. Tenant*, 1 B. C. C. 16; *La Touche v. La Touche*, 3 H. & C. 576) or a stranger (*Heatley v. Thomas*, 15 Ves. 596) may have joined in the instrument. The wife will also be liable on her bill or note (*Bullpin v. Clarke*, 17 Ves. 365; *Stuart v. Ld. Kirkwall*, 3 Mad. 387; see

Vandergucht v. De Blaquiére, 5 M. & C. 229; *M'Henry v. Davies*, L. R., 10 Eq. 88), or mere written agreement (*Master v. Fuller*, 4 B. C. C. 19; *Owens v. Dickenson*, Cr. & Ph. 48), and even upon her contracts implied by law if they arise out of written engagements. *Murray v. Barlee*, 3 M. & K. 209; *Owen v. Homan*, 4 H. L. C. 997. To what extent her separate estate will be liable on ordinary verbal engagements or on an implied promise, for instance, to pay for goods ordered or the like, was formerly not settled. In *Johnson v. Gallagher* (3 D., F. & J. 494), it was laid down by Turner, L.J., that a woman having separate estate and *living apart* from her husband must be understood as contracting with reference to such estate, at all events until the contrary is proved, but that to bind her by a general engagement in ordinary cases it should appear that it was made with reference to and upon the faith and credit of it. See *Vaughan v. Vanderstegen*, 2 Drew. 165. In this view Kindersley, V.-C., concurred generally, although he did not lay down any qualification that the wife should be living apart from her husband. *Mrs. Matthewman's Case*, L. R., 3 Eq. 787. In *Butler v. Cumpston* (L. R., 7 Eq. 16), the savings of a married woman's separate estate were held liable to indemnify trustees who, at her request, had taken shares in a company, and to answer the calls. So a married woman, who has taken shares in her own name and paid for them out of her separate property, will be put on the list of contributories. *Mrs. Matthewman's Case*, L. R., 3 Eq. 781. In *Picard v. Hine*, L. R., 5 Ch. 274, it was held that where a married woman contracted a debt which could only be satisfied out of her separate estate, it would in equity be liable. In this case she was living apart from her husband. In *Wainford v. Heyl*, L. R., 20 Eq. 321, Jessel, M.R., observed in substance that the separate estate of a married woman is liable to make good all contracts which are made by her with express reference to it, or which from the nature of the contract itself must be intended to be so referred, but not for general contracts which from their nature cannot be so referred. But the separate estate may be liable for a fraud relating to it, that is, in dealing with it by way of fraudulent misrepresentation. *Ib.*, p. 324. In *Mayd v. Field*, L. R., 3 Ch. D. 587, the same learned judge observed "that for the purpose of giving effect to the general engagements of a married woman, if property is settled upon her for life with power to dispose of it by deed or will, that is her separate property, so as to be subject to her general engagements." *Ib.*, p. 593. See also *Lon. Chart. Bank of Australasia v. Lemprière*, L. R., 4 C. P. 572. The case of *Shattock v. Shattock*, L. R., 2 Eq. 182, is *contrà*, but has been disapproved of, and would not, it is considered, now be followed.

But the debts or general engagements of a married woman can be enforced only against so much of the separate estate to which she was entitled, free from any restraint on anticipation, at the time when the debt was contracted or engagements were entered into, as remains when judgment is given, and not against separate estate to which she becomes entitled after the time of such debt being contracted or engagements made, nor against separate estate to which she was then

entitled, subject to a restraint on anticipation. *Pike v. Fitzgibbon*, 17 Ch. D. 454, overruling *S. C.*, 14 Ch. D., and *Flower v. Buller*, 15 Ch. D. 665, and approving of *Roberts v. Watkins*, 46 L. J., (Q. B.) 552. In an action by a creditor to enforce against the separate estate of a married woman a general engagement entered into with her on the credit of that estate, the court will not, before the creditor has established his right by obtaining a judgment, restrain the married woman from dealing with it. *Robinson v. Pickering*, 16 Ch. D. 660. It was at one time considered that the principle upon which the wife's separate property was liable upon her contracts or engagements was that they were equivalent to an equitable appointment of the property. *Field v. Sowle*, 4 Russ. 112. But in *Owens v. Dickenson* (Cr. & Ph. 48) this liability was put upon the ground that, where she has the power of dealing with her separate property, she had also the power incident to it of contracting debts to be paid out of it, and that the obligations thus incurred would be enforced in equity against such property. A married woman having separate estate may contract with her husband or in any matter where she is in the position of a *feme sole*. See *Wilson v. Wilson*, 1 H. L. C. 538. But a verbal agreement by a wife for valuable consideration given by the husband to convey her real estate to him, cannot be enforced against her heir at law after her death. Even a conveyance by deed, unless acknowledged under the 3 & 4 Will. 4, c. 74, ss. 77, 79, would have been ineffectual to pass the estate. *Williams v. Walker*, 9 Q. B. D. 576.

The separate property of a married woman under a settlement will be liable if she has committed a breach of trust with respect to other property under the same settlement, and subject to the same trusts which create the separate estate (*Clive v. Carew*, 1 J. & H. 199; see *Mara v. Manning*, 2 Jo. & L. 311, 318), though not where there is a clause restraining anticipation. *Clive v. Carew*, *sup.*; *Stanley v. Stanley*, 7 Ch. D. 589. In such a case, however, where there is such a clause, her *arrears* of income actually due are liable. *Pemberton v. M'Gill*, 1 Dr. & S. 266; see *Fitzgibbon v. Blake*, 3 Ir. Ch. R. 328. Her acquiescence in a breach of trust committed by her trustees will be a bar to her claims against them in respect of her separate estate. *Jones v. Higgins*, L. R., 2 Eq. 538; see *Brewer v. Swirles*, 2 Sm. & G. 219; *Davies v. Hodgson*, 25 Bea. 177. See *post*, pp. 398, 399.

Where the wife is jointly liable, in respect of her separate property, with her husband for his debt, his estate will first be liable to make it good as between them and his assignees. *Aguilar v. Aguilar*, 5 Mad. 414. And if she can be considered as acting *on behalf* of her husband, though he may be a lunatic, her separate estate will not be liable. *Re Pugh*, 17 Bea. 336; *Davidson v. Wood*, 1 D., J. & S. 465. Although the court had jurisdiction over the *income* of the separate property, effect would not formerly have been given to the wife's contracts against the *corpus*, and there was no remedy by *personal* decree against the wife. *Francis v. Wigzell*, 1 Mad. 264; see *Larkin v. Marshall*, 4 Ex. 806; *Edwards v. Martyn*, 17 Q. B. 693; consider now the recent acts, and *ante*, p. 360,

The Statute of Limitations is not a bar to a simple contract debt contracted by a married woman, in respect of her separate estate, six years before the commencement of the suit. *Norton v. Turvill*, 2 P. W. 144; *Faughan v. Walker*, 6 Ir. Ch. Rep. 471; aff. 8 Ir. Ch. Rep. 458; *Hodgson v. Williamson*, 15 Ch. D. 87; see *Coppin v. Gray*, 1 Y. C. C. C. 205.

As to the property which, under the Acts of 1870 and 1882, is made separate estate of the wife, see *ante*, Ch. VI. and VII.

SEC. 2.—*Restraint on Anticipation.*

<i>Origin of</i>	396	<i>Protection Order</i>	398
<i>Acts of 1870 and 1882</i>	396	<i>May be restricted to particular</i>	
<i>Must accompany separate Use Clause</i>	396	<i>time or Coverture</i>	398
<i>No particular Words necessary to</i>		<i>Otherwise operates on all Cover-</i>	
<i>create</i>	396	<i>tures</i>	398
<i>What Words will create</i>	396	<i>May affect any Property or In-</i>	
<i>What Words will not</i>	397	<i>terest</i>	398
<i>Effect of Clause</i>	397	<i>As to Liability for fraud or breach</i>	
<i>Arrears of Income assignable</i>	397	<i>of Trust</i>	398, 399
<i>Income available for Costs</i>	397	<i>Court cannot relieve from unless</i>	
<i>Operates only during Coverture</i> ...	397	<i>under Conveyancing Act, 1881</i> ...	399

The doctrine of separate use is of ancient date; but the provision in restraint of anticipation is, comparatively speaking, modern. It was first introduced in Miss Watson's Settlement, at the instance of Lord Thurlow, who was a trustee. See *Pybus v. Smith*, 3 B. C. C. 340, n. (1); *Jackson v. Hobhouse*, 2 Mer. 487. The Acts of 1870 and 1882 have no reference to restraint on anticipation. This must as heretofore be created by an express clause annexed to the provision for separate use. As to the power of the court under the Conveyancing Act, 1881, see *post*, p. 399.

It is not necessary that express negative words should be used in the receipt clause, or that any particular form of words should be used; but the intention must be clear that she should be restrained from anticipation. *Moore v. Moore*, 1 Coll. 54, 57; *Harrop v. Howard*, 3 Ha. 624; *Brown v. Bamford*, 1 Ph. 620; *Re Sarel*, 10 Jur., N. S. 876. It will be sufficient if the trust be to pay the income to such person as the wife shall by writing, and as the same becomes due, but not by way of assignment, charge or other anticipation, appoint. *Brown v. Bamford*, 1 Phil. 620; see *Harnett v. M'Dougall*, 8 Bea. 187. So where the gift is of income to her separate use *not to be sold or mortgaged*. *Steedman v. Poole*, 6 Ha. 193; *Goulder v. Camm*, 1 D., F. & J. 146. So if the gift or trust be coupled with a direction that the wife shall *not sell, charge, mortgage or encumber the property*, coupled with another declaration that she shall take it for her own sole and separate use and benefit. *Baggett v. Meux*, 1 Coll. 138, aff. 1 Ph. 627; *Medley v. Horton*, 14 Sim. 222, is *contra*, but may be considered as overruled. So where the property is to be a separate personal and inalienable provision during the coverture. *Spring v.*

Pride, 10 Jur., N. S. 646; see *Re Sarel*, *ib.* 876. The intention, however, must be clear to restrain anticipation. A direction for payment of income to a female as she shall from time to time appoint, and in default into her proper hands for her separate use, will not be sufficient to restrain her power of disposition. *Pybus v. Smith*, 3 B. C. C. 340, n. (1); *Witts v. Dawkins*, 12 Ves. 501. Nor a declaration that her receipts shall be, or shall alone be, good discharges (*Sturges v. Corp*, 13 Ves. 190; *Acton v. White*, 1 S. & S. 429), unless there is also a declaration that the receipts shall only be a discharge *after the income becomes due*. *Baker v. Bradley*, 7 D., M. & G. 597; see *Field v. Evans*, 15 Sim. 375. In the former case there were other expressions showing an intention to restrain anticipation. A direction that the interest shall be paid on personal appearance and receipt is insufficient. *Ross's Trusts*, 1 Sim., N. S. 196. So that it shall be for her absolute use free from all marital control. *Symonds v. Wilkes*, 11 Jur., N. S. 659. It will not be inferred from marriage articles, by which the property of the intended wife is agreed to be settled to her separate use, that it was to be with the restraint clause. *ib.*

When the clause is effectual, the wife, during the coverture, cannot do any act which will have the effect of depriving herself of her interest in the property. See *Horlock v. Horlock*, 2 D., M. & G. 644; *Re Sykes*, 2 J. & H. 415. But with her husband's concurrence she may, although restrained from anticipation, bar her estate tail and limit the fee to herself for her separate use. *Cooper v. Macdonald*, 7 Ch. D. 288. The bankruptcy of the husband and his subsequent discharge will not prevent him from concurring pursuant to the act (*ante*, p. 340). *Ib.*; see *Re Jakeman's Trusts*, 23 Ch. D. 344. An attempted conveyance of the property may operate as a release of her past income, and may be a good consideration to support an arrangement or settlement which would otherwise be void. *Harman v. Richards*, 10 Ha. 81. And *arrears* of income may be assigned, but not an apportioned part of *interest*, calculated up to the time of the assignment, the usual day of payment of interest not having arrived, though in law considered as accruing due *de die in diem*. *Re Brettell*, *Jollands v. Burdett*, 2 D., J. & S. 79. The income actually due, though intended for the wife's separate use, may still, in some cases, be available for other purposes; for instance, for the reimbursement of proper costs incurred by trustees under the instrument creating the trust. *D'Oechsner v. Scott*, 24 Bea. 239. Where property is settled to the joint appointment of husband and wife during their joint lives, with restraint on anticipation, this will not prevent their appointing to themselves in moieties prior to a divorce. *Re Linzee*, 23 Bea. 241. The separate use can only exist, and the clause in restraint of anticipation is only effectual, during coverture. The two questions are identical as to the principle which must regulate the decision upon them. *Tullett v. Armstrong*, 4 M. & Cr. 377, 392. Thus if the feme be discovert at the time of the gift, or become so afterwards, the fund may be alienated by her. *Barton v.*

Briscoe, Jac. 603; *In re Gaffee*, 1 Mac. & G. 547. So she may require it to be transferred to her (*Buttanshaw v. Martin*, Johns. 89), or may convert it into other property (*Wright v. Wright*, 2 J. & H. 655), by which means the trust will be determined. So if she has a protection order under 20 & 21 Vict. c. 85. *Cooke v. Fuller*, 26 Bea. 99. It has been held that under a devise of realty or of personalty *producing income* to a married woman for her separate use with restraint on anticipation, she is only entitled to the income. *Re Ellis's Trusts*, L. R., 17 Eq. 409; *Re Clarke's Trusts*, 21 Ch. D. 748; but where the property so given consists of cash only she is entitled to it absolutely. *Ib.* *Re Croughton's Trusts*, 8 Ch. D. 460. In these cases the husband consented to the fund being paid to his wife. Whether notice to him of his wife's petition to have the fund paid to her would be sufficient. *Qu.* See 8 Ch. D. p. 464. But in *O'Halloran v. King*, 27 Ch. D. 411, the question in cases of this description as to the operation of restraint clause was held to depend not upon the fund being income-bearing or cash but upon the intention shown by the donor that the trustees should keep the investment and pay over the income. In this case, *In re Ellis's Trusts*, *sup.*, was distinguished, and *In re Clarke's Trusts*, *sup.*, was questioned. See *Smith v. Smith*, 19 Ch. D. 277.

The clause in restraint, like the trust for separate use, may be restricted to a fixed time (*Howman v. Spencer*, W. N., 1885, p. 159), or to a particular coverture. *Re Gaffee*, 1 Mac. & G. 545; *Moore v. Morris*, 4 Drew. 33. But in such a case the words should be clear and precise; for the expression "independently of her intended husband" in a marriage settlement will apply to a future husband. *Hawkes v. Hubback*, L. R., 11 Eq. 5. For it is now settled, that unless clearly so restricted, the gift to the separate use of a woman with restraint in anticipation will operate upon all her covertures and be effectual; unless destroyed while she is discovert. *Tullett v. Armstrong*, *Scarborough v. Borman*, 4 M. & C. 377; *Re Gaffee*, *sup.*, in effect overruling *Knight v. Knight*, 6 Sim. 121, and several other cases; see also *Anderson v. Anderson*, rep. 2 M. & K. 427. The restraint clause will be valid, whether the subject-matter on which it is to operate be real or personal estate, and whatever the extent of the interest, whether absolute, for life, or for years. *Baggett v. Meux*, 1 Ph. 627. As the clause only operates during the coverture, equity permits to this extent a modification of the rule that restrictions on the absolute ownership of property are void. See *ante*, p. 206.

Though the separate property of a married woman will, in general, be liable for her breach of trust (*ante*, p. 395), it will not where she is restrained from anticipation. *Clive v. Carew*, 1 J. & H. 199. But *arrears* of income, subject to the restraint clause, will be liable in such cases. *Pemberton v. M'Gill*, 1 Dr. & S. 266. But it may be doubtful whether the restraint upon alienation will protect a *feme covert* against the rules of the court as to lapse of time and acquiescence. *Per Turner*, L. J., *Derbishire v. Home*, 3 D., M. & G. 113. Formerly the court had no power to enable a *feme covert* to alien her

life estate where there was a restraint on alienation, however beneficial the act might be for her (*Robinson v. Whelwright*, 6 D., M. & G., 535), and trustees cannot part with a fund affected by such restraint (*Gaskell's Trusts*, 11 Jur., N. S. 780). See *Dickson v. Hook*, 14 W. R. 552.

Where judgment was signed in an action against the defendants, a man and his wife, for the amount of a promissory note made by them jointly during the coverture, it was held that moneys, in the hands of trustees forming part of the income of trust funds payable to the wife to her separate use, with restraint on anticipation, could not be attached in execution. *Chapman v. Biggs*, 11 Q. B. D. 27. It would seem not to be settled whether fraud on the part of a married woman will disentitle her to the protection of the restraint clause, see *Jackson v. Hobhouse*, 2 Mer. 483, and the observations of Lord Eldon, *ib.* 488; *Clive v. Carcu*, *sup.*; *Arnold v. Woodhams*, L. R., 16 Eq. 29. Comp. *Vaughan v. Vanderstegen*, 2 Drew. 363. In *Edwards v. Dewar*, W. N. 1885, p. 142, Pearson, J., said that it was intended for the protection of a married woman outside the court, it was not intended to enable her to do a wrong in the court. *In re Prynn*, *ib.*, p. 144, is to the same effect.

Property subject to the restraint clause was liable under the Act of 1870, s. 12. *Sanger v. Sanger*, L. R., 11 Eq. 470.

Now, by the Conveyancing Act, 1881, s. 39—(1), Notwithstanding that a married woman is restrained from anticipation, the court may, if it think fit, where it appears to the court to be for her benefit, by judgment or order, with her consent, bind her interest in any property. (2) This section applies only to judgments or orders made after the commencement of the act (1 Jan. 7, 1882). In *Hodges v. Hodges*, 20 Ch. D. 749, the court under this section allowed part of a fund subject to the restraint clause to be paid to a married woman for the purpose of discharging her debts.

CHAPTER XII.

SEPARATION DEEDS.

<i>Valid if for an immediate Separation which takes place.....</i>	400	<i>As to Custody of Children.....</i>	402
<i>Consideration for.....</i>	400	<i>Liberty of Access to Children</i>	402
<i>Bad if for future Separation.....</i>	401	<i>Trifling Breach of Covenant</i>	402
<i>Trustee not necessary</i>	401	<i>Molestation by Wife—Covenant ...</i>	403
<i>Consideration necessary for Settlement, &c.....</i>	401	<i>Bankruptcy—Covenant provable ...</i>	403
<i>No Consideration, Husband's Covenant voluntary</i>	401	<i>Wife's Adultery</i>	403
<i>Covenant by Trustee to indemnify... ..</i>	401	<i>Husband's Adultery.....</i>	403
<i>Promise by Third Person</i>	401	<i>Provision for Children—After-born Children.....</i>	403
<i>Agreement or Charge by Wife</i>	401	<i>Misrepresentation—Fraud.....</i>	403
<i>Usual and Proper Clauses</i>	401, 402	<i>Where no Bar to Divorce Suit</i>	404
<i>Stipulations contrary to Public Policy.....</i>	402	<i>Husband's Covenant not to molest... ..</i>	404
		<i>Reconciliation</i>	404
		<i>Good return to Writ of Habeas Corpus.....</i>	404

It is settled, after some conflicting decisions (see *Vandergucht v. De Blaquiére*, 5 M. & C. 229), that agreements or deeds contemplating and providing for an immediate separation will, if properly framed, be specifically executed. *Wilson v. Wilson*, 1 H. L. C. 538; 5 H. L. C. 40. In *Vansittart v. Vansittart* (2 D. & J. 249), Turner, L. J., observed, that the court would enforce agreements for separation (immediate separation), and that of course the deed which was to be executed would contain covenants for that separation which were necessary. In *Wilson v. Wilson* (1 H. L. C. 538), an agreement by the wife to pay an annuity to her husband, and to abandon a suit in the Ecclesiastical Court against him, was held to be a good consideration and adequate to support articles for a separation. See *Logan v. Birkett*, 1 M. & K. 220, *post*, p. 401; *Flower v. Flower*, 20 W. R. 231. And where the wife had instituted a suit for a divorce, and a deed of arrangement was executed whereby the suit was to be discontinued, and an income provided by the husband for the wife's separate use for maintenance and keeping up an establishment for the benefit of both, it was held that such a deed was valid, and that the Court of Chancery would specifically execute it. *Jodrell v. Jodrell*, 9 Bea. 45; see *S. C.*, 14 Bea. 397. And now the Chancery Division of the Supreme Court has power to enforce specific performance of an agreement for a separation deed and for the compromise of a suit in the Divorce Court without infringing the *Judicature Act*, prohibiting interference with proceedings pending in another branch of the court. *Hart v. Hart*, 18 Ch. D. 670. But the agreement must be final, and, if necessary, to be perfected by an acknowledgment under the Fines

and Recoveries Abolition Act, that must be done or the agreement will not be binding on the wife. *Cahill v. Cahill*, 8 App. C. 420.

A separation deed contemplating and providing for an immediate separation, but which does not take place, is wholly void, and cannot, so far as regards any settlement of property in it, take effect as a voluntary settlement. *Bindley v. Mulloney*, L. R., 7 Eq. 343. And agreements or deeds made in contemplation of and providing for a future separation are invalid (*Westmeath v. Westmeath*, 1 Dow. & Cl. 519; *Proctor v. Robinson*, 35 Bea. 329; on app. 15 W. R. 138), though other provisions in the instrument unconnected with the void agreement may be good, and capable of being enforced. *H. v. W.*, 3 K. & J. 382; *Cartwright v. Cartwright*, 3 D., M. & G. 982; *Merryweather v. Jones*, 4 Giff. 509; see *Cocksedge v. Cocksedge*, 14 Sim. 244. The question of consideration in separation deeds, or in articles for a separation, is material as regards the agreements or covenants in them which relate to property and engagements by or on the part of the husband or wife. It is not essential to their validity that a trustee should be a party for the wife, in order to covenant to indemnify the husband against her debts. *Frampton v. Frampton*, 4 Bea. 287. But where a trustee is a party to the deed, and he thereby covenants with the husband to indemnify him against the wife's debts, this is a good consideration for a settlement or covenant by the latter. *Stephens v. Olive*, 2 B. C. C. 90; *Worrall v. Jacob*, 3 Mer. 256; see *Jones v. Waite*, 9 Cl. & F. 101. For in contemplation of law the relation of husband and wife continues to exist, notwithstanding a deed of separation, and the husband will continue liable for necessities supplied to her, unless there is a provision made for her which is paid. *Hindley v. Ms. of Westmeath*, 6 B. & C. 200, 215; see *Biffin v. Bignell*, 7 H. & N. 877. To relieve him from this liability, a covenant to indemnify him against them by a trustee or some third person is generally stipulated for by the husband. Where there is no such covenant or some other consideration, the husband's settlement of, or covenant in respect of, property is voluntary, and cannot be enforced in equity. *Walrond v. Walrond*, John. 18; *Cowx v. Foster*, 1 J. & H. 30.

In *Clough v. Lambert*, 10 Sim. 174, it was held, that although there was no covenant to indemnify the husband, his covenant to pay an annuity might be enforced against his executors but not against his creditors. The execution of a deed of separation by a husband is a good consideration for an agreement by a third person to contribute towards the discharge of some of the husband's debts. *Waite v. Jones*, 9 Cl. & Fin. 101. And a charge by the wife upon her separate property of an annuity for her husband is a good consideration for a release by him in respect of her future property. *Logan v. Birkett*, 1 M. & K. 220. So an agreement between a husband and the father of the wife that the husband and wife shall live apart, and that the husband shall execute a deed of separation containing all usual and proper clauses, and securing an annuity for the maintenance of his wife and child, discloses a good consideration, and will be decreed to be specifically performed. *Gibbs v. Harding*, L. R., 5 Ch. 336. A

dum casta clause is not within the term "usual covenants" in a separation deed agreed to as part of the terms of compromise of a divorce suit. The expression "usual covenants" has reference to surrounding circumstances. If an agreement on the face of it is complete an arbitration clause in it can only come into force in case of difference between the parties, and does not oust the jurisdiction of the court to settle the deed itself. *Hart v. Hart*, 18 Ch. D. 670. In these cases, as regards the question how far the adultery of the husband or wife will influence the court in decreeing specific performance or not, it seems settled that it will not: see *Gandy v. Gandy*, 7 P. D. 168; *Fearon v. Earl of Aylesford*, 14 Q. B. D. 792, *post*, p. 403. A covenant to indemnify the husband against the wife's debts is one consideration usually given to him. *Gibbs v. Harding*, L. R. 5 Ch. 336, 401.

Where any stipulations in an executory agreement for a separation are contrary to public policy, *no part* of it will be enforced (*Vansittart v. Vansittart*, 2 D. & J. 249), and, in this respect, an agreement for a separation differs from a deed of separation. *Ib.* If, therefore, there are stipulations that the wife shall facilitate the husband's proceedings for a divorce, no part of the agreement will be specifically executed. *Hope v. Hope*, 8 D., M. & G. 731. Nor, formerly, where there was a stipulation that the children should be delivered to, and remain under, the care of, the mother (*Ib.*; *Vansittart v. Vansittart*, *sup.*), though, in special cases, the conduct of the father towards his children might have been such as to render such a stipulation proper. *Swift v. Swift*, 34 Bea. 266, *aff.* 11 Jur., N. S. 458. But an agreement that the children should remain at such school as the father, with the consent of the mother, should direct, and should pass their holidays at such places as trustees should, having regard to the wishes of both parents, direct, was valid. *Hamilton v. Hector*, L. R. 6 Ch. 701. And now by the 36 Vict. c. 12, s. 2, agreements in separation deeds are not to be void *merely* because they provide for the mother having the custody and control of the infants. But the court is not to enforce such agreements, if not for the benefit of the children. See *Hart v. Hart*, 18 Ch. D. 670, 681. Where, in a separation deed, the husband had covenanted to allow a child to reside with his wife, and had subsequently concurred as next friend of the infant in a petition under the Infants' Custody Act (36 Vict. c. 12), for the removal of the child from the wife's custody which had been ordered by the court, this was held not to be a breach of the husband's covenant. *Besant v. Wood*, 12 Ch. D. 605. And a husband is not debarred from enforcing a deed of separation and from obtaining an order restraining his wife from commencing an action for the restitution of conjugal rights by reason of trifling breaches of the covenants on his part. *Ib.* A covenant by the husband, an officer, that the wife shall have free liberty of access to their children, and the opportunity of spending one day in every fortnight with them, does not preclude him from taking some of them to Egypt, he being ordered there on service. *Hunt v. Hunt*, 28 Ch. D. 606. Covenants in a

separation deed by the husband to pay an annuity and by the wife's trustee that she shall not molest her husband are independent. *Fearon v. Earl of Aylesford*, 14 Q. B. D. 792. Neither adultery alone by the wife, nor adultery by her followed by the birth of a spurious child, is a breach of a covenant in a separation deed *against molestation* by the wife. But, *semble*, adultery by the wife followed by the birth of a spurious child whom she puts forward as the child of her husband, especially if this is done with intent to claim a title or property to which the legitimate offspring of her husband would be entitled, is evidence of a breach of a covenant against molestation by her. *Fearon v. Earl of Aylesford*, 14 Q. B. D. 792.

The right to judicial separation may be barred by lapse of time and the execution of a separation deed. *Besant v. Wood*, 12 Ch. D. 605. See *Marshall v. Marshall*, 27 W. R. 399; *Rowley v. Rowley*, L. R., 1 H. L. Sc. 63; *Brown v. Brown*, 3 P. & M. 202. A covenant to pay an annuity in a separation deed was provable in bankruptcy under the act of 1869. *Ex parte Neal*, 14 Ch. D. 579. See, now, Act of 1882, 46 & 47 Vict. c. 52, s. 37. A deed of separation is not construed as an agreement that the parties shall live in chastity. If the wife covenants not to take any proceedings to compel the husband to allow her any larger amount as alimony, his subsequent adultery does not deprive him of the right to have the restraining provisions of the deed enforced. *Gandy v. Gandy*, 7 P. D. 168. See S. C., 30 Ch. D. 57, on the question of the husband's liability to increase his wife's alimony on other grounds. If the husband covenants to pay an annuity without any restriction as to her chastity, the annuity is payable, although the wife subsequently commits adultery. *Fearon v. Earl of Aylesford*, 14 Q. B. D. 792. But if the intent was that the wife might be at liberty to commit adultery the deed would be void; *semble*, *per Cotton, L.J., ib.* See *Seagrave v. Seagrave*, 13 Ves. 443; *Carrington v. Evans*, 2 D., F. & J. 481. Where a wife, by a deed of separation, agreed to accept certain sums as a provision for her support, and not to sue her husband for any further maintenance, and subsequently having discovered that he had been guilty of incestuous adultery, she obtained a decree for dissolution of the marriage. It was held, that notwithstanding the deed, she was entitled to the usual order for permanent maintenance. *Morrall v. Morrall*, 6 P. D. 98.

Where there are children, provisions in the separation deed for their benefit are common, but such provisions will not extend to children born after subsequent cohabitation, unless expressly framed so as to include them. *Hulme v. Chitty*, 9 Bea. 437. The children have no equity to sue on the deed unless they can show they have beneficial rights as *cestuis que trusts*. *Gandy v. Gandy*, 30 Ch. D. 57. If through misrepresentations the husband has been induced to enter into a covenant with the trustee under the deed, to pay him an annuity for the wife, the covenant cannot be enforced. *Evans v. Edmonds*, 13 C. B. 777. And such deeds will be set aside if either the husband or wife has been induced by fraud to enter into them. *Evans v. Carrington*, 2 D., F. & J. 481. Thus, the circumstance of a wife

having induced her husband to execute a deed of separation in contemplation of a renewal of illicit intercourse, is sufficient to invalidate the deed. *Ib.*; see *Brown v. Brown*, L. R., 7 Eq. 185. A deed of separation, will not affect the right of the wife to a share of her husband's property under the Statute of Distributions unless such right be expressly excluded by the deed. *Slatter v. Slatter*, 1 Y. & C., Ex. 28.

A deed of separation not acted upon will be no bar to a suit by the wife under the Divorce and Matrimonial Causes Acts. *Cock v. Cock*, 3 S. & T. 514; see *Williams v. Baily*, L. R., 2 Eq. 731. But a covenant in a separation deed by the husband with his wife's trustees, that she may live separate from him and that he will not endeavour to compel her to cohabit with him, will be enforced, and he will be restrained from proceedings in the Divorce Court for a restitution of conjugal rights. *Hunt v. Hunt*, 4 D., F. & J. 221. As to this case, see the observations of the Earl of Selborne, L.C., in *Cahill v. Cahill*, 8 App. C. 420, 421. But, in the Ecclesiastical Court, a separation deed is no bar to a suit for restitution of conjugal rights. *Spering v. Spering*, 32 L. J., Mat. Ca. 116; see *Thomas v. Everard*, 6 H. & N. 448. By the 47 & 48 Vict. c. 68, decrees in such deeds are not to be enforced by attachment, but the court may order payments to be made to the wife out of the husband's property, or for the benefit of him and their children out of her property (if any).

Primâ facie reconciliation with cohabitation puts an end to a deed of separation (*Bateman v. Ross*, 1 Dow. 235; *Westmeath v. Westmeath*, 1 Dow. & Cl., 519; *Webster v. Webster*, 4 D., M. & G. 437), but not reconciliation without cohabitation (*Frampton v. Frampton*, 4 Bea. 287, 289), nor residence under the same roof without reconciliation (*Bateman v. Ross*, 1 Dow. 245); but a proviso may be inserted that the trusts shall continue though the parties become reconciled, and such a proviso is valid. *Wilson v. Mushett*, 3 B. & Ad. 743; *Webster v. Webster*, 4 D., M. & G. 437; see *Crouch v. Waller*, 4 D. & J. 302; *Randle v. Gould*, 8 E. & B. 457. And where there are provisions in the deed relating to property beyond what is necessary for a mere separation deed reconciliation with cohabitation will not, it seems, necessarily put an end to such provisions. Thus, in *Ruffles v. Alston* (L. R., 19 Eq. 539), a lady was entitled at the time of her marriage to a sum of money secured by the promissory note of her brother. A deed of separation between her and her husband was afterwards executed, in which the brother covenanted that he would hold the money upon trust for the wife and husband successively for life and then for the child of the marriage. The husband and wife, after separation, returned to cohabitation, and the husband became bankrupt. It was held that, as the deed contained provisions beyond the purview of a mere separation deed, it could be supported as a valid settlement. And see *Nicol v. Nicol*, 30 Ch. D. 143.

The existence of a separation deed will be a good return to a writ of *habeas corpus* granted at the instance of the husband seeking to obtain the custody of his wife (*Rex v. Mead*, 1 Burr. 542), and the husband will be restrained from molesting her. *Sanders v. Rodway*, 16 Bea. 207.

CHAPTER XIII.

PROTECTION ORDERS, JUDICIAL SEPARATION, AND DISSOLUTION OF MARRIAGE.

<i>Divorce and Matrimonial Causes Acts</i>	405	<i>Renewal of Cohabitation</i>	407
<i>Wife deserted may apply for Protection Order</i>	405	<i>Contracts—Joint Power</i>	407
<i>Effect of—Discharge of</i>	405	<i>Settlement of Damages</i>	407
<i>Payments to and Acts done by Wife protected</i>	406	<i>Settlement of Wife's Property</i>	407
<i>Property in Remainder</i>	406	<i>Settlement by Husband</i>	407
<i>Effect of Judicial Separation</i>	406	<i>Orders for Maintenance</i>	407
		<i>Dissolution of Marriage</i>	408
		<i>Wife's Reversionary Property</i>	408
		<i>Jurisdiction of Foreign Courts</i>	408

IN this work the Divorce and Matrimonial Causes Acts, 20 & 21 Vict. c. 85, amended by the 21 & 22 Vict. c. 108, are only considered so far as they relate to property. By them, important alterations are made in the law with reference to the earnings of married women in certain cases; to the settlement of damages given in a suit for the dissolution of the marriage; to the settlement of part of the wife's property; and to her rights after a judicial separation or dissolution of marriage. With regard to the earnings of the wife, the acts of 1870 and 1882 (*ante*, Chapters VI. and VII.) have rendered the provisions of the first-mentioned acts relating to such earnings in many cases to a great extent unnecessary, but it does not affect other provisions contained in them, which will presently be noticed.

By the 20 & 21 Vict. c. 85, s. 21, a wife who has been deserted by her husband may apply to a magistrate or justices, or the judge ordinary of the Divorce Court (21 & 22 Vict. c. 108, s. 6; see *Ex parte Aldridge*, 1 S. & T. 88), who are empowered to give her an order protecting her earnings and property acquired since the commencement of such desertion, from her husband and those claiming under him, which are to belong to her as if she were a *feme sole*, and during the continuance of the order (which the husband may apply to discharge) the wife is to be deemed to have been, during such desertion, in the like position as to *property and contracts* as if she had obtained a decree of *judicial separation*. See *infra*, as to the effect of a judicial separation. The protection extends to property to which she has become entitled as executrix, administratrix or trustee since the commencement of the desertion, and as from the death of the testator or intestate. 21 & 22 Vict. c. 108, s. 7. The order will remain in force until discharged by the judge ordinary, or formerly by the same magistrate or justices by whom the order was made. 20 & 21 Vict. c. 85,

s. 21; *The Queen v. Arnold*, 5 B. & S. 322. But by the 27 & 28 Vict. c. 44, the order may be discharged by the magistrate for the time being acting as the successor of the magistrate who made the order. The property will not be protected if it is derived from an immoral source, as from keeping a brothel. *Mason v. Mitchell*, 3 H. & C. 528. Where a married woman, entitled to a legacy charged on real estate which had not been reduced into possession by her husband, obtained a protection order, in consequence of her husband's desertion, under 20 & 21 Vict. c. 85, s. 21, it was held that the legacy, on being paid to her after the date of the order, was property which then came to or devolved upon her within sects. 21 and 25 of the act, and that her receipt was a good discharge. *Re Coward and Adams' Purchase*, L. R., 20 Eq. 179. Where an administration suit is instituted by a married woman who has obtained a protection order, and sues as a *feme sole*, evidence must be produced that the separation is a continuing one, but before payment to her of money out of court an affidavit as to this fact, and also as to no settlement or agreement for a settlement having been made, will be sufficient. *Ewart v. Chubb*, L. R., 20 Eq. 454. An application to discharge a protection order is not limited to the lifetime of the married woman. *Mudge v. Adams*, 6 P. D. 54.

Notwithstanding the reversal of any protection order, or the cessation of separation, all persons who, without notice thereof and in reliance upon such order, shall make any payment to the wife, or permit any transfer or act to be done by her, are protected as if the order had been subsisting or the separation had not ceased at the time of the payment, &c. 21 & 22 Vict. c. 108, s. 10. Property of which the wife is possessed *in remainder or reversion* at the date of the desertion or decree (as the case may be) shall be deemed to be included in the protection order. 21 & 22 Vict. c. 108, s. 8. And although the order may be in terms limited, it must be construed as extending to the interests specified in this section. *Re Whittingham's Trusts*, 10 Jur., N. S. 818. The effect of a protection order, it will be seen, is to place the wife in the same position as to property and contracts as if she had obtained a decree of judicial separation. The decree of judicial separation has the same effect as a divorce *à mensâ et thoro* before the act 20 & 21 Vict. c. 85, s. 16, but this did not constitute her a *feme sole* as to property. By sect. 25, however, of this act, "In every case of a judicial separation the wife shall, from the date of the sentence and whilst the separation shall continue, be considered as a *feme sole* with respect to property of every description which she may acquire, or which may come to or devolve upon her, and such property may be disposed of by her in all respects as a *feme sole*, and on her decease the same shall, in case she shall die intestate, go as the same would have gone if her husband had been then dead: provided that if any such wife should again cohabit with her husband all such property as she may be entitled to when such cohabitation shall take place, shall be held to her separate use, subject, however, to any agreement in writing made between herself and her husband whilst separate."

The effect of a judicial separation as to contracts is, that the wife

while separated is to be considered a *feme sole* for the purposes of contracts, her husband not being liable for her engagements. Nothing is to prevent the wife from joining her husband during the separation in the exercise of a joint power (s. 26). If the wife obtains a protection order she will be entitled to the payment of a fund settled to her separate use with restraint on anticipation. *Cooke v. Fuller*, 26 Bea. 99; *In re Kingsley*, *ib.* 84. In those cases in which damages are given on any petition for dissolution of marriage or for judicial separation the Divorce Court has power to direct in what manner the damages shall be paid, and also to order the whole or any part thereof to be settled for the benefit of the children (if any) of the marriage or as a provision for the maintenance of the wife. 20 & 21 Vict. c. 85, s. 33. In any case in which such court shall pronounce a sentence of judicial separation for adultery on the part of the wife, it shall be lawful for such court, if it shall think proper, to order such settlement as it shall think reasonable to be made of the property of the wife in possession or reversion for the benefit of the innocent party and of the children of the marriage, or any of them (20 & 21 Vict. c. 85, s. 45); and any instrument executed pursuant to such order is to be valid notwithstanding the disability of coverture (23 & 24 Vict. c. 144, s. 6).

The court, on dissolving the marriage, may order the husband to *secure* to the wife such gross sum of money or such annual sum of money for any term not exceeding her own life (or *pay* such monthly or weekly sums during their joint lives, 29 & 30 Vict. c. 32, s. 1) as, having regard to her fortune (if any), to the ability of the husband, and to the conduct of the parties, it shall deem reasonable, and for that purpose may refer it to any one of the conveyancing counsel of the Court of Chancery to settle and approve of a proper deed or instrument to be executed by all necessary parties; and the said (Divorce) Court may, if it shall see fit, suspend the pronouncing of its decree until such deed shall have been duly executed. 20 & 21 Vict. c. 85, s. 32. This section empowers the court to order a gross or annual sum to be secured for the benefit of the wife, but not to make a direct order on the husband to pay a gross or annual or other periodical sum to the wife. The qualification "*dum sola et casta vixerit*" is inserted in the deed of security. The provisions of 29 & 30 Vict. c. 32, respecting the payment of monthly or weekly sums to the wife do not apply to the case of a husband who has property abroad sufficient and available for a security. *Medley v. Medley*, 7 P. D. 122. An order for maintenance cannot be made in the alternative for securing a gross or annual sum of money, or else for the payment of monthly or weekly sums by the husband. *ib.* Such future weekly or monthly payments of alimony are not capable of valuation, and are not a "debt or liability" within the meaning of s. 37 of the Bankruptcy Act, 1883. They cannot, therefore, be proved in the bankruptcy of the husband, and he is, notwithstanding his bankruptcy, liable to continue the payments. *Linton v. Linton*, 15 Q. B. D. 239.

As to the powers of this court to deal with marriage settlements, see that title, Ch. XII.

On a dissolution of marriage, although there is no express enactment, as in the case of a judicial separation, that thereupon the (former) wife shall become a *feme sole* to all intents, yet such is the necessary consequence of the act. *Wilkinson v. Gibson*, L. R., 4 Eq. 162, 169. The status of a married woman is not affected by the pronouncing of a decree *nisi* for the dissolution of the marriage. She continues to be subject to all the disabilities of coverture until the decree is made absolute. *Norman v. Villars*, 2 Ex. D. 359.

After a decree of judicial separation or dissolution of marriage the wife is entitled to her reversionary property subsequently falling into possession, though she may have previously joined her husband in a mortgage of it (*Re Insole*, L. R., 1 Eq. 470; *Prole v. Soady*, L. R., 3 Ch. 220), and after the decease of the wife her personal representatives will be entitled. *Wilkinson v. Gibson*, L. R., 4 Eq. 162; comp. *Cooke v. Williams*, 11 W. R. 504; and see *Jessop v. Blake*, 3 Giff. 639. It will be observed, however, that the mortgage in *Re Insole* (*sup.*), was not under the 20 & 21 Vict. c. 57 (*ante*, p. 354). For a mortgage or conveyance under that act will, it is considered, give a mortgagee or purchaser an indefeasible interest as against the wife, surviving, whether separated or divorced. The decree for a dissolution of the marriage, if made absolute, *takes effect* as from the date of the decree *nisi*. *Prole v. Soady*, L. R., 3 Ch. 220; see *Johnson v. Lander*, L. R., 7 Eq. 228; *Swift v. Wenman*, L. R., 10 Eq. 15. And if the wife has an absolute power of appointment in default of children, and there are none, she may appoint to herself after such a decree. See *Bond v. Taylor*, 2 J. & H. 473.

A foreign tribunal has no authority, so far as any consequences in England are concerned, to pronounce a decree of divorce *à vinculo* in the case of an English marriage between English subjects, unless they are at the time of the decree *bonâ fide* domiciled in the country where the tribunal has jurisdiction, and the suit is prosecuted without collusion. *Shaw v. Gould*, L. R., 3 H. L., 55. Whether collusion can be set up after both parties are dead; and whether the jurisdiction of Scotch courts to decree a dissolution for adultery is not restricted to cases where the adultery is committed in *Scotland itself*, *Qu.* See *Birt v. Boutinez*, L. R., 1 P. & M. 487.

JOINT STOCK COMPANIES FORMED UNDER THE ACT OF 1862, AND AMENDING ACTS.

- CH. 1.—FORMATION OF COMPANIES AND ALLOTMENT OF SHARES, p. 410.
SEC. 1.—PRELIMINARY—PROMOTERS, p. 410.
SEC. 2.—ACT OF 1862 (AMENDED BY ACTS OF 1867, 1877, and 1879), p. 414.
SEC. 3.—APPLICATION FOR SHARES—ALLOTMENT, p. 420.
SEC. 4.—DEVIATION FROM PROSPECTUS—MISREPRESENTATIONS IN, p. 426.
- CH. 2.—DISTRIBUTION OF CAPITAL—REGISTRATION—LIABILITY OF MEMBERS, p. 431.
SEC. 1.—PROVISIONS OF ACTS OF 1862, 1867, AND MATTERS CONNECTED WITH REGISTER, p. 431.
SEC. 2.—EXTENT OF LIABILITY OF SHAREHOLDERS, p. 436.
- CH. 3.—SALE, TRANSFER, SURRENDER AND FORFEITURE OF SHARES, p. 437.
- CH. 4.—MANAGEMENT OF COMPANIES, p. 446.
SEC. 1.—STATUTORY PROVISIONS, p. 446.
SEC. 2.—POWERS, DUTIES AND LIABILITIES OF DIRECTORS, p. 448.
SEC. 3.—ACTS ULTRA AND INTRA VIRES, p. 459.
SEC. 4.—CALLS—DIVIDENDS, p. 465.
- CH. 5.—WINDING-UP, p. 468.
SEC. 1.—BY THE COURT, p. 468.
SEC. 2.—WHO ARE CONTRIBUTORIES—RIGHTS AND LIABILITIES OF, p. 473.
SEC. 3.—POWER OF JUDGE—COURT, p. 478.
SEC. 4.—VOLUNTARY WINDING-UP, p. 487.
SEC. 5.—MISCELLANEOUS PROVISIONS, p. 491.
- CH. 6.—APPLICATION OF ACT OF 1862 TO COMPANIES NOT FORMED UNDER IT, p. 496.

CHAPTER I.

FORMATION OF COMPANIES AND ALLOTMENT OF SHARES.

SEC. 1.—*Preliminary—Promoters.*

<i>Promoters of Companies—Cannot</i>		<i>Company taking benefit of Contract</i>	412
<i>make secret profit if Agents...</i>	410, 411	<i>Prospectus to state Contracts.....</i>	412
<i>Nor Persons in fiduciary position...</i>	411	<i>Non-disclosure—Misrepresentation.</i>	413
<i>Provisional and Managing Com-</i>		<i>Deposits and Subscriptions</i>	413
<i>mittees.....</i>	411	<i>Scheme abortive</i>	413
<i>Advertisements—Prospectus</i>	411	<i>Preliminary Expenses—Agreement</i>	414
<i>Contracts by Promoters</i>	411	<i>Misrepresentation.....</i>	414

I HAVE endeavoured in this title to show, as clearly and concisely as possible, and under appropriate divisions and subdivisions, the provisions of the Joint Stock Companies Act of 1862 (amended 1867, 1870, and several subsequent acts hereafter mentioned), the various decisions upon them, and the general rules and principles of equity applicable to such companies. In some chapters portions of the Acts of 1862 and 1867 have been cited separately and under distinct subdivisions, in others this plan has been departed from when found more convenient and considered to be more useful for reference. I have adhered generally to the leading divisions of the acts, not excluding the substance of any important section, though of course, in a work of this nature, it would be impracticable to give the statutes themselves in any but an abridged form.

Joint stock companies, speaking generally, are partnerships on a large scale, with this difference, that, in many if not most of them at the present day, the liability of the shareholders is limited to the amount unpaid on their shares. Joint stock companies under the Acts of 1862 and 1867 form almost exclusively the subject-matter of this title, although various cases decided with reference to other companies, and other statutes, have occasionally been cited and referred to.

As to promoters, whether of joint stock or other companies, they are not partners, and a promoter or provisional committee man has no implied authority as such to bind the others. *Reynell v. Lewis*, 15 M. & W. 517; *Bailey v. Macaulay*, 13 Q. B. 815; see *Scott v. Ld. Ebury*, L. R., 2 C. P. 255. As a rule of universal application, promoters if agents of a company, and directors stand in a fiduciary relation to the shareholders of a company, and are not allowed to derive any profit from agreements and arrangements undisclosed to the company. *Parker v. McKenna*, L. R., 10 Ch. 96.

Promoters of a company who become directors in it cannot buy property and then sell at an advanced price to the company or derive a benefit by way of commission on any such sale. *Hichens v. Congreve*, 1 R. & My. 150; see *Fawcett v. Whitehouse*, *ib.* 132; *Beck v. Kantorowicz*, 3 K. & J. 230; and this rule will apply where the transaction is a partnership one in which a third person not connected with the company is interested with the director. *Imp. Merc. Credit Ass. v. Coleman*, L. R., 6 H. L. 189. Directors who on the transfer of the business of their company receive money from the purchasing company, which they withhold from their own shareholders, are trustees of such money, and must account for it accordingly. *Gaskell v. Chambers*, 26 Bea. 360. And, in general, secret agreements between promoters, that in the formation of a company they shall derive some especial benefit at the expense of the company, cannot stand. See *Ex parte Williams*, L. R., 2 Eq. 216; comp. *Heymann v. Europ., &c. Co.*, L. R., 7 Eq. 154; *Ex parte Preston*, 37 L. J., Ch. 618; *McKay's Case*, L. R., 2 Ch. D. 1; see *Emma Silver Min. Co. v. Lewis*, 4 C. P. D. 396; *Whaley, Bridge, &c. Co. v. Green*, 5 Q. B. D. 109; comp. *In re Cape Breton Co.*, *infra*.

These rules apply to solicitors and others who stand in a fiduciary relation towards a company. *Bank of London v. Tyrrell*, 10 H. L. C. 26; *Maxwell v. Port. Ten., &c. Co.*, 24 Bea. 495; *Gt. Lux. R. Co. v. Magnay*, 23 Bea. 646. But contracts by A. with a firm negotiating a sale of and afterwards selling its business to a company are valid in general, if made prior to the incorporation of the company, although A., pending the negotiations, is named as a director in the prospectus and acts as such. *Albion Steel, &c. Co. v. Martin*, 1 Ch. D. 580.; comp. *Gover's Case*, and other cases cited, *post*, p. 413. And where a director acting for a company sells his own property to the company not disclosing the fact that it is his, the company when they become aware of it may repudiate the purchase; but if they do not, neither they nor the official liquidator can afterwards make the director liable for the difference between the price he gave for it, and that at which he sold it. *In re Cape Breton Co.*, 29 Ch. D. 795; *Bowen, L.J., diss.*

Members of a provisional committee, who appoint a managing committee, are not, from that act alone, liable for the engagements of the latter. *Williams v. Pigott*, 2 Ex. 201. But advertisements or prospectuses sanctioned by a promoter may be of such a nature as to confer authority on his co-promoters to act for and bind him. *Collingwood v. Berkeley*, 15 C. B., N. S. 145; *Muddick v. Marshall*, 17 *ib.* 829; see *Maitland's Case*, 4 D., M. & G. 769.

With respect to contracts by promoters with third persons before the formation of a company, and the liability of the company to perform them, it is settled that if the contract is *ultra vires* of the company, it is not binding. See *E. Shrewsbury v. N. Staff. R. Co.*, L. R., 1 Eq. 593. But an agreement by which directors of a railway company bind themselves in the event of their bill passing to take land for the purpose of making the railway and to pay for it within a

certain time after the passing of the bill is valid. *Taylor v. Chichester and Midhurst Ry. Co.*, L. R., 4 H. L. 628. Although the contract may not be *ultra vires* of the company, no independent right is given to a party to a contract with a promoter to sue the company afterwards formed. The former is an outsider, and unless, under the provisions of an Act of Parliament (*In re Tilleard*, 3 D., G. & S. 519), cannot sue the company at law. *Melhado v. Porto, &c. Ry. Co.*, L. R., 9 C. P. 503; see *Eley v. Positive, &c. Co.*, 1 Ex. D. 88; or equity, *In re Hereford, &c. Co.*, 2 Ch. D. 621; *In re Empress, &c. Co.*, 16 Ch. D. 125; *In re Rotheram, &c. Co.*, 25 Ch. D. 103. The case of *Spiller v. Paris Skating Rink Co.*, 7 Ch. D. 368, before Malins, V.-C., is *contra*, but must be considered as overruled. But if a company takes the benefit of services rendered, it is, it has been said, in equity, bound to pay for such services. See *Re Hereford, &c. Co.*, *sup.*; *Re Empress Engineering Co.*, *sup.* But a doubt has been thrown upon this doctrine in the later case of *In re Rotheram, &c. Co.*, *sup.* In the last cited case it was held that there may be what has been called a novation, that is, if the company chooses to adopt the contract made by a promoter with an outsider, the latter releasing the promoter, or, as it would seem, if consideration is given for the contract of the company, it will be bound.

It is *ultra vires* of a railway company to enter into an agreement to pay a large sum of money to a person for not opposing the passing of the company's bill in Parliament. *Preston v. Liverpool, &c., Railway*, 5 H. L. C. 605; and see *Cal. R. Co. v. Helensburgh*, 2 Macq. H. L. 391. The cases of *Edwards v. G. Junc. R. Co.*, 1 M. & Cr. 650; *Stanley v. Chester, &c. R. Co.*, 3 M. & Cr. 773; *Petre v. E. C. R. Co.*, 1 Rail. Ca. 462, are *contra*, but are overruled. See *E. Shrewsbury v. N. Staff. R. Co.*, L. R., 1 Eq. 593; *Williams v. St. George's Harbour Co.*, 2 D. & J. 547; *Touche v. Met. Rail. Co.*, L. R., 6 Ch. 671; *Bedford R. Co. v. Stanley*, 2 J. & H. 746; *Simpson v. Ld. Howden*, 9 Cl. & F. 61; *E. C. R. Co. v. Hawkes*, 5 H. L. C. 331; *Scott v. Ld. Ebury*, L. R., 2 C. P. 255. In general a personal liability attaches to those who profess to contract for the company, *Kelner v. Baxter*, L. R., 2 C. P. 174; *Scott v. Ld. Ebury*, *ib.* 255; and to an individual director or promoter who authorizes an agent to pledge his credit, *Riley v. Packington*, *ib.* 536.

By the 30 & 31 Vict. c. 131 (1867), every prospectus and notice inviting persons to subscribe for shares must specify the dates and names of parties to any contract made prior to the issue of such prospectus or notice, or such prospectus or notice will be fraudulent on the part of promoters, directors and officers knowingly issuing them, as regards a person taking shares on the faith of the prospectus without notice of the contract (s. 38). As to deviations from the prospectus, see *post*, sec. 4.

In re New Sombrero Phosphate Co. v. Erlanger, 5 Ch. D. 73, aff. 3 App. Ca. 1218, it was held that the prospectus was the act of the promoters, and that promoters stand in a fiduciary relation to the company which is their creature, and that persons in a fiduciary position must make a full and fair disclosure when they are about to

sell property to those towards whom they stand in that relation. In the same case it was held by the House of Lords that persons who purchase property and then get up a company to purchase from them the property they possess, stand in a fiduciary position towards that company, and must faithfully state to the company the facts which apply to the property, and would influence the company in deciding on the reasonableness of acquiring it. The cases of *Lindsay Petroleum Co. v. Hurd*, L. R., 5 P. C. 221, and *Bagnall v. Carlton*, 6 Ch. D. 371, were similar cases. In these cases there was a secret agreement by which persons standing in a fiduciary relation to the company were to derive a profit from the sale of property to the company, and it was held that the transaction could not stand. See also *Hereford, &c. Co.*, 2 Ch. D. 621, 626; *Emma Silver Co. v. Grant*, 11 Ch. D. 918; *Phosphate Sewage Co. v. Hartmont*, 5 Ch. D. 394. In *Gover's case*, 1 Ch. D. 182, the question was whether a shareholder who alleged misrepresentation in a prospectus by reason of the non-disclosure of an agreement made between the owner of a patent and a trustee for a company about to be formed, was entitled to have her name removed from the list of shareholders. The question chiefly turned upon this, whether the owner of the patent was a promoter when he made the agreement or not. The majority of the court held that he was not, and that the applicant was not entitled to the remedy asked: Brett, L.J., *diss.* See *Craig v. Phillips*, 3 Ch. D. 722. *Twycross v. Grant*, 2 C. P. D. 469, is similar in principle to *Gover's case*, *sup.*, with this difference, that in *Twycross v. Grant* the plaintiff brought an action against the promoters of a company for omitting from the prospectus two contracts, which the jury found to be material. He was held entitled to recover the price of the shares: Kelly, C.B., *diss.* In this case *Gover's case*, *sup.*, was much discussed. Cockburn, L.C.J., observed (2 C. P. D. 539), "I do not hesitate to say that had this case (*Twycross v. Grant*) been on all fours with *Gover's case*, I should have adopted the view there taken by Brett, L.J." Consider also *Charlton v. Hay*, 31 L. T., N. S., 437; *Sullivan v. Mitcalfe*, 5 C. P. D. 455. Comp. *In re Ambrose, &c. Co.*, 14 Ch. D. 390; *In re Cape Breton Co.*, 26 Ch. D. 220, aff. W. N. 1885, p. 97. This section is applicable only for the protection of shareholders in the company, and creates no statutory duty towards bondholders of the company or others for breach of which an action on the statute will lie. *Cornell v. Hay*, *Cornell v. Massey*, *Cornell v. Torrens*, L. R., 8 C. P. 328.

Where there is a material misstatement of fact in a prospectus, the directors will be liable in an action for deceit although the applicant is also influenced by a mistake of his own in applying for shares, &c. *Edgington v. Fitzmaurice*, 29 Ch. D. 459.

If deposits or subscriptions have been paid in a company about to be formed, they may in general be recovered back at law from the promoters if the scheme proves abortive (see *Johnson v. Goslett*, 3 C. B., N. S. 569; *Mowatt v. Londesborough*, 3 E. & B. 307; 4 E. & B. 7; *Ashpitel v. Sercombe*, 5 Ex. 147), unless by the terms of the prospectus, deed or agreement between the parties they were to

be applied in defraying the preliminary expenses. *Garwood v. Ede*, 1 Ex. 264; *Vane v. Cobbold*, *ib.* 798. It may be observed, too, that calls may be made so as to bind subscribers and shareholders, although only a small number of the shares have been taken up (*Ornamental, &c. Co. v. Brown*, 2 H. & C. 63), unless there is an express or implied prohibition in the articles of association against carrying on the business of the company until the whole or a particular part of the capital is subscribed. *N. Staff. Steel, &c. Co. v. Ward*, L. R., 3 Ex. 172.

When there is an agreement between promoters or managing directors and shareholders or subscribers, that certain expenses are to be borne by the latter, they will be liable to that extent, but not for further expenses (*Gillan v. Morrison*, 1 De G. & S. 421); and if there has been misrepresentation on the part of such promoters or directors, although the subscribers will be liable to the general creditors of the company, the promoters or directors will, in equity, be primarily responsible to the extent of their liability. *Carew's Case*, 7 D., M. & G. 43. It has been held, however, that although a scheme, by which the property of the company is estimated much beyond its true value may have been intended to deceive the public, there is no fraud upon the company, all the members of which are parties to the arrangement. *In re Ambrose, &c. Co.*, 14 Ch. D. 390.

SEC. 2.—Act of 1862 (amended by Acts of 1867, 1877, and 1879).

<i>Preliminary</i>	414	<i>Reduction of Capital</i>	417
<i>Commencement of Act</i>	414	<i>When Capital may be reduced</i> ..	417
<i>Insurance Companies</i>	415	<i>Acts of 1867 and 1877</i>	417
<i>Banking Companies</i>	415	<i>Nominal—Paid up Capital</i> ...	417
<i>Prohibition of Partnerships</i> <i>exceeding a certain number</i> .	415	<i>Act of 1879</i>	418
<i>Mining Companies</i>	415	<i>Articles of Association</i>	418
<i>Constitution and Incorporation of</i> <i>Companies—Memorandum of As-</i> <i>sociation</i>	416	<i>Regulations under</i>	418
<i>Mode of forming Company</i>	416	<i>Table A</i>	419
<i>Reduced to less than Seven</i>	416	<i>To be signed—Effect of</i>	419
<i>Limited by Shares or Guarantee</i> ..	416	<i>Money payable by Member a</i> <i>Specialty Debt</i>	419
<i>Banking Company</i>	416	<i>Altering Articles</i>	419
<i>Word "Limited"</i>	416	<i>General Provisions</i>	419
<i>Name of Company, &c., &c.</i> ...	416	<i>Registration of Articles</i>	419
<i>Liability in Guarantee Com-</i> <i>panies</i>	416	<i>Certificate of Registration</i>	419
<i>Where Liability unlimited</i> ...	416	<i>Copies of Memorandum and</i> <i>Articles for Members</i>	419
<i>Change of Name</i>	417	<i>Identity of Names prohibited</i> ..	420
		<i>Prohibition as to certain Com-</i> <i>panies holding Land</i>	420

Preliminary.] The 25 & 26 Vict. c. 89 (7th August, 1862), as amended by the 30 & 31 Vict. c. 131 (1867, in force 1st January, 1868), is the act now in force for the incorporation, regulation and winding-up of trading companies and other associations. The act, in

a great many of its sections, corresponds with the 19 & 20 Vict. c. 47, the Joint Stock Companies Act, 1856, which it repeals. Where there have been decisions on sections of the Act of 1856, they are authorities on the corresponding sections of the Act of 1862.

An insurance company, which carries on the business of insurance in common with any other business, is to be deemed an insurance company (s. 3). See now, as to life assurance companies established after the 9th August, 1870, the Life Assurance Companies Act, 1870, 33 & 34 Vict. c. 61.

Banking companies consisting of more than ten persons must be registered under the act, unless formed under another act or by letters patent (s. 4). As to banking companies, see Lindley on Partnership, 4th ed., 1583, and *post*, p. 487.

Companies consisting of more than twenty persons, formed for the purpose of *carrying on* any other *business* (than that of banking) for gain by the company or individual members thereof must be registered under the act, unless formed in pursuance of some other act or letters patent, or unless they are mining companies subject to the jurisdiction of the Stannaries (s. 4). A company of originally less than twenty, but which afterwards increases to more than twenty, is within the act. *In re Thomas*, 14 Q. B. D. 379. But in *Shaw v. Simmons*, 12 Q. B. D. 117, it was held that an association of more than twenty persons formed before the commencement of the act where some members are from time to time paid off, new members being added, the existence of the association being continuous, does not require registration. In *Smith v. Anderson*, 15 Ch. D. 247, it was held (overruling *Sykes v. Beadon*, 11 Ch. D. 170, and doubting *In re Arthur Average Association*, L. R., 10 Ch. 542), that where the object of the deed of settlement of a company was not to authorise the carrying on of a business, but to provide for the management of a trust fund where trustees of the company had certain powers of selling the shares and reinvesting the proceeds, these provisions being merely subsidiary, and not forming any substantial part of the object, the company was not within the act. Even had the company been as regards its objects within the act, the case was not within it, as the trustees having the management were fewer than twenty. *Ib.*; see *Crowther v. Thorley*, 32 W. R. 330; *Wigfield v. Potter*, 45 L. T., N. S., 612; *In re Siddall*, 29 Ch. D. 1. Unregistered companies of more than twenty members having for objects the acquisition of gain to the company or the individual members of it, are illegal. Therefore the costs of solicitors for services in the formation of such a company and otherwise in connection with carrying it on, cannot be recovered. The company being illegal, no legal debt arises in respect of such services. *In re South Wales Atlantic Steamship Co.*, 2 Ch. D. 763. No winding-up order of such a company can be made: *In re Padstow Total Loss, &c. Association*, 20 Ch. D. 137. See *Harris v. Amery*, L. R. 1, C. P. 148; *Jennings v. Hammond*, 9 Q. B. D. 225; *Shaw v. Benson*, 11 Q. B. D. 563.

Mining companies within the Stannaries of Devon and Cornwall are

now regulated by the 32 & 33 Vict. c. 19, but nothing in that act is to extend to companies registered under any of the Joint Stock Companies Acts, except where such companies are expressly mentioned or necessarily implied. *Ib.* s. 3. See *In re West Devon Consols Mine*, 27 Ch. D. 106.

Constitution and Incorporation of Companies—Memorandum of Association.] Seven or more persons may, by subscribing their names to a memorandum of association and registering, form an incorporated company, with or without limited liability. J. S. C. Act, 1862, s. 6. A form is given (Schedule 1, Table A.) for companies adopting that table. Companies reduced to less than seven members, are prohibited from carrying on business for more than six months after the number has been so reduced (s. 48). The liability may be limited by *shares* or *guarantee* (s. 7). But with regard to banking companies claiming to issue notes in the United Kingdom, the liability in respect thereof is *unlimited* (s. 182).

In cases of share and guarantee limited companies, the word *limited* is to be the last word in the name of the company (ss. 8, (1) 9, (1)). By the Act of 1867 (30 & 31 Vict. c. 131), limited associations for promoting commerce, art, science, religion or charity, or any other useful object, where no dividends are payable, but the profits, if any, are to be applied in promoting their objects, may with the sanction of one of the secretaries of the Board of Trade be registered without the word “limited” (s. 23). The memorandum of association must state the name and objects of the company, that the liability is limited, and where the *registered office* is to be; and in the case of share limited companies, the capital, amount and number of shares. Each subscriber is to write opposite his name the number of shares he takes, being one at least. Act of 1862, ss. 8, 9, 14; see *East Glouc. R. Co. v. Bartholomew*, 37 L. J., Ex. 17. Although the liability under section 9 of a member of the company may be limited as regards creditors of the company, a shareholder may be liable beyond his shares where from the nature of the association he incurs a liability quoad other members, as where the association is a mutual insurance association. *Lion Insurance Association v. Tucker*, 12 Q. B. D. 176; see *Maxwell's case*, L. R., 20 Eq. 585, on the J. S. C. Act, 1856.

In the case of guarantee limited companies, there is a declaration that each member undertakes to contribute a *specified amount* in the event of the company being wound up. Act of 1862, s. 9; Forms B. and C., Sched. 2. If the liability is unlimited, the memorandum of association must state the name and objects of the company, and where its registered office is to be, *ib.* (s. 10). Form D., Sched. 2. A share limited company may, if duly authorised by its regulations or by special resolution, *increase or consolidate its capital or convert shares into stock*; but cannot otherwise alter the conditions contained in the memorandum of association, except as mentioned in the 13th section (*post*, p. 417) (s. 12).

The objects mentioned cannot be departed from except so far as s. 12 permits. *Ashbury Railw. Car. & Iron Co. v. Riche*, L. R., 7 H. L. 653. After a resolution to increase the capital of a company by the issue of new shares has been approved of by two meetings, according to sects. 50 & 51 of the act, *post*, p. 447, the directors can proceed to issue the shares; and it is not necessary, under sect. 12, to have the articles varied at two meetings and the issue of the shares authorised by two other meetings. *Alison's Case*, *Campbell's Case*, *Hippesley's Case*, L. R., 9 Ch. 1. A company may, if so authorised by special resolution and by the Board of Trade, change its name, *ib.* (s. 13). The change is not complete until the new name is entered on the register, and a certificate of incorporation issued. *Shackleford, &c. Co. v. Owen*, L. R., 3 C. P. 407; see as to calls and actions in such cases, *ib.*

Reduction of Capital.] Before the Act of 1867, companies could not reduce their capital, *Droitwich, &c. Co. v. Curzon*, L. R., 3 Ex. 35. By this act a share limited company may reduce its capital by special resolution sanctioned by an order of the court, which is to be registered (ss. 9, 11, 15, 16, 18). Such a company must add the words "and reduced" to its name for the period fixed by the court (*ib.* s. 10); three months from the final order is a proper period. *Re Estate Co.*, L. R., 5 Ch. 407, or even fourteen days. *Re Patent Ventilating Co.*, 12 Ch. D. 254. The court means the court having jurisdiction to make winding-up orders under ss. 81 and 83 of the Act of 1862 (Act of 1867, s. 12); and see *ib.* s. 20 as to making rules. Creditors may object to the reduction (*ib.* s. 19). The court may dispense with the consent of creditors on the company securing their debts (*ib.* s. 14). The rights of creditors who are ignorant of the proceedings are saved (*ib.* s. 17). A petition for reduction ought *prima facie* to be advertised. *In re Tambracherry Estates Co.*, 29 Ch. D. 683. The capital of a company may be divided into shares of a smaller amount than that fixed by its memorandum of association (*ib.* ss. 21, 22). But under this act it was held that the court could not sanction a reduction of capital to enable a company whose paid-up share capital had been partially lost, to write off that loss by reducing the nominal amount of each share. *In re Ebbw Vale Steel, Iron, and Coal Co.*, 4 Ch. D. 827; and where the capital of a company had been issued and fully paid up it could not be reduced. *In re Kirkstall Brewery Co.*, 5 Ch. D. 535. The word capital in s. 9 of the Act of 1867, and in s. 12 of the Act of 1862, was held to mean nominal capital only, *ib.* See also *In re Tambracherry Estates Co.*, 29 Ch. D. 683.

By the 40 & 41 Vict. c. 26, 1877, s. 3, amending the Acts of 1862 and 1867, the word "capital," as used in the Act of 1867, is to include paid-up capital; and the power to reduce capital conferred by that act, includes a power to cancel any lost capital, or any capital unrepresented by available assets, or to pay off any capital which may be in excess of the wants of the company; and paid up capital may be reduced either with or without extinguishing or reducing the liability

(if any) remaining on the shares of the company, and to the extent to which such liability is not extinguished or reduced it shall be deemed to be preserved, notwithstanding anything contained in the Act of 1867. The provisions of that act, as amended by this act, shall apply to any company reducing its capital in pursuance of this act and the Act of 1867. Where the reduction of the capital of a company does not involve either the diminution of any liability in respect of unpaid capital or the payment to any shareholder of any paid up capital: (1) The creditors of the company shall not, unless the court otherwise direct, be entitled to object or required to consent to the reduction; and (2) It shall not be necessary before the presentation of the petition for confirming the reduction to add (and the court may, if it thinks it expedient so to do, dispense altogether with the addition of) the words "and reduced," as mentioned in the Act of 1867, s. 4. The court may require the company to publish the reasons for the reduction and other information. The registered minute must show the amount proposed to be deemed to have been paid up on the shares (*ib.*). Any company limited by shares may so far modify the conditions contained in its memorandum of association, if authorised so to do by its regulations as originally framed or as altered by special resolution, as to reduce its capital by cancelling any shares which at the date of the passing of such resolution have not been taken or agreed to be taken by any person; and the provisions of the Act of 1867 shall not apply to any reduction of capital made in pursuance of this section (s. 5). By the 43 Vict. c. 19 (1879), when any company has accumulated a sum of undivided profits, which with the consent of the shareholders may be distributed among the shareholders in the form of a dividend or bonus, the company may by special resolution return the same, or any part thereof, to the shareholders in reduction of the paid up capital of the company, the unpaid capital being thereby increased by a similar amount. The powers vested in the directors of making calls upon the shareholders in respect of moneys unpaid upon their shares shall extend to the amount of the unpaid capital as augmented by such reduction (s. 3). No resolution is to take effect until particulars of it have been registered (s. 4). A shareholder may within one month after the resolution require the company to retain the money paid on his shares to be invested to represent future calls made to replace the capital reduced on those shares (s. 5). The company shall specify in the annual lists of members the amounts so retained and the amount of undivided profits returned to the shareholders in reduction of capital (s. 6).

Articles of Association.] The memorandum of association may in the case of share limited companies, and must in the case of other companies, be accompanied when registered by articles of association prescribing regulations for the company, and may adopt all or any of the provisions in Table A. in the 1st Schedule, and if the capital is divided into shares, shall state the amount of capital, and if not, the number of members with which it is proposed to register; and in

guarantee limited or unlimited companies, having a share capital, each subscriber shall take at least one share, and write opposite his name the number he takes (Act of 1862, s. 14). The provisions in Table A. apply to all share limited companies, unless excluded by their articles of association (if any), and so far as applicable have the same effect as if they had been inserted in registered articles of association (s. 15).

The articles of association are to be printed, stamped and signed by each subscriber, and when registered operate as a covenant by each member to conform to the articles, subject to the provisions of the act. Any money payable by a member to the company in pursuance of its regulations, is a specialty debt (s. 16).

A company having formed a scheme for reducing their capital by the purchase of fully paid shares, and this being in violation of their articles of association, passed a resolution at a general meeting: "That notwithstanding any thing contained in the articles, the directors be authorized to carry out the following compromise or modification of the agreement with the vendors," which was in effect to cancel 12,000 fully paid vendors' £5 shares upon payment of a less sum per share, it was held that this resolution was valid, notwithstanding that the effect of it was to carry out two distinct objects, viz., to set aside for the purpose of this transaction the article forbidding the purchase of shares, and to authorize the directors to carry out the proposed scheme. *Taylor v. Pilsen Joel and General Electric Light Company*, 27 Ch. D. 268, following *Campbell's Case*, L. R. 9 Ch. 1; see *Imperial Hydropathic Hotel Company v. Hampson*, 23 Ch. D. 1.

General Provisions.] The memorandum and articles of association are to be registered (s. 17). Although there may be circumstances tending to show that a company sought to be registered is in several respects a foreign company, the registrar is not bound to refuse it registration, and if registered it may be wound up. *Princess Reuss v. Bos*, L. R., 5 H. L. 176.

After registration the registrar is to give a certificate of incorporation, and, in the case of a limited company, that the company is limited. The subscribers and subsequent members form a body corporate having perpetual succession and a common seal, and with power to hold lands. The certificate is conclusive, that all requisites of the act as to registration have been complied with (s. 18). See *Oakes v. Turquand*, L. R., 2 H. L. 325; *Peel's Case*, L. R., 2 Ch. 674; *Nassau Phosphate Co.*, 2 Ch. D. 610. There are similar provisions as to companies existing at the date of the passing of the act and registering under it (s. 191).

Copies of the memorandum of association and articles (if any) are to be given to members on payment of not more than one shilling (s. 19).

The registration of a company under a name substantially the same as that of another registered company is prohibited (s. 20). A company not registered under the Companies Act, 1862, can restrain the

registration under that act of a projected new company, which is intended to carry on the same business as the unregistered company, and to bear a name so similar to that of the unregistered company as to be calculated to deceive the public. *Hendriks v. Montagu*, 17 Ch. D. 638. The principles as to granting injunctions applicable to individuals trading under identical or similar names apply equally to companies. *Merch. Bank. Comp. of London v. Merch. J. S. Bank*, 9 Ch. D. 560.

The sanction of the Board of Trade is required to enable companies for promoting art, science, religion, charity or other like object, and not for gain, to hold more than two acres of land (s. 21, Sched. 2, Form (F)).

SEC. 3.—Application for Shares—Allotment.

<i>Who may apply</i>	420	<i>Conditional or Collateral Agree-</i>	
<i>As to Infants—Married Women</i> ...	420	<i>ment</i>	422
<i>Other Companies</i>	420	<i>Amalgamation of Companies</i>	422
<i>Application withdrawn before Ac-</i>		<i>Allottee not bound but dealing with</i>	
<i>ceptance</i>	420	<i>Shares</i>	423
<i>Allotment and Notice of</i>	421	<i>Specific Performance of Agreement</i>	
<i>Payment of Deposit</i>	421	<i>to take Shares</i>	423
<i>Executors of Shareholder</i>	421	<i>Allotment being ultra vires</i>	423
<i>Delegation of Power</i>	422	<i>Directors' Qualification Shares</i>	424
<i>Certainty of Contract as to Shares</i> .	422	<i>Liability in respect of</i>	424, 425
<i>Unconditional Acceptance</i>	422	<i>Scrip Certificates</i>	426

As a general rule, any person capable of entering into a contract may be a shareholder. An infant who applies for shares which are allotted to him, will be bound by his acquiescence after his majority (in the case cited, for fourteen months afterwards) and be liable as a contributory. *Ebbett's Case*, L. R., 5 Ch. 302; and see Chapters III. and V., *post*. A married woman may hold shares, *post*, Chap. V., and see *ante*, tit. "HUSBAND AND WIFE."

A limited company may hold shares in another company if authorized by its own memorandum and articles of association to do so. *Ex parte Contract Corporation*, L. R., 3 Ch. 105; *Re Asiatic, &c., Corporation*, L. R., 4 Ch. 252. But not unless so authorized. *G. E. R. Co. v. Turner*, L. R., 8 Ch. 149. But if the directors of one company, although unauthorized, apply its funds in the purchase of shares in another company, taking a transfer to a nominee, who afterwards becomes bankrupt, the former company will be entitled to them and not the trustee in bankruptcy, as they are not within the reputed ownership clause. *Ib.*

An application for shares may be withdrawn before the acceptance of it. *Ramsgate, &c., Co. v. Goldsmid*; *Same v. Montefiore*, L. R., 1 Ex. 109; see *Chapman's Case*, L. R., 2 Eq. 567. This acceptance is evidenced by an allotment, and on allotment and notice of it to the

allottee, or a response by the company signifying their acceptance of the application, the company and applicant are bound. *Pellatt's Case*, L. R., 2 Ch. 527; *Adams' Case*, L. R., 13 Eq. 474 (in which case, however, no notice of the allotment was given); *Sahlgreen & Carrall's Case*, L. R., 3 Ch. 323. In general there is no binding contract before, and *Bloxham's Case* (33 Bea. 529; 33 L. J., Ch. 574), in which the applicant was held to be bound before notice of the allotment, is referable to its special circumstances. *Pellatt's Case*, *sup.*; *Gunn's Case*, L. R., 3 Ch. 40; *Ex parte Hebb*, L. R., 4 Eq. 9; *Wallis's Case*, L. R., 4 Ch. 325 (n.); *Robinson's Case*, *ib.* 330; *Pentelou's Case*, *ib.* 178; *Ward's Case*, L. R., 10 Eq. 659. The mere entry of an applicant's name on the register of shareholders is not sufficient. *Gunn's Case*, *sup.* But otherwise, if he is aware of the entry, and that he is held out to the public as a shareholder. *Sewell's Case*, L. R., 3 Ch. 131, 138. It is now settled that merely posting a letter of allotment is a sufficient acceptance. *Dunlop v. Higgins*, 1 H. L. C. 381; *Harris's Case*, L. R., 7 Ch. 587; *Household Fire Co. v. Grant*, 4 Ex. D. 216, overruling *Reidpath's Case*, L. R., 11 Eq. 86, and *Br., &c., Tel. Co. v. Colson*, L. R., 6 Ex. 108. See *Duncan v. Topham*, 8 C. B. 225; *Townsend's Case*, L. R., 13 Eq. 148; *Adams' Case*, *ib.* 474; *Wall's Case*, L. R., 15 Eq. 18. In the case of notices, &c., to a company, see act of 1862, ss. 62, 63. Mere payment of a deposit on the one side, and giving a receipt for it on the other, is not equivalent to an allotment. *Best's Case*, 2 D., J. & S. 650; see L. R., 1 Ex. 109; and comp. *Fletcher's Case*, 37 L. J., Ch. 49.

See as to shares of directors, *post*, p. 425. An allotment to A., on the application of B., and subsequent application for the shares by A., is a sufficient contract between A. and the company. *Levita's Case*, L. R., 5 Ch. 489. An application by A., as trustee for B., and allotment to A. is binding on A. if assented to. In this case A. was placed on the register and attended a meeting as a director, and he was held liable although a dividend was credited to B. in the company's books. *Levita's Case*, L. R., 3 Ch. 36. The person who is really the applicant for shares is liable in respect of them, although he may have induced the actual applicant to sign the form of application for them. *Pugh and Sharman's Case*, L. R., 13 Eq. 566. Where the prospectus fixes a time for allotting shares, stating that the concern will start without delay at a period specified, an applicant is not bound by an allotment considerably after the time named. *Re Bowron, Baily, & Co.*, L. R., 3 Ch. 592. For the allotment must be made within a reasonable time. *Ramsgate, &c., Co. v. Goldsmid*; *Same v. Montefiore*, L. R., 1 Ex. 109. Where additional shares were offered to the executors of A., a deceased shareholder, and the agent of one of the executors who received the dividends for the executors applied in his own name for them, but they were allotted to the executors, although the agent wrote acknowledging the allotment as if made to himself and promising to pay, it was held that there was no contract between the agent and the company. *Mallorie's Case*, L. R., 2 Ch. 181. Executors of a shareholder who accept shares offered to the old shareholders

are personally liable in respect of them. *Fearnside and Dean's Case*; *Dobson's Case*, L. R., 1 Ch. 231.

Directors cannot, as a rule, delegate their power of allotting shares to some of their body. *Howard's Case*, L. R., 1 Ch. 561. The contract must be *certain* as to the number of shares to be taken. If, on the one hand, there is merely an offer to accept an uncertain number of shares, *e.g.*, *fifty or more*, and on the other an allotment of *one hundred*, with a request to know how many the applicant would take, there is no binding contract in respect of *any* number. *Carmichael's Case*, 17 Sim. 163. The acceptance of an application for shares, as of any other offer, must introduce no *new term*. *Jackson v. Turquand*, L. R., 4 H. L. 305; *Beck's Case*, L. R., 9 Ch. 392. Thus a person who applies for a certain number of shares *not agreeing to accept any less number*, is not bound by an allotment of a less number (see *Roberts' Case*, 1 Drew. 204), or the same number, but subject to *conditions*. *Duke v. Andrews*, 2 Ex. 290; see *Hutton v. Upfill*, 2 H. L. C. 674. Where a shareholder in a limited company, A., which was being amalgamated with an unlimited company, B., applied for shares in the latter, "if limited," and an allotment was made, he was held liable, although the B. company shares were unlimited. The forms of application for shares and allotment described the A. company as "limited" and the B. without that word, and this was held to be sufficient notice. *Perrett's Case*, L. R., 15 Eq. 250. Where there is an extension of time by the directors for payment of deposits or instalments, this will not entitle an allottee of shares to repudiate his contract to take shares, unless there is a misrepresentation in the prospectus. See *Pentelow's Case*, L. R., 4 Ch. 178; *Peek's Case*, *ib.* 532; *Jackson v. Turquand*, L. R., 4 H. L. 305.

If a stipulation is made by an applicant for shares, and the stipulation is a condition precedent, he is not liable as a contributory, if the condition is not performed. *Austin's Case*, L. R., 2 Eq. 435; *Shackleford's Case*, L. R., 1 Ch. 567; *Pellatt's Case*, L. R., 2 Ch. 527; *Rogers' Case*, *Harrison's Case*, L. R. 3 Ch. 633; *Simpson's Case*, L. R., 4 Ch. 184. *Gorrissen's Case*, L. R., 8 Eq. 507; *Wynne's Case*, L. R., 8 Ch. 1002; *Wood's Case*, L. R., 15 Eq. 236. But the condition must be annexed to or form part of the contract to take the shares, and not in the nature of a *collateral agreement*, or the liability will attach. *Elkington's Case*, L. R., 2 Ch. 511; *Bridger's Case*, L. R., 5 Ch. 305; and see *Bunn's Case*, 2 D., F. & J. 275; *Odessa Tramways Co. v. Mendel*, 8 Ch. D. 235. A person who agrees to *place* shares does not thereby agree to take them in default of procuring others to do so, and is not liable as a contributory. *Gorrissen's Case*, *sup.*

A shareholder of company A., who agrees to take shares in company B., conditionally upon both being amalgamated, is not liable as a shareholder of B. in the event of the amalgamation not taking place. *Alabaster's Case*, L. R., 7 Eq. 273; see *Hare's Case*, L. R., 4 Ch. 503. The doctrine of the court on this subject would seem to be that if the shareholder enters into no personal negotiation, and only acts

through his own company and does nothing but consent to and act on the amalgamation, then unless the amalgamation is eventually completed he is not bound, but if he has made a personal application to the purchasing company and the shares are registered in his name, he is bound, although the amalgamation goes off altogether. *Dougan's Case*, L. R., 8 Ch. 540, 546; see *Alabaster's Case*, L. R., 7 Eq. 273; *Leeke's Case*, L. R., 6 Ch. 469. Where the agreement for amalgamation was of doubtful validity, a shareholder in the old company, who acknowledged the receipt of certificates for shares in the new one, was held to be liable as a shareholder in the latter, but not a shareholder who simply took no notice of the communication announcing that he was entitled to shares. *Challis's Case*, *Somerville's Case*, *ib.* 266; see *Leeke's Case*, *sup.* If by an agreement between two companies, one company is to buy the business of the other company, the consideration to be paid in shares of the buying company, to be issued to the selling company and divided amongst its shareholders, and the buying company does really acquire (by a title which, though originally defective as against dissentient shareholders, has been in the end confirmed) the property of the selling company, the holders of the new shares being issued *bonâ fide* cannot repudiate them. *Campbell's & Hippisley's Case*, L. R., 9 Ch. 1.

An irregularity in the allotment of the shares will be cured, and the allottee will be liable if he subsequently deals with them; for instance, by executing a transfer (*Crawley's Case*, L. R., 4 Ch. 322), and an allottee may lose his right to relief by delay and acquiescence (*Perrett's Case*, L. R., 15 Eq. 250; comp. *Wynne's Case*, L. R., 8 Ch. 1002), and may be estopped from saying he is not a shareholder, as where as director he allots shares to himself. *York Tram. Co. v. Willows*, 8 Q. B. D. 685. If an allotment is *ultra vires* of the directors, they may rescind it, and place the allottee *in statu quo* before the allotment. *Barnett's Case*, L. R., 18 Eq. 507. And an agreement *in fieri* may be discharged by a fresh agreement. Thus, if there is a provision that no shares shall be issued or vest, until a particular payment is made, if A. takes and is registered in respect of shares for which he has not made the required payment, he will be discharged by transferring them, his name being removed from the register and the transferee's placed upon it. *Morton's Case*, L. R., 16 Eq. 104; see *Ex parte Beresford*, 2 Mac. & G. 197. The preceding decisions with reference to the contract between the applicant and company being complete and binding, have for the most part arisen on the winding up of a company, but they are equally applicable to other cases which may arise; for instance, in actions for calls. An agreement by a company to allot shares, or by an applicant to take them will be specifically enforced, but it must be a concluded agreement. *Oriental Steam Co. v. Briggs*, 2 J. & H. 625; *Cheale v. Kenward*, 3 D. & J. 27. In *Sheffield Gas, &c., Co. v. Harrison*, 17 Bea. 294, however, the court refused to compel an allottee of shares to accept them and to execute the company's deed of settlement. But as to this case, see *New Brunswick, &c., Co. v. Muggerridge*, 4 Drew. 686, 701.

Where by the memorandum of association or deed of settlement a director is required to hold a certain number of shares, this applies to the directors who are elected by the subscribers or shareholders, but not or not in general to those who are nominated in the articles of association. *Roney's Case*, 10 Jur., N. S. 812; see the judgment of Turner, L.J., p. 814; *Forbes' Case*, L. R., 8 Ch. 768; comp. *Currie's Case*, 11 W. R. 46. Articles of a company which do not require qualification shares for directors cannot be altered by a resolution of the directors. *De Rurigne's Case*, 5 Ch. D. 306.

In the *Marquis of Abercorn's Case* (4 D., F. & J. 78), the holding of a particular amount of stock was a necessary qualification for a director. The marquis, who did not know this, was elected a director, and more than the amount of qualification stock was credited to him in the books of the company, and he was debited with the price of it. He never knew this; never held any of the stock, and never acted as a director; and it was held, that he was not liable as a contributory. See *Ex parte Eve*, 37 L. J., Ch. 844; *Green's Case*, L. R., 18 Eq. 428; *Hallmark's Case*, 9 Ch. D. 329.

Even where a person acts as a director and applies for shares, he will not be liable for shares not allotted to him, and in respect of which there is no contract between him and the company (*Tothill's Case*, L. R., 1 Ch. 85); *secus*, if though not allotted, he signs the articles of association in respect of them (*Ib.*; *Evans' Case*, L. R., 2 Ch. 427; *In re London, &c., Coal Co.*, 5 Ch. D. 525), or is put on the register in respect of them, being advertised also as a director and attending a meeting in that capacity. *Levita's Case*, L. R., 3 Ch. 36; see *Re Disderi*, L. R., 11 Eq. 242. A mistake by a director between shares necessary for and allotted to him as his qualification as a director, and other shares applied for by and allotted to him, he conceiving that they were the same shares, will not relieve him from liability in respect of the qualification and other shares. *Fowler's Case*, L. R., 14 Eq. 316. But this case was questioned by Jessel, M.R., in *Duke's Case*, 1 Ch. D. 620. There, by arrangement notified in the prospectus, shares, in substitution for those originally taken by directors, were to be allotted to them, it was held that they were liable for the latter only, and not for the former as well.

As to directors' shares, as distinguished from other shares, two questions may arise: 1st. As to the effect of acts by a person leading or not to the inference that he has agreed to take certain shares; 2ndly, as to the liability of a director in respect of shares which he has improperly acquired, having regard to his position as a director. As to the first class of cases, where the holding by a person of a certain number of shares at, or for a certain period before, his election as director is a condition precedent to his being so elected, if he is not such a holder of shares at the time of election, the election is void. His acting as director is no evidence of a contract to take the shares; and his name cannot be placed on the list of contributories. *Hamley's Case*, 5 Ch. D. 705; *Barber's Case*, *ib.* 963; *Jenner's Case*, 7 Ch. D. 132. See as to the necessity of the shares being held by a director *bene-*

ficially, *Pulbrook v. Richmond, &c., Co.*, 9 Ch. D. 610. Where a director is to hold a certain number of shares, the mere acceptance of the office only involves an agreement to have the qualifying shares within a reasonable time after becoming director; and if a person accepting the office retracts the acceptance before the reasonable time for acquiring the shares has expired, and without having acted as director, he will not be fixed with the qualification in the event of the company being afterwards wound up. *Karuth's Case*, L. R., 20 Eq. 506. And merely acting as a director does not amount to a contract by the person so acting to take the requisite qualification shares directly from the company, but he may acquire them from a promoter, who is entitled to paid-up shares in the company. *Brown's Case*, L. R., 9 Ch. 102. But this is subject to the second class of cases, *infra*. Where a certain number of shares was to be the qualification, and by the articles, each director was, in consideration of services, to receive that number as fully paid-up, to be forfeited on his ceasing to be a director by his own act, and one of them who had not applied for shares resigned, it was held that his name, which had been placed on the register, ought to be removed. *Miller's Case*, 5 Ch. D. 70.

If a certain number of shares is the qualification for a director, it is not settled whether, if a person signs the memorandum of association, and afterwards acts as a director, this amounts to an agreement by him within the section to take the number necessary for a qualification. But if so, he has a reasonable time in which to perform it. *Hewett's Case*, *Brett's Case*, 25 Ch. D. 283, 296. See *In re Harward's Case*, L. R., 13 Eq. 30; *Brown's Case*, L. R., 9 Ch. 102; *Leeke's Case*, L. R., 6 Ch. 469; *In re Esparto Trading Co.*, 12 Ch. D. 191. A person who acts as a director without taking the number of qualification shares, cannot be made liable under s. 165 (*post*, p. 494) for the amount of them if the company is afterwards wound-up. *Coventry and Dixon's Case*, 14 Ch. D. 660.

As to the second class of cases, directors are agents of, and trustees for, their companies. Arrangements, therefore, between promoters contemplating a sale of their property to the company and persons whom the promoters are desirous of having as directors, by which such persons, on becoming directors are to sanction the purchase on behalf of the company, and to get money or fully paid-up shares for so doing, cannot stand, and no mere colourable payment out of the purchase-money for shares will support such transactions, but a director will be liable for such shares if he has contracted to take them. *Hay's Case*, L. R., 10 Ch. 593. But in such cases, if the arrangement is that the director shall receive from the promoter fully paid-up shares, there being no contract by the director to take shares from the company, then, although the transaction is a breach of trust, the director cannot be fixed as the holder of *unpaid* shares, whatever other remedy may be open to the company, whether under the Act of 1862, s. 165, or otherwise. *Carling's*, *Hespeler's* and *Walsh's Cases*, 1 Ch. D. 115. In *Mitcalfe's Case*, 13 Ch. D. 169, the vendor of property to a company gave to one of the directors a number of shares, part of some

which had been allotted to him as fully paid up in payment of the purchase-money of the property. At the commencement of the winding-up of the company some of the shares so given remained registered in the director's name, and the rest had been transferred by him, some for value, others for a nominal consideration. There was evidence that the public had subscribed for the ordinary shares of the company at their par value. It was held that the director had been guilty of a misfeasance in relation to the company, and that he must pay to the liquidator the full nominal value of all the shares which had been given to him. Again, in *In re Carriage, &c., Association*, 27 Ch. D. 322, it was held that directors who are bound by the articles of association to hold shares as a qualification, and who accept, with the knowledge and approval of each other, fully paid shares from the promoter who had received them as cash from the company in consideration of his paying all preliminary expenses, are jointly and severally liable to pay the full value of the shares. See *Pearson's Case*, 4 Ch. D. 222; *De Ruigne's Case*, 5 Ch. D. 306; *In re Englefield Coll. Co.*, 8 Ch. D. 388; *Ex parte Pelly*, 21 Ch. D. 492; comp. *Brown's Case*, ante, p. 425.

In some companies letters of allotment are exchanged for scrip or scrip certificates stating that the allottee, or sometimes the holder, is entitled to a certain number of shares. *Littlehampton Steam, &c., Co.*, 2 D., J. & S. 521; *Ormerod's Case*, L. R., 5 Eq. 110. Scrip-holders are not shareholders in the strict sense of the term, though they will be contributories, if registered in respect of the shares, but not otherwise. *Ib.*; *Ex parte Aston*, 4 D. & J. 320; *Ex parte Grisewood and Smith*, ib. 544; *East Gl. Ry. Co. v. Bartholomew*, L. R., 3 Ex. 15; *Eustace v. Dub. Trunk Ry. Co.*, L. R., 6 Eq. 182; *M'Ilwraith v. Dub. Trunk Ry. Co.*, L. R., 7 Ch. 134; see *Weston's Case*, L. R., 5 Ch. 614; *McEuen v. West Lon. Wharves Co.*, L. R., 6 Ch. 655.

SEC. 4.—Deviation from Prospectus—Misrepresentations in.

<i>Of the Prospectus generally</i>	426	<i>Misrepresentation in Prospectus—</i>	
<i>What should be stated</i>	426	continued.	
<i>Contracts</i>	427	<i>Advantages—Value</i>	428
<i>Deviation from Prospectus</i>	427	<i>Non-disclosure of Private Ar-</i>	
<i>As to Business to be carried on</i>	427	<i>rangements</i>	429
<i>Where Promoter authorized to</i>		<i>As to recovery of Deposit</i>	429
<i>obtain Act or Charter</i>	427	<i>False representation</i>	429
<i>Alteration in Articles</i>	427	<i>Repudiation of Shares</i>	429
<i>Misrepresentation in Prospectus</i> ...	427	<i>Should be prompt</i>	429
<i>Effect in general</i>	427	<i>Shareholder should not pay</i>	
<i>Prospectus referring to Articles</i>	428	<i>Calls or receive Dividends</i> ...	430
<i>Innocent Mistake</i>	428	<i>Nor deal in Shares</i>	430
<i>Representations as to Directors</i>	428	<i>Agreement to abide by result of</i>	
		<i>Suit</i>	430

Of the Prospectus generally.] The prospectus states in general

the particulars relating to the company, the nature of the undertaking, number and amount of shares, and names of the parties connected with it. It is almost superfluous to observe that such a document, on the faith of which shares are usually taken, should be very accurate, and that there should be no misrepresentation and no concealment which may be equivalent to misrepresentation. As to the omission to state contracts, see *ante*, pp. 412, 413.

Deviation from Prospectus.] As a very general rule a person who applies for shares in a company on the faith of a prospectus is not bound by an allotment, if the terms of the prospectus be afterwards materially departed from on the formation of the company. *Downes v. Ship*, L. R., 3 H. L. 343. As where, according to the prospectus, the undertaking is to carry on a general banking business, the company being established for that and the construction of railways and other works. *Ib.*; and see *Stewart's Case*, L. R., 1 Ch. 574; *Webster's Case*, L. R., 2 Eq. 741. But subscribers to an undertaking which is intended to be carried out by means of an act of parliament or charter, who give the promoters powers which expressly or impliedly authorize a deviation from the strict terms of the prospectus, will be bound if the act be accordingly obtained for other or more extensive purposes than those originally contemplated. See *Nixon v. Brownlow*, 3 H. & N. 686; *Norman v. Mitchell*, 5 D., M. & G. 648. And an alteration in the articles of association between the application for shares and allotment will not invalidate the contract where the alteration is made under the authority of the Act of 1862, the objects of the company not being altered. *Lyon's Case*, 35 Bea. 646. As to alterations in articles by means of new or false sheets, see *Re Richmond*, 4 K. & J. 305; *Re Felyate*, 2 D., J. & S. 456. A person may also by his own acts be precluded from objecting, upon the ground of deviation from the prospectus (see *Tredwen v. Bourne*, 6 M. & W. 461; *Longworth's Executors Case*, 1 D., F. & J. 17), or by his delay in applying to be relieved. See *post*, p. 431.

Misrepresentation in Prospectus.] The proper purpose of a prospectus of an intended company is to invite persons to become allottees of the shares, or original shareholders in the company. When it has performed this office it is exhausted. *Peek v. Gurney*, 6 H. L. 377. The same rules as to false or deceptive representations which are applicable to contracts between individuals are also applicable to contracts between an individual and a company. See the cases, *ante*, pp. 89, 90. A statement by promoters in a prospectus that the expenses of an undertaking will amount to a certain sum, of which part only remains for subscription, will render them liable as contributories for the balance. *Moore and De la Torre's Case*, L. R., 18 Eq. 661. And where there has been fraudulent misrepresentation or wilful concealment of facts by which a person has been induced to enter into a contract, it is no answer to his claim to be relieved from

it that he might have known the truth by proper inquiry. *Venezuela R. Co. v. Kisch*, L. R., 2 H. L. 99.

There is no binding contract in respect of shares where there is an untrue statement in the prospectus that a certain number of shares have been subscribed for, when in fact the application was by the promoter of the company for himself or his nominees, he having paid no deposit, and ultimately only taking some of them, the rest being allotted to general applicants. *Ross v. Estates Investment Co.*, L. R., 3 Ch. 682. So, where there is a misrepresentation that the directors and their friends have subscribed a large portion of the capital (*Henderson v. Lacon*, L. R., 5 Eq. 249), or as to the amount of the capital or purchase-money of the business of the company (*Kent v. Freehold, &c. Co.*, L. R., 4 Eq. 588; reversed, L. R., 3 Ch. 493, but upon the ground that the application was after a petition for winding up, see *post*, p. 431). But a misstatement of the valuation of the property of a company to the amount of 3000*l.* in 301,000*l.* is not a material misstatement. *Smith v. Chadwick*, 20 Ch. D. 27; nor a statement that the purchase-money for the works was to be paid by instalments, the amount of which was mentioned, but it did not state, according to the fact, that interest was to be paid on the instalments, *ib.*; aff. 9 App. C. 187. If a prospectus refer to articles which materially extend the objects of the company as stated in the prospectus, an applicant for shares is bound by the articles. *Brigg's Case*, 35 Bea. 273. So if an ambiguous statement in the prospectus is corrected in the articles which are referred to. *Hallows v. Fernie*, L. R., 3 Ch. 467. Where a prospectus was sent on the faith of which shares were taken, and afterwards a circular was sent containing other statements, it was held that the circular could not be taken as a contemporaneous document with the prospectus, and could not be read for the purpose of explaining it. *Smith v. Chadwick*, 9 App. C. 187.

And although there may be no reference to articles, a person will not in every case be entitled to repudiate shares merely because there is a mistake in the prospectus. In one case in which the prospectus alleged erroneously, but through an innocent mistake, that a contract with a colonial government had been entered into, an applicant for shares on the faith of the prospectus was nevertheless held bound at law. *Kennedy v. Panama, &c. Co.*, L. R., 2 Q. B. 580. The decisions in equity, however, would seem to lead to the conclusion that, if a person has been induced to take shares solely or principally in consequence of the statement in the prospectus that a particular contract has been entered into, he will not be bound if the statement prove to be untrue, however innocent the representation might be. Consider *New Brunswick, &c. Co. v. Muggeridge*, 1 Dr. & Sm. 363; *Henderson v. Lacon*, L. R., 5 Eq. 249—262; *Venezuela R. Co. v. Kisch*, L. R., 2 H. L. 99; and *Ross v. Estates, &c. Co.*, L. R., 3 Ch. 682, particularly the third point.

The announcement of certain persons as directors, who had consented to become directors but afterwards declined to act, is not a ground for discharging a shareholder; *Hallows v. Fernie*, L. R., 3 Ch. 467,

In this case the shareholders did not claim to be released for some months after the allotment, and then only upon the ground that a particular subsidy had not been obtained from a foreign government, *ib.*, p. 468. In *Anderson's Case*, 17 Ch. D. 373, shares were applied for upon the faith of certain persons named in the prospectus as directors being such, the notice of allotment stated that they had ceased to be directors. It was held that the allottees were entitled to repudiate their shares, which they did *immediately* on receipt of the notice of allotment. This case was approved of in *Re Scottish Petroleum Co.*, 23 Ch. D. 413. See *Blake's Case*, 34 Bea. 639; *Smith v. Chadwick*, 9 App. C. 187. The mere fact that the prospectus contains exaggerated statements of the advantages to be derived by the company, or of the value of property which they are about to purchase (*Denton v. Macneil*, L. R., 2 Eq. 352; *Smith v. Reese River Co.*, L. R., 4 H. L. 64; *Bellairs v. Tucker*, 13 Q. B. D. 562); or that the prospectus does not state certain arrangements between promoters and others to induce the latter to become directors, or to assist in the bringing out of the company; *Heymann v. European, &c. Co.*, L. R., 7 Eq. 154, is no ground for releasing a shareholder, although in *Ex parte Williams*, L. R., 2 Eq. 216, the non-disclosure in articles of association of an arrangement between promoters and directors was held to release shareholders from claims of the promoters; and see *Ex parte Preston*, 37 L. J., Ch. 618; also the Act of 1867, s. 38, *ante*, p. 412; and *Arkwright v. Newbold*, 17 Ch. D. 301.

In cases of this description it has been held that, although a person may be entitled to be removed from the list of shareholders upon the ground of a material variation between the articles of association and prospectus, there being an excess in the objects of the former over those stated in the latter, he cannot maintain a suit for the recovery of the deposit which he has paid, his remedy being at law against the company. *Stewart v. Austin*, L. R., 3 Eq. 299; *Ship v. Crosskill*, L. R., 10 Eq. 73, 83. But otherwise if the directors make a false representation, knowing it to be false; but it must be a material representation. *Henderson v. Lacon*, L. R., 5 Eq. 249; see L. R., 10 Eq. 84; *Hill v. Lane*, L. R., 11 Eq. 215; comp. *Ogilvie v. Currie*, 37 L. J., Ch. 541. A director is not liable for a fraud (such as the issue of a fraudulent prospectus of the company) committed by his co-directors or by any other agent of the company, unless he has either expressly authorized or tacitly permitted its commission. *Cargill v. Bower*, 10 Ch. D. 502; see *Peek v. Gurney*, L. R., 6 H. L. 377; *Weir v. Barnett*, 3 Ex. D. 32.

Repudiation of Shares.] Where there is a right to repudiate shares, the repudiation should be prompt after knowledge of the circumstances giving such right of repudiation, or after such notice of them as should have led to an inquiry respecting them. *Laurence's Case*, *Kincaid's Case*, L. R., 2 Ch. 412; *Wilkinson's Case*, *ib.* 536; *Taite's Case*, L. R., 3 Eq. 795; *Whitehouse's Case*, *ib.* 790; *Heymann v. European, &c., Co.*, L. R., 7 Eq. 154; *Ex parte Boyle*,

W. N., 1885, p. 59; comp. *Peek v. Gurney*, L. R., 6 H. L. C. 377. For creditors are entitled to assume that whatever amount of liability attaches to the shares is taken upon themselves by the individuals in whose name they stand. See *per* Earl Cairns, L.C., *Cree v. Somervail*, 4 App. C. p. 659. But there must, in general, be such knowledge or notice. *Stewart's Case*, L. R., 1 Ch. 574; *Webster's Case*, 2 Eq. 741; and see *Langham v. East Wheal, &c., Co.*, 37 L. J., Ch. 253. The provisions of arts. 95, 97 of Table A. to the Companies' Act, 1862, for the service of notices by a company on its members, apply only to notices relating to the ordinary business of the company, and service in the way there pointed out is not sufficient for the purpose of fixing a shareholder with knowledge of a misrepresentation which would entitle him to repudiate his shares, unless he had been guilty of laches after notice of the misrepresentation. *In re London and Staffordshire Fire Insurance Co.*, 24 Ch. D. 149.

If there has been *fraudulent misrepresentation* or *wilful concealment*, an omission to examine documents which were referred to in a prospectus, and which would have disclosed the truth, does not disentitle a person to be relieved from a contract made on the faith of the prospectus. *Venezuela Ry. Co. v. Kisch*, L. R., 2 H. L. 99.

A person who is entitled to rescind a contract on the ground of misrepresentation should not pay calls or receive dividends (*Scholey v. Venezuela Ry. Co.*, L. R., 9 Eq. 266, n. (3); see a plea of fraud to an action for calls, *Bwlch, &c., Co. v. Baynes*, L. R., 2 Ex. 324), and should not attempt to deal with shares taken on the faith of such misrepresentation being correct. *Ex parte Briggs*, L. R., 1 Eq. 483.

Where after resolutions for a voluntary winding-up, a shareholder in ignorance of them, commenced an action against the company, and the directors, to have his name removed from the register, on the ground of misrepresentations in the prospectus, and to obtain repayment of all moneys already paid, and an indemnity against future liability, it was held that the relief asked in the action was not inconsistent with the winding-up; and the court refused to stay the proceedings. *Hall v. Old Tarlagoch Lead Mining Co.*, 3 Ch. D. 749. A person who has been induced to take shares through the misrepresentation of the company, but has not repudiated, or taken legal proceedings to repudiate them at the time of the *winding up* of the company, will be liable as a contributory (*Oakes v. Turquand*, L. R., 2 H. L. 325; *Kent v. Freehold Land, &c., Co.*, L. R., 3 Ch. 493; *Smith v. Reese River Co.*, L. R., 4 H. L. 64); *Tennent v. City of Glasgow Bank*, L. R., 4 App. C. 615; *Houldsworth v. Same*, L. R., 5 App. C. 317; *Burgess' Case*, 15 Ch. D. 507. But this principle does not extend to the case of shareholders who by arrangement allow one of their number to try by a suit (which is ultimately decided in his favour) the question of their right to repudiate their shares, the company agreeing that they shall not be prejudiced by not taking proceedings pending that suit. *Paule's Case*, L. R., 4 Ch. 497; comp. *Harc's Case*, *ib.* 503. In the absence of an express agreement between the company and a shareholder in such a case, the

latter must give notice to the company that he is a dissentient shareholder, and intends to claim the benefit of the decision in the suit. *Ashley's Case*, L. R., 9 Eq. 263; comp. *M'Niell's Case*, L. R., 10 Eq. 503. But where in such a case a shareholder has a right to rescind, if he does not before the winding-up take any proceedings to have his name removed from the register, and there is no agreement that the cases of repudiating allottees shall be governed by the result of the proceedings in a similar case, the shareholder must be on the list of contributories. *In re Scottish Petroleum Co.*, 23 Ch. D. 413; see *Fox's Case*, L. R., 5 Eq. 118. If directors are aware of a misrepresentation in the prospectus unknown to a shareholder, but upon some other ground he requires the directors to cancel his shares, which they do, this is effectual, and relieves the shareholder from all further liability. *Wright's Case*, L. R., 7 Ch. 55.

CHAPTER II.

DISTRIBUTION OF CAPITAL—REGISTRATION—LIABILITY OF MEMBERS.

SEC. 1.—*Provisions of Acts of 1862, 1867, and Matters connected with the Register.*

<i>Shares Personal Estate</i>	431	<i>No Trusts to be entered</i>	433
<i>Some may be fully paid, others not.</i>	431	<i>Trustee of Shares liable</i>	433
<i>Payable for in Cash</i>	431	<i>Transfer to evade liability</i>	434
<i>Unless Contract contra</i>	431	<i>Certificates primâ facie evidence</i> ...	434
<i>Contract to be Registered</i>	432	<i>Inspection of Register</i>	434
<i>Certificate that Shares fully paid</i> ...	432	<i>Closing Register</i>	434
<i>Members Subscribers</i>	432	<i>Notice of Increase of Capital</i>	434
<i>Transfer by representatives</i>	433	<i>Rectification of Register</i>	434
<i>Register of Members</i>	433	<i>Power to remove name</i>	434, 435
<i>Annual Lists</i>	433	<i>Informalities</i>	435
<i>Conversion of Capital into Stock</i> ...	433	<i>Company's Irregularity</i>	435, 436
<i>Warrant, Transfer by delivery of</i> ...	433	<i>Colonial Registration</i>	436

SHARES are personal estate, capable of being transferred in the manner provided for by the regulations of the company, and in share-limited companies must be numbered (Act of 1862, s. 22). By the Act of 1867, a company, if authorized by its regulations may have some shares fully paid up, others not, and pay dividend accordingly (*ib.* s. 24).

All shares are to be taken, as issued and held, subject to the payment of the whole amount in cash, unless there is a written contract to the contrary (it need not state the numbers of the shares, *Ex parte Forde*, 30 Ch. D. 153) filed with the registrar (*ib.* s. 25). See *Stace and*

Worth's Case, L. R., 4 Ch. 682; *Cleland's Case*, L. R., 14 Eq. 387; *Fothergill's Case*, L. R., 8 Ch. 270; *Spargos' Case*, *ib.* 407; *Dent's Case*, *Forbes' Case*, *ib.* 768; *In re Appletreewick, &c., Co.*, L. R., 18 Eq. 95; *Pritchard's Case*, *ib.* 956; *Ferrao's Case*, L. R., 9 Ch. 355; *Adamson's Case*, L. R., 18 Eq. 670, and *post*, p. 477. The contract within this section must be one which shows what shares are to be issued fully paid up, and for what consideration they are to be issued. *Crickmer's Case*, L. R., 10 Ch. 614, 617; *Firmstone's Case*, L. R., 20 Eq. 524. This section is in favour of creditors, and does not apply as between the company and the shareholders. *Blyth's Case*, 4 Ch. D. 140. Where articles of association provided that certain shares should be considered as fully paid up but there was no registered contract to that effect, it was held that the provisions of this section were not complied with. *Crickmer's Case*, L. R., 10 Ch. 614. In *Anderson's Case*, 7 Ch. D. 75, the articles of association stated that certain shares, the purchase money of the property, were paid up. The agreement to this effect was duly registered, and it was held that the requisites of this section were satisfied.

Shares are not *issued* within the meaning of this section until certificates are issued. When property is sold for paid up shares which are allotted, the contract being registered, a mere informality in issuing certificates will not affect the rights of the holders of the shares as paid up shares. See *Bush's Case*, L. R., 9 Ch. 554; *Clarke's Case*, 8 Ch. D. 635; see *Blyth's Case*, 4 Ch. D. 140. Where shares were allotted and accepted as fully paid up in pursuance of a contract which, through inadvertence, had not been registered in accordance with this section, and upon discovery of the omission the directors removed the name of the allottee from the register, then filed the contract, and subsequently issued fresh shares to the allottee, and the company was subsequently wound up, it was held that although the directors had no power to cancel shares, they could rectify a mistake common to them and the allottee without applying to the court for an order directing them to do so; and, consequently, that the allottee could not be placed on the list of contributories in respect of those shares. *Hartley's Case*, L. R., 18 Eq. 542. In such cases also the court can make an order under sec. 35, *post*. *Ex parte Shaw*, *ib.* 16. A company having issued certificates that shares are fully paid up is, and also the official liquidator, estopped as against a transferee for value without notice from saying that they are not fully paid up. *In re British Farmers' Comp.*, 7 Ch. D. 533; *Barrow's Case*, 14 Ch. D. 432. If shares are taken in the course of business for valuable consideration, on the person who asserts that he who took the shares had notice that they were not actually paid up lies the burden of proof of that notice. This section applies to a company generally, and not to its liquidation alone. *Per Lord Cairns*, L. C., *Burkinshaw v. Nicolls*, 3 App. Ca. 1004. A limited company may, where so authorized by its articles of association, issue shares at a discount under a contract duly registered pursuant to s. 25, Act of 1867. *In re Plaskynaston Tube Co.*, 23 Ch. D. 542.

Persons, by subscribing to the memorandum of association, agree to become members, and on registration are to be entered as members on

the register of members, and every other person who has agreed to become a member, and is registered, shall be deemed to be a member. Act of 1862, s. 23; see *post*, Chap. V., Sec. 2. *Nicol's Case*, 29 Ch. D. 421.

The personal representatives of a deceased member may transfer his shares as if they had been members (*ib.* s. 24).

Registers of members are to be kept, showing the names, addresses and occupations of members, the shares in share companies held by each, and the amount paid or to be considered as paid thereon, and the dates when persons were entered as, or ceased to be, members (*ib.* s. 25).

Companies having their capital divided into shares are to make, annually at least, a list of present members, and of those who had ceased to be such since the last list, and their occupations, addresses and shares, together with a summary specifying the amount of capital and number of shares, shares taken and forfeited, the amount of calls made, received and unpaid. This list and summary are to be contained in a separate part of the register. A copy is to be forwarded to the registrar of joint-stock companies (*ib.* s. 26), under a penalty not exceeding 5*l.* for every day of default (*ib.* s. 27). The company is to give notice to the registrar of consolidation or conversion of capital into stock (*ib.* s. 28). On conversion the provisions applicable to shares are to cease, but the returns are to show particulars of stock and stockholders (*ib.* s. 29). By the Act of 1867, where shares are fully paid up or stock is held in share-limited companies, warrants may be issued stating that the bearer is entitled to the shares or stock therein specified (s. 27). Such shares or stock may be transferred by delivery of warrant (*ib.* s. 28), and the bearer of a warrant may, on surrendering it for cancellation, be entered in the register of members (*ib.* s. 29); or the bearer may, if the regulations of the company so provide, be deemed a member, but not a director or manager (*ib.* s. 30). Sections 31 to 36 of this act contain provisions, consequent on the issue of share warrants, relating to entries on the register, annual summaries, stamps on warrants, forgery of warrants and personation of owners of shares, and improperly engraving plates of share warrants. Notices of trusts are not to be received or entered in the register (Act of 1862, s. 30). As to disregarding notice of trusts, see *Société Générale, &c., v. Tramways Union*, 14 Q. B. D. 424. A shareholder who holds shares as trustee is liable, like any other shareholder (*Hoare's Case*, 2 J. & H. 229; *Chapman and Barker's Case*, L. R., 3 Eq. 361; see *Cragg v. Taylor*, L. R., 1 Ex. 148; *Levita's Case*, L. R., 3 Ch. 36), and the City of Glasgow Bank cases (*Muir v. City of Glasgow Bank*, L. R., 4 App. C. 337; *Bell's Case*, *ib.* 547; *Mitchell's Case*, *ib.* 567; *Rutherford's Case*, *ib.* 581; *Buchan's Case*, *ib.* 583; *Ker's Case*, *ib.* 598; *Cuninghame's Case*, *ib.* 607; *Tennent's Case*, *ib.* 615; *Nelson Mitchell's Case*, *ib.* 624; *Gillespie and Paterson's Case*, *ib.* 632), but his *cestui que trust* is not. *Bugg's Case*, 2 Dr. & S. 452. The latter must, if required, indemnify the former against any demands that may be made upon him. *Hemming v. Maddick*, L. R., 7 Ch. 395; *James*

v. *May*, L. R., 6 H. L. 328. The lien of a company in accordance with the articles of association on the share of a trustee for money due by him to the company prevails over the title of the *cestui que trust*. *New London, &c., Bank v. Brocklebank*, 21 Ch. D. 302. A shareholder who, for purposes of his own, in order to evade liability or to deceive the public, transfers shares into the names of third persons, the transaction not being a real one, will be liable in respect of such shares. *Hyam's Case*, 1 D., F. & J. 75; *Cox's Case*, 9 Jur., N. S. 1184. But where a person who is not a shareholder buys shares which he procures to be transferred into the name of a nominee, he cannot in general be made liable as a shareholder. *Ex parte Bugg*, 2 Dr. & Sm. 452; *King's Case*, L. R., 6 Ch. 196; *Williams' Case*, 1 Ch. D. 576. To make a person liable as a transferee he must be a consenting party to the transaction by which he has been put on the register. *Hennessey's Executors' Case*, 2 Mac. & G. 201. Transferees are not liable to be placed on the share register or list of contributories in respect of shares which have been transferred to them as trustees for the company, under the express provision that they should not, except by their own direction, be registered as the holders of such shares. *Gray's Case*, 1 Ch. D. 664. As to the rights and liabilities of a person who is a shareholder in one company, but as trustee only for another company, both companies being in liquidation, see *Re National Financial Co.*, L. R., 3 Ch. 791.

Certificates of shares or stock are *primâ facie* evidence of title (Act of 1862, s. 31). As to banking companies, see *Perry v. Barnett*, 15 Q. B. D. 388. Registers of members are to be kept at the company's office, to be open to the inspection of members gratis, and other persons on payment of not more than one shilling, and copies are to be given on payment for the same (*ib.* s. 32). Registers may be closed for not more than thirty days (*ib.* s. 33). In share companies notice of increase of capital and of members is to be given to the registrar (*ib.* s. 34).

In case of any improper entry of any name on or omission thereof from the register, it may be rectified by order of the proper court or judge (*ib.* ss. 35, 36). *Re Lon. & Sub. Bank*, L. R., 15 Eq. 274. In *Ward and Henry's Case* (L. R., 2 Ch. 431), Turner, L.J., considered that the jurisdiction given by this section was general. Cairns, L.J., on the other hand, considered that it was confined to cases where there was default on the part of the company. Where a person claiming shares under a legal title applies to have the register rectified, the Court has jurisdiction to decide a question of title between him and another person claiming to be entitled to the shares, but has no jurisdiction to order costs to be paid by such third party. Nor (*semble*) has the court jurisdiction to make an order under that section where the title of the applicant is equitable only. *Ex parte Sargent*, L. R., 17 Eq. 273. In this case (p. 276) Jessel, M.R., expressed his concurrence in the view stated by Lord Cairns in *Ward and Henry's Case*. In *Ex parte Ward* (L. R., 3 Ex. 180), it was held that the power to remove a name was confined to two cases, first, that

of the name having been improperly entered; secondly, that of a shareholder ceasing to be a member. See *Pontifex's Case*, 36 L. J., Ch. 903; *White's Case*, 15 W. R. 754. A person whose name is improperly placed on the register, is not bound to take steps to have it removed. *Gorissen's Case*, L. R., 8 Ch. 507. In order to give jurisdiction to the court or judge under s. 35, it is not necessary that there should be actual default in the company. It is a matter of discretion whether the court or judge will exercise the summary jurisdiction; and in a complicated or doubtful case the jurisdiction ought not to be exercised; but when the legal title in the applicant is clear the order ought to be made. *Ex parte Shaw*, 2 Q. B. D. 463; see *Ex parte Shaw*, L. R., 18 Eq. 16, *sup.*; *In re Manchester & Oldham Bank*, W. N. 1885, p. 169. A policy holder in an unlimited assurance company who has agreed to become a member of the company and to execute the articles of association is a shareholder, and although his name is not on the register of shareholders the court has power to order it to be placed there. *Winstone's Case*, 12 Ch. D. 239. Where a company accepts the wife as a shareholder without any misrepresentation or concealment on the part of the husband, his estate is not liable, and the company are not entitled to any rectification of the list. *In re London, Bombay, and Mediterranean Bank*, 18 Ch. D. 581. Where a holder of fully paid-up shares applied to have his name removed from the list of shareholders, alleging that he was induced to take shares by fraud, and the facts alleged by him were denied by the company, the court refused to make any order under this section until the applicant had tried the question at law. *Askew's Case*, L. R., 9 Ch. 664. If owing to the default of the company a transfer has not been registered before the winding up, the court will not rectify the register on the application of the official liquidator. *Sichells' Case*, L. R., 3 Ch. 119. In general a trustee in bankruptcy (*Re Bentham Mills Spinning Co.*, 11 Ch. D. 900), or liquidation (*Ex parte Harrison*, 26 Ch. D. 522), is entitled to be placed on the register subject to subsisting equities created by the bankrupt or liquidating party.

Registers of members are *primâ facie* evidence of matters directed or authorised by the act to be inserted therein (*ib.* s. 37). See *ib.*, ss. 25, 26, *ante*, p. 433.

Although the mere formal regulations of a company have not been strictly carried out, a shareholder, who has been treated as such by the company, will in general be entitled to the same rights, and be subject to the same liabilities, as if such formalities had been complied with. *Burnes v. Pennell*, 2 H. L. C. 497. Thus, if the transfer of shares be in some respects informal, but the transferee is registered, or claims to be registered, as a shareholder, he cannot in an action for calls deny the validity of the transfer. *Cheltenham R. Co. v. Daniel*, 2 Q. B. 281; see *Hull, &c., Co. v. Wellesley*, 6 H. & N. 38. (These cases are not under the Act of 1862.) On the other hand, where persons have been treated by the company as having ceased to be members, some mere informality, for instance, in the transfer of

the shares, cannot afterwards be set up against them as a ground of continuing liability. *Grady's Case*, 1 D., J. & S. 488; *Lane's Case*, *ib.* 504. And, as a very general rule, a company cannot take advantage of an irregularity which is the act of one of its own officials. *Bargate v. Shortridge*, 5 H. L. C. 297. A mere informality in respect of the numbering of shares is immaterial. *Ind's Case*, L. R., 7 Ch. 485; and see *Weikersheim's Case*, L. R., 8 Ch. 831.

By the 46 & 47 Vict. c. 30, s. 3, any company whose objects comprise the transaction of business in a colony may, if authorised so to do by its original regulations, or by special resolution keep, in any colony in which it transacts business, a colonial register of members resident in such colony (1); notice of the office where colonial register is kept is to be given to Registrar of Joint Stock Companies (2); Register to be *primâ facie* evidence (3); Copies of entries in colonial registers to be transmitted to its registered office (4); Shares in different registers to be distinguished (5); Colonial share registers may be discontinued (6).

SEC. 2.—*Extent of Liability of Shareholders.*

<i>Unincorporated Companies</i>	436	<i>Liability of Directors and Mana-</i>	
<i>Limitation by Contract</i>	436	<i>gers may be unlimited</i>	436
<i>Acts of 1862, 1867</i>	436	<i>Transferors and Transferees</i>	437

Members of unincorporated companies, whose liability is not restricted by some statutory provision, are, like ordinary partners, liable to the utmost extent of their property for the debts of the concern. See *Carlen v. Drury*, 1 V. & B. 157; *Greenwood's Case*, 3 D., M. & G. 459; *Re Robinson's Executors*, 6 D., M. & G. 572. But *incorporated companies* may by contract limit the liability of their members, irrespective of the Limited Liability Acts of 1856, 1857 and 1862. See *Halket v. Merchant Traders' Association*, 13 Q. B. 960; *Durham's Case*, 4 K. & J. 517; *Re Anglo-Californian, &c. Co.*, 37 L. J., Ch. 78. And this right is expressly recognised by the Act of 1862, s. 38 (6). But it is subject in equity to the payment of the amount still unpaid on their shares. *Evans v. Coventry*, 8 D., M. & G. 835. The liability of shareholders of share or guarantee limited companies under the Act of 1862 is limited to the amount of such shares or guarantee (s. 38) (4), (5).

By the Act of 1867 (30 & 31 Vict. c. 131), however, companies may be formed with unlimited liability as regards the directors or managers (s. 4). Notice must be given to directors on their election that their liability will be unlimited. *Ib.* s. 7. Existing companies may, by special resolution, make the liability of directors and managers unlimited. *Ib.* s. 8. As to the extent to which they are liable to contribute, see *post*, Chap. V.

Sometimes important questions arise between policy holders in

insurance companies and shareholders. In such cases it will depend upon the construction of the articles of association whether, although the participating policy-holders are members and contributories, they can be called upon to contribute until the shareholders are exhausted. In the case cited it was held that they could not. *In re Albion Life Assurance Society*, 16 Ch. D. 83.

Shareholders in joint stock companies, becoming such by transfer of shares, are liable in respect of the past debts and liabilities of the company which may be unpaid at the time of the winding up. See Act of 1862, s. 38. See also *Cape's Executors' Case*, 2 D., M. & G. 562; *Mayheir's Case*, 5 D., M. & G. 837; *Henderson v. Sanderson*, 3 H. L. C. 698. And transferors, after the transfer, are liable as past members for one year after they ceased to be members if the winding up commences within the year (s. 38 (1)), but not in respect of debts contracted after they ceased to be members (*Ib.* (2)), nor unless the existing members are unable to satisfy the contributions required. *Ib.* (3). See *post*, Chap. V. And transferors who have been compelled to pay have a right to be indemnified by their transferees. *Kellock v. Enthoven*, L. R., 9 Q. B. 241.

CHAPTER III.

SALE, TRANSFER, SURRENDER AND FORFEITURE OF SHARES.

<i>Sale and Transfer of Shares</i>	437	<i>Mode of Transfer</i>	442
Where no restriction	437	On Death—Executors	443
Consent of Directors	438	Specific Legatee	443
Debt due to Company	438	Rights acquired on Transfer ...	443
Where purchaser to register ...	438	Liabilities after	443
Purchaser bound by Broker's		Transfer to evade Liability ...	443
Contract	438		
Where transferor liable	439	<i>Surrender or Transfer of Shares to</i>	
Custom of Stock Exchange.....	439	Company or Directors	444
Purchaser to indemnify Vendor	439	To Company	444
Transfer not approved before		Transfer to Directors on com-	
winding up.....	440	promise	444
Neglect or delay of Directors			
to register	440	<i>Forfeiture of Shares</i>	445
Where power to reject transfer	440	Notice of intention to forfeit ...	445
Forged Transfer	441	Improperly declared	445
Transfers to Infants.....	441	Contribution as past Members .	445
Calls unpaid	442	Collusion.....	445
Contract to transfer.....	442	Bankruptcy of Shareholder ...	445

Sale and Transfer of Shares.] Where no restriction is imposed by the deed of settlement or agreement between the shareholders, there is no restriction on the right of the latter to transfer their shares. *Weston's Case*, L. R., 4 Ch. 20. It is not to be inferred in

the absence of express evidence that transfers have not been executed by the transferees, and if they have not been so executed they are not null but only irregular, and after they have been acted upon and treated as valid for a long period they can not be impeached. *In re Taurine Co.*, 25 Ch. D. 118. Where a transferee was bound to furnish to directors such evidence as they should require of the transfer and no evidence of it had been offered to or required by them; and the name of the transferee was not entered upon the register of members; it was held that the transferee was not a contributory. *Sander's Case*, 20 Ch. D. 403. If the consent of the directors to the transfer is necessary, it must not be unfairly withheld (see *Robinson v. Chartered Bank of India*, L. R., 1 Eq. 32); though, on the other hand, a court of equity will not interfere to compel them to give it, if they have acted *bonâ fide* in refusing it. *Birmingham v. Sheridan*, 33 Bea. 660; see *Taft v. Harrison*, 10 Ha. 489. The directors are not bound to disclose their reasons. In the absence of evidence to the contrary it will be assumed that they acted reasonably and *bonâ fide*. *Ex parte Penney*, L. R., 8 Ch. 446. A committee of the board of directors need not consist of more than one person, and he may approve the transfers. *Re Taurine Co.*, 25 Ch. D. 118. Where by the articles of association the company may decline to register any transfer of shares whilst the member making the transfer is *indebted* to the company on any account whatever, the acceptance of a bill of exchange (not arrived at maturity) by a shareholder which is held by the company does not operate so as to disentitle him to transfer his shares. *Re Stockton, &c. Co.*, 2 Ch. D. 101. Indebtedness is not restricted to calls or otherwise in respect of the particular shares proposed to be transferred, but enables the company to decline to register the transfer if the member is indebted to them on any account whatever. *Ex parte Stringer*, 9 Q. B. D. 436.

It may be doubtful whether the duty of obtaining the consent of the directors to a transfer, where such consent is necessary, devolves upon the vendor or purchaser on an ordinary sale of shares. See *Wilkinson v. Lloyd*, 7 Q. B. 27; *Biederman v. Stone*, L. R., 2 C. P. 504. But where the case is governed by the usages of the Stock Exchange, the vendor is not bound to procure such consent. *Stray v. Russell*, 1 E. & E. 888, 916. It is the duty of the purchaser to execute the transfers and procure them to be registered in his name, and if not registered, he will in general be liable to the vendor in equity for the consequences of non-registration, if it is owing to his neglect that the vendor has been made a contributory. This is clearly the rule as between an ordinary vendor and purchaser, there being no intervening jobber, for then the vendor can require the purchaser to accept and register a transfer in his own name. *Coles v. Bristowe*, L. R., 4 Ch. 3, 10; see *Martel v. Paine*, L. R., 6 Ex. 132. And where the sale is through the medium of brokers or jobbers, a purchaser cannot allege that there is no privity between him and the vendor, upon the ground that the one sells and the other buys through brokers or jobbers. *Evans v. Wood*, L. R., 5 Eq. 9; *Shepherd v. Gillespie*,

L. R., 3 Ch. 764; *Hawkins v. Maltby*, L. R., 3 Ch. 188; *S. C.*, 4 Ch. 200. And if in such cases the real purchaser procures a transfer of the shares to be executed to a mere nominee of his own, he will still continue liable to the vendor for the consequences of non-registration, and of the shares still standing in the vendor's name. *Castellan v. Hobson*, L. R., 10 Eq. 47. So where on a sale the real purchaser causes the shares to be transferred into the name of an infant and the vendor in consequence is fixed with liability, he is entitled to be indemnified by the purchaser. *Brown v. Black*, L. R., 8 Ch. 939. If, however, there has been laches on the part of the vendor, and delay in taking steps to see that the transfer has been registered, whatever his remedy may be against his purchaser, he will as a rule be liable as a contributory if his name is on the register at the time of the winding up. See *Head's Case*, *White's Case*, L. R., 3 Eq. 84; *Walker's Case*, L. R., 6 Eq. 30. A shareholder vendor has now the right to require registration of a transfer. For it is provided by the Act of 1867 that on the sale of shares by a shareholder the transfer shall be registered at the request of the transferor, as well as the transferee (s. 26). By the 30 & 31 Vict. c. 29 (Leeman's Act), after the 1st July, 1867, contracts for the sale of shares or stock passing by deed or written instrument in Joint Stock Banking Companies are void unless the numbers by which such shares are distinguished in the register of the company are set forth in the contract, or where there is no such register unless the name of the person registered as the proprietor of them is specified in the contract (s. 1). The act does not extend to shares or stock in the Banks of England or Ireland (s. 2). It would seem to be the usage of the Stock Exchange to disregard this act, but such usage is unreasonable as regards strangers who do not know of it. *Perry v. Barnett*, 15 Q. B. D. 388.

A broker who buys shares, and is compelled, according to the rules of the Stock Exchange, to pay for them, may recover over against his principal (the purchaser) though the latter, in consequence of a winding-up petition, derives no benefit from the purchaser. *Chapman v. Shepherd*, *Whitehead v. Izod*, L. R., 2 C. P. 228. The ultimate purchaser of shares who (through his brokers) has accepted a transfer of them, must indemnify the vendor against subsequent calls, and an action lies against him for not doing so. *Bowring v. Shepherd*, L. R., 6 Q. B. 309. By the usage of the Stock Exchange, which is held to be a reasonable usage, in transactions between members of it, there is an implied understanding, that, in the purchase of stock and shares, the buying jobber shall be at liberty by a given day, called the "name day," to substitute, or give the name of another person as buyer, and so relieve himself from further liability on the contract; provided such other person be one to whom the original seller cannot reasonably except, and that such person accept a transfer of the stock or shares and pay the price to the original seller. Therefore, where there is a sale by a shareholder (through his brokers) to jobbers, and before the settling day the company stops, but transfers are executed on pay.

ment to persons to whom the jobbers have sold the shares, but which cannot be registered by reason of the winding up of the company, the jobbers are not liable, by the custom of the Stock Exchange, to indemnify the vendor against calls. *Coles v. Bristowe*, L. R., 4 Ch. 3; *Grissell v. Bristowe*, L. R., 4 C. P. (Ex. Ch.) 36; *Torrington v. Lowe*, *ib.* 26; see *Hodgkinson v. Kelly*, L. R., 6 Eq. 496; *Davis v. Haycock*, L. R., 4 Ex. 373; *Maxted v. Paine*, L. R., 6 Ex. 132. But the jobber will be liable if he gives the name of an infant transferee, although not aware of his infancy, and although the name was not objected to, within the ten days allowed by the custom of the Stock Exchange for objecting to a name. *Merry v. Nickalls*, L. R., 7 Ch. 733; overruling *Rennie v. Morris*, L. R., 13 Eq. 203. If the sale to the jobber be "with registration guaranteed," he must, although he give the name of a responsible person to whom the transfer is executed, procure it to be registered, or he will be responsible for the consequence of its non-registration (*Cruse v. Paine*, L. R., 4 Ch. 641), and, in such a case, the jobber has his remedy over against the purchaser. See *Paine v. Hutchinson*, L. R., 3 Ch. 388.

Where the transfer, though executed by all necessary parties to it, has not been approved of (where approval is necessary) and registered by the directors before the commencement of the winding up, the transferor will continue liable as a contributory (*Walker's Case*, L. R., 2 Eq. 554; *Shepherd's Case*, L. R., 2 Ch. 16; *Ward and Henry's Case*, *ib.* 431), the Lords Justices differing in opinion as to the grounds of their judgments. See *Musgrave and Hart's Case*, L. R., 5 Eq. 193. The court, however, may, under section 98 of the Act of 1862, allow the register to be altered, which in general it will do, if the transfer was left in time for approval, and the delay in registration was on the part of the directors, there being no ground for rejecting the transferee. *Nation's Case*, L. R., 3 Eq. 77; *Ward and Garfit's Case*, L. R., 4 Eq. 189; *Ex parte Read*, 36 L. J., Ch. 472; *Evans v. Wood*, L. R., 5 Eq. 9; *Lowe's Case*, L. R., 9 Eq. 589; *Fyfe's Case*, L. R., 4 Ch. 768. The discretionary power of the directors to reject a transfer must be exercised in a reasonable manner. *Robinson v. Chartered Bank*, L. R., 1 Eq. 32; see *Shipman's Case*, L. R., 5 Eq. 219; *Weston's Case*, L. R., 6 Eq. 238; *Ex parte Penney*, L. R., 8 Ch. 446; see *Ex parte Harrison*, 28 Ch. D. 363. It would be proper for directors to refuse to register a transfer in which the transferee is untruly described and the consideration untruly stated (*Williams' Case*, L. R., 9 Eq. 225, n.; *Payne's Case*, *ib.* 223), or the transfer is to a pauper to escape liability. *Ex parte Parke*, L. R., 2 Ch. 685. But the holder of shares has the right to transfer them, although his object is thereby to multiply votes and increase his own voting power at meetings. *In re Stranton, &c., Co.*, L. R., 16 Eq. 559; *Pender v. Lushington*, 6 Ch. D. 70; *Moffatt v. Farquhar*, 7 Ch. D. 591. The court has no power to rectify the register, if, by the articles of association, or established practice of the company, the transfer is to be executed by both transferor and transferee, and it is

not executed by the latter and is not registered in consequence prior to the winding up of the company. *Musgrave and Hart's Case*, L. R., 5 Eq. 193; *Marino's Case*, L. R., 2 Ch. 596. But where, notwithstanding the transfer is not executed by both, it is registered, and the transferee's name is afterwards removed, though that of the transferor be not restored, he will be liable as a contributory. *Heritage's Case*, L. R., 9 Eq. 5. Where A. transfers to B., and B. before his transfer is registered, transfers to C., both transfers being eventually registered, but the registration of the transfer to C. being dated first, the irregularity will in general be immaterial. *Weikersheim's Case*, L. R., 8 Ch. 831. Although transferors know that the company is on the eve of being wound up voluntarily this will not take away their power of transferring their shares. *Re Taurine Co.*, 25 Ch. D. 118; comp. *Chappell's Case*, L. R., 6 Ch. 902. Where a shareholder's signature to a transfer to a *bonâ fide* innocent purchaser was forged, the company, by registering the transfer and giving certificates of ownership to the transferee, was held to be estopped from disputing the effect of their own certificates. *Re Bahia, &c., Co.*, *Re Tritton*, L. R., 3 Q. B. 584; *Hart v. Frontino, &c., Co.*, L. R., 5 Ex. 111; and comp. *Simm v. Ang. Am. Tel. Co.*, and *Ang. Am. Tel. Co. v. Spurling*, 5 Q. B. D. 188; see *Swan v. North British, &c., Co.*, 2 H. & C. 175; *Midland Ry. Co. v. Taylor*, 8 H. L. C. 751; *Johnston v. Renton*, L. R., 9 Eq. 181; *Knights v. Wiffen*, L. R., 5 Q. B. 660; *Shaw v. Port Philip, &c., Co.*, 13 Q. B. D. 103.

A transfer by a father of his shares in a company to his child, who is a minor, will not relieve the father from his liability if the shares are repudiated by the court on behalf of the minor. *Reid's Case*, 24 Bea. 318. The principle of this case has been applied in many subsequent cases. A transfer to an infant will not relieve the transferor from his liability, though he was ignorant of the fact of the infancy of the transferee. *Capper's Case*, L. R., 3 Ch. 458; *Mann's Case*, *ib.* 459, n.; *à fortiori* will it not do so when he is cognizant of it. *Weston's Case*, L. R., 5 Ch. 614; *Curtis's Case*, L. R., 6 Eq. 455. For the transferor must show that his transferee can be made liable in respect of the shares transferred. When there is a transfer by A. to an infant, and then one by the latter to an adult, both duly registered, the company cease to have any interest in the voidable character of the intermediate transfers; and if the company be wound up more than a year after the transfer to the infant, A., the transferor to him is not liable as a past member. *Gooch's Case*, L. R., 8 Ch. 266; see *Ex parte Wilson*, *ib.* 45. But when the transferor and the company are both ignorant at the time of the transfer that the transferee is an infant, it is incumbent upon the company, when apprised of that fact, to communicate it to the transferor. *Parson's Case*, L. R., 8 Eq. 656. As to the right of an infant to repudiate shares after considerable delay on his part, see *Hart's Case*, L. R., 6 Eq. 512; *Delmar's Case*, 17 W. R. 21; cons. *Symons' Case*, L. R., 5 Ch. 298. A transfer to an infant was formerly not void, but voidable, and he might have elected on coming of age, to hold them, and the directors

had then no power to disaffirm his right and place his transferor on the register of shareholders. *Lumsden's Case*, L. R., 4 Ch. 31. But in a later case (*Symons' Case*, L. R., 5 Ch. 298), the rule was stated by Giffard, L.J., to be, that not only was confirmation by the infant necessary, but also the acceptance of that confirmation, either implied or actual, on the part of the company. See L. R., 5 Ch. 301. It was necessary that there should have been some distinct act of confirmation on the part of the infant when of age. *Wilson's Case*, L. R., 8 Eq. 240; see *Castello's Case*, *ib.* 504. See, now, *ante*, p. 69.

Under the Act of 1862, in companies adopting Table A., on the death or bankruptcy of a member or marriage of a female member, the person thereupon becoming entitled may be registered or elect to have some other person registered. Table A. (13—16.) See, now, as to married women, *ante*, tit. "HUSBAND AND WIFE," Chaps. VI. and VII. As to the right of a shareholder to transfer shares on which there are unpaid calls, see *Orpen's Case*, 9 Jur., N. S. 615, on the 7 & 8 Vict. c. 110, s. 54; *Hubbersty v. Manchester Ry. Co.*, L. R., 2 Q. B. 59, on the 8 & 9 Vict. c. 16, s. 16; see Act of 1862, Table A. 10. As to contracts for the sale of shares, stock, or other interest in any joint stock banking company in England or Ireland, issuing shares, &c., transferable by deed or written instrument, see *ante*, p. 439. Where there is a contract to transfer, and the transfer is not to be made until a future day, a call in the interval does not invalidate the contract. *Hawkins v. Maltby*, L. R., 3 Ch. 188. But a contract to transfer, entered into in ignorance of a petition for winding up having been presented, cannot be enforced against the purchaser so as to make him a contributory. *Emmerson's Case*, L. R., 1 Ch. 433. Where, however, the contract is *complete*, it can be enforced, notwithstanding there is a winding-up order subsequent to the action for specific performance, and the vendor will be entitled to an indemnity. *Paine v. Hutchinson*, L. R., 3 Ch. 388.

Mode of Transfer.] By the Companies Clauses Consolidation Act, 8 Vict. c. 16, s. 14, the transfer must be by deed. By the Act of 1862, the transfer is to be according to the regulations of the company (s. 22). See where Table A. is adopted, cl. 8—11. Where the transfer is to be by deed a transfer in blank, the transferee not being named, is invalid. *Hibblewhite v. M'Morine*, 6 M. & W. 200. But a transfer is valid, although the denoting number of shares and date of transfer may be filled in after execution. *Re Barded's Bank, Ex parte Contract Corp.*, L. R., 3 Ch. 105. Where the owner of shares borrows money and deposits with the lender certificates of his shares, and also transfers thereof signed by him, but with the date and name of the transferee left blank, the lender has implied power to fill up the blanks, and the transfers will pass the legal interest if the articles of association do not require a deed; otherwise only an equitable interest. *Re Tahiti Cotton Co., Ex parte Sargent*, L. R., 17 Eq. 273. If the articles of association of a company permit a

transfer of shares to be made by "instrument in writing," it is not necessary that the transfer should be by deed, even although the uniform practice of the company may have been to require one. *Ib.* The personal representatives of a deceased member may transfer his shares as if they had been members. Act of 1862, s. 24. Although shares have been specifically bequeathed, and the bequest has been assented to by the executors of the testator, his estate will be liable to contribute, and not the legatee, on a winding up, at all events until the directors have approved of the legatee as a shareholder. *Keene's Executors' Case*, 3 D., M. & G. 272; *Bulmer's Case*, 33 Bea. 435. Executors accepting *fresh* shares, though as executors, and in right of their testator, are personally liable as contributories. *Fearnside and Dean's Case* and *Dobson's Case*, L. R., 1 Ch. 231. By the transfer, and due registration of it, the transferee acquires the rights of the transferor, and is bound to the extent that the latter would have been bound in matters affecting the company. *Fooks v. S. W. Ry. Co.*, 1 Sm. & G. 142; *Mayhew's Case*, 5 D., M. & G. 837.

After a *bonâ fide* transfer, duly registered, the transferee is the person liable as a contributory, subject nevertheless to the continuing liability of the transferor in the case mentioned in the Act of 1862 (s. 38, *ante*, p. 436). But on a mere colourable transfer, made without or for a nominal consideration, and solely with a view to avoid liability, the transferor continues liable. See *Hyam's Case*, 1 D., F. & J. 75; *Lund's Case*, 27 Bea. 465; *Costello's Case*, 2 D., F. & J. 302; *Budd's Case*, 3 D., F. & J. 297; *Ex parte Parker*, L. R., 2 Ch. 685; *Kintrea's Case*, L. R., 5 Ch. 95; *Payne's Case*, L. R., 9 Eq. 223; *Williams' Case*, *ib.* 225, n.; *Gilbert's Case*, L. R., 5 Ch. 559; comp. *De Pass's Case*, 4 D. & J. 544; *Slater's Case*, 35 Bea. 391; *King's Case*, L. R., 6 Ch. 196; *Master's Case*, L. R., 7 Ch. 292. An agreement by a shareholder on a *bonâ fide* transfer, though for a nominal consideration, to guarantee the directors in respect of future calls, provided they registered the transfer, is good, and the transferor cannot afterwards be placed on the list of contributories. *Harrison's Case*, L. R., 6 Ch. 286. Irregularities connected with the transfer will not necessarily render it invalid, where the transferees have been recognised as shareholders and directors at a meeting of the shareholders. *Murray v. Bush*, L. R., 6 H. L. 37. In *Chynoweth's Case*, 15 Ch. D. 13, it was held that, although a transfer may be fraudulent as regards the company if it has been acted on and the shares afterwards forfeited by the company, with full knowledge of the fraud, it cannot be set aside in the winding up, and the name of the transferor cannot be put on the list of contributories. By the Act of 1862, s. 38, shareholders remain liable for one year after they have ceased to be members, in the event of the other members being unable to satisfy the calls. *Needham's Case*, L. R., 4 Eq. 135; *Ex parte Andrews*, L. R., 3 Ch. 161; see *post*, Chap. V.

Surrender of Shares.] Under the Acts of 1862 and 1867 there

are no express provisions enabling shareholders to surrender their shares to the company and retire, though by the Companies Clauses Act, 1863, 26 & 27 Vict. c. 118, ss. 8—10, that power is given in the case of companies having special acts of parliament, and incorporating the Act of 1863. In general directors of a company have no power to accept a surrender of shares from a shareholder and thus release him from liability, and he will be liable as a contributory even after the lapse of many years, in some of the cases cited twelve years (*Stanhope's Case*, L. R., 1 Ch. 161; *Stewart's Case*, *ib.* 511; *Spackman v. Evans*, L. R., 3 H. L. 171; *Dixon's Case*, L. R., 5 Ch. 79; *In re London, &c., Coal Co.*, 5 Ch. D. 525; *In re Esparto Trading Co.*, 12 Ch. D. 191); unless the directors have power to do so by the terms of the memorandum of association or articles of the company (see *Grady's Case*, 1 D., J. & S. 488); and if they have they may accept a surrender, although the shareholder may not be registered under s. 23 of the Act of 1862. *Snell's Case*, L. R., 5 Ch. 22; comp. *Hall's Case*, *ib.* 707; *Thomas's Case*, L. R., 13 Eq. 437. So the surrender will be valid if it has been ratified by the company, and is part of an arrangement and compromise between shareholders and the company. See *Brotherhood's Case*, 31 Bea. 365; aff. on appeal 8 Jur., N. S. 926. And if all the shareholders assented to the arrangement, or there is a clear presumption that they did so, and everything is substantially done according to the agreement sanctioned by them, the arrangement will be binding, and the shareholder agreed to be discharged will be discharged accordingly. *Smallcombe v. Evans*, L. R., 3 H. L. 249; *Houldsworth v. Evans*, *ib.* 263. Where a director as part of an arrangement sold and surrendered his shares to the company, the arrangement being sanctioned by a meeting of shareholders, the surrender was held valid although the company had not in terms power to purchase its own shares. *In re Dronfield Silkstone Coal Co.*, 17 Ch. D. 76. The liability of a former holder of shares may, however, be kept alive notwithstanding a surrender or transfer by his transferee to, and release of the latter by, the company. *Nevill's Case*, L. R., 6 Ch. 43; and see *post*, Chap. V.

A transfer to an individual director on a compromise of claims on proceedings against the company, is valid. *Reeve's Case*, 10 W. R. 817. But in *Eyre's Case* (31 Bea. 177), where the transfer appears to have been, to the knowledge of the transferor, to a director as trustee for the company and in order to stifle inquiry, the transferor was held liable on a subsequent winding up. The transferor should in such cases see that the transfer is duly registered, or he will continue liable as a contributory, though the transfer may in other respects be good (*Walker's Case*, L. R., 6 Eq. 30), unless he never ought to have been put on the register at all. *Fox's Case*, L. R., 5 Eq. 118.

Forfeiture of Shares.] As to forfeiture under the Act of 1862, Table A, see cl. 17—22. Mere notice of intention to forfeit without an actual forfeiture is insufficient. *Bigg's Case*, L. R., 1 Eq. 309; see *Knight's Case*, L. R., 2 Ch. 321. A resolution of forfeiture for

a default may be made prospectively, that is, before the actual day arrives, if on the day the default is made. *Woolleston's Case*, 4 D. & J. 437; acc. L. R., 2 Ch. 327. A forfeiture improperly declared will be relieved against in equity. *Clarke v. Hart*, 6 H. L. C. 633; see *Norman v. Mitchell*, 5 D., M. & G. 648; *Watson v. Eales*, 23 Bea. 294. As where it is declared by an insufficient number of directors. *Bottomley's Case*, 16 Ch. D. 681. The discretion of directors to forfeit shares for non-payment of calls is in the nature of a trust to be exercised for the benefit of all the shareholders. *Harris v. N. Devon R. Co.*, 20 Bea. 384. A clause in the articles of association that the shares of any shareholder who directly or indirectly commenced or threatened any action, suit, or other proceeding against the company or the directors should be forfeited on payment to him of the full market value, is invalid. *Hope v. International Financial Society*, 4 Ch. D. 327. After a forfeiture of shares duly made, the holder of them at the time of the forfeiture cannot afterwards be made a contributory, except as a past member under the Act of 1862 (s. 38, *ante*, p. 444). *Knight's Case*, L. R., 2 Ch. 321; *Kelk's Case*, *Pahlen's Case*, L. R., 9 Eq. 107 (cases of mining companies); *Ex parte Collum*, *ib.* 236 (case of a chartered company); see *Daves' Case*, L. R., 6 Eq. 232. It makes no difference in the application of the rule that the name of the shareholder has not been removed from the register of members. *Lyster's Case*, L. R., 4 Eq. 233. But a forfeiture merely to enable a shareholder to retire is invalid. *Gower's Case*, L. R., 6 Eq. 77. A shareholder will be liable to pay calls, although his shares are forfeited for non-payment of them, if such a right be expressly reserved to the company; but not interest on the calls. *Stocken's Case*, L. R., 3 Ch. 412. And though shares are duly forfeited the shareholder will remain liable for one year under the Act of 1862, s. 38. *Creyke's Case*, L. R., 5 Ch. 63; see *Needham's Case*, L. R., 4 Eq. 135. On the bankruptcy of a shareholder the trustee may disclaim unmarketable shares, which thereupon shall be deemed to be forfeited from the order of adjudication. 32 & 33 Vict. c. 71, s. 23. This is repealed by the 46 & 47 Vict. c. 52, Bankruptcy Act, 1883, in operation 1st January, 1884, which enacts that the trustee may disclaim shares, &c. See *ante*, p. 84.

CHAPTER IV.

MANAGEMENT OF COMPANIES.

SEC. 1.—Statutory Provisions.

<i>Registered Office</i>	446	<i>Majority by number of votes</i>	447
<i>Name of Company</i>	446	<i>Powers of Attorney</i>	447
<i>Register of Mortgages</i>	446	<i>Examination into Affairs of Com-</i>	
<i>Statement of Assets and Liabilities</i>	446	<i>pany</i>	447
<i>Annual Meetings—Chairman</i>	446, 447	<i>Notices—Penalties</i>	447
<i>Alteration of Regulations</i>	447	<i>Minutes of Proceedings, &c.</i>	447
<i>Special Resolution</i>	447	<i>Arbitration</i>	448

IN this section the chief statutory provisions relating to the management of companies will be noticed, and in the following sections of this chapter the general principles and decisions on the subject of such management will be referred to.

Every company is to have a registered office, Act of 1862 (ss. 39, 40).

Limited companies are to have their names painted or affixed outside the office, and to have their names engraved on their seals and used legibly in all notices, bills, cheques, orders, &c. (*ib.* ss. 41, 42). Registers of mortgages are to be kept (*ib.* s. 43; *In re Credit Co.*, 11 Ch. D. 256; see *post*, p. 450). Limited banking companies, insurance companies, deposit, provident or benefit societies, under the act are to make a statement of the capital, shares, calls, assets and liabilities twice a year (s. 44, and Form D., 1st schedule). Lists of directors of non-share companies are to be kept, and sent to the registrar (ss. 45, 46). Section 47 relates to bills and notes (*post*, p. 449). Companies are prohibited from carrying on business with less than seven members (s. 48, *ante*, p. 416). General meetings are to be held once a year at least (s. 49); and, by the Act of 1867, s. 39, one is to be held within four months after registration. An extraordinary general meeting is within this section, although by a resolution passed at it, the first ordinary meeting is postponed to a period beyond the four months. *Ld. C. Hamilton's Case*, L. R., 8 Ch. 548. Although the court will not interfere with the powers and duties of directors in their management of the internal affairs of a company, directors will be restrained from fixing a particular date for holding the annual general meeting of the company for the purpose of preventing shareholders from exercising their voting powers. *Cannon v. Trask*, L. R., 20 Eq. 669. The chairman of a general meeting has *primâ facie* authority to decide all incidental questions which arise at such meeting, and necessarily require decision at the time, and the entry by him in the minute

book of the result of a poll, or of his decision of all such questions, although not conclusive, is *prima facie* evidence of that result, or of the correctness of that decision, and the *onus* of displacing that evidence is thrown on those who impeach the entry. *In re Indian Zoedone Co.*, 26 Ch. D. 70. Where a poll is to be taken as the chairman may direct, he may direct it to be taken *then and there*. *In re Chillington Iron Co.*, 29 Ch. D. 159; see *Reg. v. D'Oyly*, 12 A. & E. 139; *In re Horbury, &c., Co.*, 11 Ch. D. 109, 114.

The regulations of the company may, subject to the act and memorandum of association, be altered, and new ones made in general meeting, by special resolution, of which due notice has been given, passed by a majority of not less than three-fourths of the members, and confirmed by a majority at a subsequent general meeting held at an interval of not less than fourteen (clear: *In re Railway, &c., Co.*, 29 Ch. D. 204) days nor more than one month from the first meeting. Where a poll is demanded (by at least five members), a majority has reference to the *number of votes* to which each member is entitled (Act of 1862, ss. 50, 51). If the majority of a company propose to benefit themselves at the expense of the minority, the court may interfere to protect the minority. In such a case one shareholder may proceed on behalf of the others and against the company. *Menier v. Hooper's Telegraph Works, L. R.*, 9 Ch. 350. A company cannot contract itself out of s. 50. *Walker v. Lon. Tram. Co.*, 12 Ch. D. 705. In default of regulations of the company, there are provisions as to voting, summoning meetings and chairman of meetings (s. 52). Where, by the articles of association of a company, the directors, and in the alternative a certain portion of the shareholders, can summon a meeting of the company, the court will not order the directors to summon a meeting for the general purposes of the company. *MacDougall v. Gardiner, L. R.*, 10 Ch. 606. Copies of special resolutions are to be sent to the registrar (s. 53), and are to be annexed to or embodied in the articles (s. 54). Companies may give powers of attorney to execute deeds out of the United Kingdom (s. 55). The Board of Trade may appoint inspectors to examine into the affairs of any company on the application of members holding at least one-third of the shares in banking companies and one-fifth of the shares in other share companies, or in non-share companies on the application of not less than one-fifth of the registered members (ss. 56, 57). Sections 58, 59, relate to the powers and duties of such inspectors. Companies may, by special resolution, appoint inspectors for a like examination (s. 60), whose report, authenticated by the seal of the company, is legal evidence of their opinions (s. 61). Sections 62 to 64 provide for the service of notices, &c., on companies, which may be sent through the post, and for the authentication of notices, &c., by companies. Sections 65, 66, provide for the recovery and application of penalties which in many cases will be incurred by companies on non-compliance with the provisions of the act. Minutes of proceedings at general meetings and meetings of directors, purporting to be signed by the chairman of the meeting or next succeeding meeting, are evidence in legal proceedings, and, unless the

contrary is proved, such meetings are to be deemed duly held and convened, the resolutions duly passed and the acts of directors, managers or liquidators valid (s. 67).

Section 68 relates to the jurisdiction of the vice-warden of the Stannaries. Sections 69, 70, contain provisions as to costs and actions at law. Section 71 relates to the forms which are to be used. Companies may refer matters to arbitration (ss. 72, 73).

SEC. 2.—Powers, Duties, and Liabilities of Directors.

<i>Appointment—Removal</i>	448	<i>Power to borrow Money—Accounts</i>	
<i>Subscribers to Memorandum of Association</i>	448	—continued.	
<i>Removal</i>	449	“ <i>Floating Securities</i> ”	454
<i>Authority to draw Bills, &c.</i>	449	<i>Receiver appointed, not Manager</i>	455
<i>Must act in Name of Company</i>	449	<i>Accounts</i>	455
<i>Power to borrow Money—Accounts</i>	449	<i>Authority to enter into Contracts</i>	456
<i>To borrow when necessary</i>	449	<i>Contracts in general bind Company only</i>	456
<i>Power given by Shareholders</i>	450	<i>Under Seal</i>	456
<i>Register of Mortgages</i>	450	<i>Part performed</i>	456
<i>Mortgage by Directors, &c.</i>	450	<i>Statutory Provisions</i>	456
<i>Mortgage by Shareholders</i>	451	<i>Purchasing Business of another Company</i>	456
<i>Mortgage of Culls made</i>	451	<i>Goods supplied on Agent's Orders</i>	457
<i>Mortgage Debiture Acts</i>	451	<i>Dealings with Companies by Directors</i>	457
<i>Persons dealing with Directors must see that they have authority</i>	452	<i>Directors not cognisant</i>	457, 458
<i>But not as to internal Regulations of Company</i>	452	<i>Taking Proceedings</i>	458
<i>Money applied for benefit of Company</i>	452	<i>Reports—Misrepresentations</i>	458
<i>Directors unauthorised</i>	453	<i>Effect in general</i>	458
<i>Debentures—Lloyd's Bonds</i>	453	<i>False Reports to Shareholders</i>	458
<i>Rights and Remedies of Debenture Holders</i>	453	<i>Criminal Liability of Directors and Officers</i>	459

Appointment—Removal.] The directors are elected by the shareholders, but, in the first instance, the subscribers to the memorandum of association are competent to act as first directors. *Hallows v. Fernie*, L. R., 3 Eq. 520. See as to companies adopting Table A. of the Act of 1862, *ib.* cl. 55, *et seq.* If a certain number of directors are required to conduct the business of a company, calls made and forfeitures declared by a less number are in general invalid. *Bottomley's Case*, 16 Ch. D. 681; see *Thames Haven, &c., Co. v. Rose*, 4 Man. & Gr. 532; *Kirk v. Bell*, 16 Q. B. 290. Where articles provided that the directors might fill up any casual vacancy and one occurred, and before it was filled up a general meeting was held, at which the vacancy was not filled up, it was held that the power of the board to elect a new director remained. *Semble*, the general meeting could have exercised the power. *Munster v. Cammell Co.*, 21 Ch. D. 183. An agreement between the directors of two companies,

A. and B., by which some of the directors of A. are to be appointed directors of B. and no further appointment of B. directors is to be made without the consent of the A. directors, is illegal. *James v. Eve*, L. R., 6 H. L. 335. If the original directors are not required to hold any particular number of shares, a resolution at a meeting of the shareholders that "the future qualification of a director" shall be a certain number of shares, has reference to future, not existing directors. *Ld. C. Hamilton's Case*, L. R., 8 Ch. 548. As to qualification or other shares improperly obtained by directors, see *ante*, p. 425. A director of a company can sustain an action in his own name against the other directors, on the ground of individual injury to himself, for an injunction to restrain them from wrongfully excluding him from acting as director. *Pulbrook v. Richmond, &c., Comp.*, 9 Ch. D. 610. A joint stock company whose directors are appointed for a definite period has no inherent power to remove them before the expiration of that period, and if the articles of association of a company contain no power to remove directors before the expiration of their period of office, but authorize the shareholders by special resolution to alter any of the articles, there must be a separate special resolution altering the articles so as to give power to remove directors before a resolution can be passed to remove any of them. *Imperial Hydropathic Hotel Company, Blackpool v. Hampson*, 23 Ch. D. 1.

Authority to draw Bills, &c.] By the act of 1862, promissory notes and bills shall be deemed to have been made, accepted or indorsed on behalf of the company, if made, &c., in the name of the company by any person acting under the authority of the company, or if made, &c., by or on behalf or on account of the company by any person acting under its authority (s. 47). But the power to draw bills is not necessarily incident to every company formed under the act of 1862; and, by virtue of sect. 47 of that act, that power only exists where, upon a fair construction of the memorandum and articles of association, it appears that it was intended to be conferred. *Re Peruvian Railways*, L. R., 2 Ch. 617. Where the power exists, an irregularity in the exercise of it connected with matters relating to the internal management of the company will not affect a *bonâ fide* holder for value without notice. *Re Land, &c., Co. of Ireland*, L. R., 4 Ch. 460; see *Lindus v. Melrose*, 3 H. & N. 177; *Penrose v. Martyr*, E., B. & E. 499, decided on the analogous section of the previous act, 19 & 20 Vict. c. 47. Directors who, without authority, accept bills "for and on behalf of a company," are personally liable, as by their acceptance they represent that they have authority to accept on behalf of the company. *West Lon. Com. Bank v. Kitson*, 13 Q. B. D. 360.

Power to borrow Money.] As regards some companies, banking companies for instance, the power to borrow money is an essential one. *Bank of Australasia v. Breillat*, 6 Moo. P. C. 152. So a trading company to an extent reasonable and necessary for the purposes of the business. *In re Hamilton's Windsor Iron Works*, 12 Ch. D. 707.

Directors who have power to do all that *the company* can do in general meeting, have power to raise money on the security of the assets of the company. *Austr. St. &c. Co. v. Mounsey*, 4 K. & J. 733, on the 19 & 20 Vict. c. 47. If the directors have no power to borrow, the majority of the shareholders may authorize them to do so. *Bryon v. Metr. Saloon Omnibus Co.*, 3 D. & J. 123. Where the borrowing powers of a company are expressly limited by statute they cannot be exceeded. *Lady Wenlock v. River Dee Co.*, 10 App. Ca. 354.

A provision in a company's special Act that moneys were to be borrowed by order of a general meeting, is directory only, and does not operate so as to postpone money borrowed without such order, to other mortgages of the company, ranking in other respects *pari passu*. *Landowners West of England, &c. Co. v. Ashford*, 16 Ch. D. 411. Where directors had powers to a limited extent of borrowing and securing the repayment by the issue of debentures and also powers to do such acts, &c., as the company might do, it was held that both under the special and general powers the directors had power to issue debentures at a discount. *In re Anglo-Danubian, &c., Co.*, L. R., 20 Eq. 339. If directors who are authorized to borrow do so, but not in the manner required by the articles of association, for instance, if they agree to repay by an ordinary agreement and not by a document sealed with the company's seal and countersigned by the secretary as directed by the articles, they will be personally liable. *McCollin v. Gilpin*, 5 Q. B. D. 390. See further as to borrowing powers, *Gibbs and West's Case*, L. R., 10 Eq. 312; *In re Pooley Hall Co.*, 18 W. R. 201; *English Chan. Steam. Co. v. Rolt*, 17 Ch. D. 715.

Where, under the Act of 1862, money is borrowed on mortgage, a register of mortgages must be kept (s. 43). Directors who are entitled to the benefit of a mortgage which is not registered cannot set it up against the general creditors. *Quære*, whether an unregistered mortgagee can do so against unsecured creditors. *Re Wynn Hall Coal Co.*, L. R., 10 Eq. 515. In the absence of any prohibition in the articles a company may secure a past debt by deposit of deeds. *Semble*, *Re Patent File Co.*, L. R., 6 Ch. 83. Equitable mortgages by deposit are in general valid, although the formality of registration is not complied with. A banker of the company is not an officer of the company bound to see to the registration of securities. *In re General Provident, &c., Co.*, L. R., 14 Eq. 507. But where the mortgagee is himself acting in the transaction as the solicitor of the company, creating the mortgage, he must do so, otherwise he cannot avail himself of his mortgage. *Ex parte Valpy and Chaplin*, L. R., 7 Ch. 289. But see *In re International, &c., Co.*, 6 Ch. D. 556, *infra*. Where three directors of a company advanced money to the company and took as security a debenture, giving a general charge on the undertaking, and the debenture was registered, but the register contained no description of any property as charged, it was held that the debenture was not valid as against the creditors of the company. *In re Native Iron Ore Co.*, 2 Ch. D. 345. But this case and *Ex parte Valpy and Chaplin*, *supra*, were adversely commented upon in *In re International*

Pulp and Paper Co., 6 Ch. D. 556, by Jessel, M.R., who, while stating that he was bound by them, held that a stranger a sub-mortgagee from a director who had taken a mortgage from the company, but had not registered it, was not affected by the non-registration. The rule *In re Native Iron Ore Co.*, does not apply to a case where the mortgage is made to partners who are not all directors of the company. *Smith's Case*, 11 Ch. D. 579, Baggallay, L. J., diss. In this case the circumstances under which a court may overrule previous decisions of the same court were considered. Where a company mortgaged to two of the directors, who furnished the secretary with the necessary particulars for entering it in the register of mortgages, and directed him to register it, but he omitted to do so, and the directors realized their security; and subsequently the company was ordered to be wound up, it was held that as the directors had not "knowingly and wilfully authorized or permitted the omission" of the entry of the mortgage on the register, and had realized their security before the commencement of the winding-up, the liquidator could not compel them to refund the proceeds of the security. *In re Borough of Hackney Newspaper Co.*, 3 Ch. D. 669. If by the articles of association a limited company has power to mortgage all the property of the company, shareholders holding debentures purporting to charge all the property of the company have priority over its general creditors, and their priority is not affected by imperfection in the register of debentures kept by the company. *In re General South American Co.*, 2 Ch. D. C. A. 337. Book debts not yet accrued may be charged under a power over any property of the company. *Bloomer v. Union, &c., Co.*, L. R., 16 Eq. 383. See as to charging after-acquired property, *Ex parte Moor*, 10 Ch. D. 530; *Norton v. Florence, &c., Co.*, 7 Ch. D. 332.

A person who lends money to a company, shares being transferred into his name, subject to a condition of repayment by the company on his giving notice, the shares to be then cancelled, is in the position of an ordinary shareholder, and if notice be given and the money repaid, and then the shares are transferred to a nominee of the company, the lender will nevertheless be liable as a contributory, even after a lapse of some years (eight in the case cited) after the transfer. *Addison's Case*, L. R., 5 Ch. 294.

Under a power to mortgage or charge the works, hereditaments, property and effects of the company, calls already made but not paid may be charged, but not future calls. *Re Sankey Brook, &c., Co.*, L. R., 10 Eq. 381; see *Ex parte Stanley*, 33 L. J., Ch. 535; *Pickering v. Ilfracombe, &c., Co.*, L. R., 3 C. P. 235; *King v. Marshall*, 33 Bea. 565.

By the 28 & 29 Vict. c. 78 (1865), "The Mortgage Debenture Act, 1865" (amended 33 & 34 Vict. c. 20 (1870)), certain companies, incorporated under the Act of 1862 or under an act of parliament, are authorized, under certain regulations and restrictions, to issue mortgage debentures founded upon the after-mentioned property, such debentures being registered in the Office of Land Registry. The

securities upon and in respect of which mortgage securities may be founded and issued are the following :—

- “(a.) Lands, messuages, hereditaments or real property, or some estate or interest therein :
- “(b.) Rates, dues, assessments or impositions upon the owners or occupiers of lands, messuages, hereditaments or real property, imposed by or under the authority of any act of parliament, public or private, royal charter, commission of sewers, or drainage, or other sufficient legal authority :
- “(c.) Charges upon or affecting lands, messuages, hereditaments or real property executed, made, given or issued under the authority of any act of parliament, public or private.”

From the securities mentioned in paragraph (a) are excepted : securities upon mines or mineral property, quarries, brickfields, factories, leasehold estates determinable upon a life or lives, and not renewable, or held for less than fifty years, or at a rent beyond one-fourth part of the annual value of the property leased. Act of 1870, s. 4.

The acts are only applicable to companies formed for the purpose of making advances on the securities above-mentioned, or of borrowing money on transferable mortgage debentures, or on one or more of such securities. The company must have a paid-up capital of not less than 100,000*l.* Each share must be of the nominal value of not less than 50*l.*, with not less than one-tenth, nor more than one-half paid up. Act of 1865, s. 3.

Persons dealing with directors, with respect to contracts and other matters, are bound to ascertain what their powers are. See *Ernest v. Nicholls*, 6 H. L. C. 401, 419; *Eagle Ins. Co.*, 4 K. & J. 549. But if they have the powers generally to do particular acts, an *irregularity* in the mode of doing them, arising from non-compliance with some *internal regulation* of the company, will not avoid them. Thus, if directors have power to borrow money on bond, if authorized by a general resolution of the company, and they borrow money on bond, but without such a resolution, the company will be bound. *Roy. Brit. Bank v. Turquand*, 6 E. & B. 327; *Bargate v. Shortridge*, 5 H. L. C. 297, 318; *County Life Assurance Co.*, L. R., 5 Ch. 288. In *Campbell's and Hippisley's Case*, L. R., 9 Ch. 1, James, L.J., observed (p. 24), “It is in the highest degree important . . . that the principle of the decision in *Roy. Brit. Bank v. Turquand*, *sup.*, should be adhered to and acted upon.” So, if directors are authorized to accept bills on taking securities to a *specified amount*, the company will be bound, although securities to an inadequate amount are taken. *Re Land, &c. Co.*, L. R., 4 Ch. 460. With respect to companies not limited, there are cases establishing the doctrine that, if directors, though without authority from the shareholders, borrow money, or advance it themselves, and apply it *bonâ fide* in the business and for the benefit of the company, they are entitled to be reimbursed by the company with interest. *Ex parte Chippendale*, 4 D., M. & G. 19; *Ex parte Bignold*, 22 Beav. 143; *Troup's Case*, 29 Bea. 353; *Hoare's Case*, 30 Bca. 225; see *Cath. Pub. Co.*, 10 Jur., N. S. 192, under

the Act of 1856. But if some of the directors apply the funds of the company for an unauthorized purpose, they and the other directors who have sanctioned the proceeding will be liable to make good the money so applied. *Land, &c. Co. of Ireland v. Ld. Fermoy*, L. R., 5 Ch. 763. Where a liability has been created by the unauthorized act of directors, which is *ultra vires*, the shareholders will not be bound. See *Kent Benefit Building Society*, 1 Dr. & S. 417. If directors have power to borrow on mortgage, but not on bills, a mortgage by them to secure money borrowed on bills will be valid. *Scott v. Colburn*, 26 Bea. 276.

Debentures are bonds or covenants to pay a particular sum, acknowledged to be due, under the company's seal. When such debentures are made payable to a person, or bearer or order, which would seem to make them promissory notes, an assignee of them takes them discharged from any equities as between the company and original holder. *Re Blakely Co.*, L. R., 3 Ch. 154; *Re Gen. Estates Co.*, *ib.* 758; *Ex parte Colborne and Strawbridge*, L. R., 11 Eq. 478; see *In re Regent's Can. Iron Co.*, 3 Ch. D. 43. But not if they are merely payable to a person, his executors, administrators or transferees, or in special cases, it would seem, even to the holder for the time being, for they are then merely ordinary *choses in action*, and the general rule in such cases applies. *Natal, &c. Co.*, L. R., 3 Ch. 355. Lloyd's bonds are securities given for work done and materials supplied to a company. These bonds were originally intended to enable companies to hand over to contractors to whom they might be indebted for works performed, something, which if not money was its equivalent, and upon which money might be realized. See per Crompton, J., *Chambers v. Manchester, &c. Co.*, 5 B. & S. 588, 608. Debentures issued by a company under a general power of borrowing, in part discharge of existing debts, are valid. *Inns of Court Hotel Co.*, L. R., 6 Eq. 82; see *Re Cork, &c. R. Co.*, L. R., 4 Ch. 748. But if Lloyd's bonds are given after statutory powers of borrowing have been fully exercised, for the mere purpose of raising money, they are illegal. *Chambers v. Manch. R. Co.*, 5 B. & S., 588; *Fountain v. Carmarthen R. Co.*, L. R., 5 Eq. 316; see *Blackmore v. Yates*, L. R., 2 Ex. 225; *Rashdall v. Ford*, L. R., 2 Eq. 750; *Watson v. Mid. Wales R. Co.*, L. R., 2 C. P. 593. But they are valid to the extent of the money secured by them which has been applied in paying off other bonds or debts of the company, and which would not otherwise have been paid off. *Cork, &c. R. Co.*, L. R., 4 Ch. 748; see the judgment of Lord Hatherley, L. C., and decree, p. 761; *Blackburn B. Soc. v. Cunliffe & Co.*, 22 Ch. D. 61.

Debentures of a company established for buying, selling, &c., freehold and leasehold property, being charged on the property of the company for the time being, are a *first* charge at the date of the winding-up order (*Re Marine Mansions Co.*, L. R., 4 Eq. 601), and, in general, an assignment or charge of "the undertaking" has reference to all the property of the company existing at the date of the charge or debenture and *afterwards belonging* to the company, giving

priority over the general creditors, who can touch nothing until such incumbrances are discharged. *Panama, &c. Co.*, L. R., 5 Ch. 318, overruling *New Clydach, &c. Co.*, L. R., 6 Eq. 514, on the point, as to the future property. In *In re Florence Land, &c. Co.*, 10 Ch. D. 530, there was power to borrow money on the security of all the estate, &c., present or future of the company. It was held that a debenture binding the estate of the company was a charge on all the property comprised in it, without prejudice to the question *what* property was comprised therein. See order, *ib.* p. 550, and *Norton v. Florence Land, &c. Co.*, 7 Ch. D. 332, in which, at the end of p. 337, the words "themselves, their successors and assigns," should be "estate, property and effects." See 10 Ch. D. p. 536. In *In re Hamilton's Windsor Ironworks*, 12 Ch. D. 707, it was held that the mortgage of the property and undertaking of a company to secure debentureholders or mortgagees did not prevent the company from making a valid charge on specific property as a security for an advance of money necessary for carrying on the business, unless such property was fairly and properly included in the first mortgage. In *In re Colonial Trusts Corporation*, 15 Ch. D. 465, it was held that debentures charging the assets and uncalled capital of the company were a floating charge on the former in preference to general liabilities at the time of the winding up, but not on the uncalled capital, that such floating charges did not affect the power of making *specific* charges or alienations of property. See *ib.* p. 472. In *Wheatley v. Silkstone, &c. Co.*, 29 Ch. D. 715, debentures which were a first charge on the undertaking, hereditaments and effects of the company were, upon the principle of the preceding cases, postponed to a subsequent equitable mortgagee by deposit. In *In re Horne and Hellard, ib.* 736, debentures, part of 500,000*l.*, were, until default in payment of principal and interest in respect of that sum, made "a floating security" on the undertaking and property of the company, "not hindering sales or dealings with the property in the course of business as a going concern," it was held that a subsequent purchaser from the company was entitled to reasonable evidence that there had been no default in respect of the principal and interest. The principle, therefore, would seem established by the preceding cases, that effect will be given to such "floating securities" on the property of the company, but so as not to interfere with their dealings with it as a going concern from time to time.

Where directors have borrowing powers, and cannot issue their debentures at par, they may do so at a reasonable discount, and on the same terms as the general public. *Campbell's Case*, 4 Ch. D. 470. See as to power to issue debentures or obligations, *Ex parte Moor*, 10 Ch. D. 530. Although debentures are improperly issued, if they purport to be transferable, subsequent equitable transferees for value without notice, not being the original holders or first transferee, are entitled to recover what they have advanced on them. *Pocock's Claim, Trickett's Claim, and Carew's Claim*, 24 Ch. D. 85. Kay, J., observed in this case, p. 92, I understand the law to be that, "Where a company have power to issue securities, an irregularity in the issue cannot

be set up against even the original holder if he has a right to presume *omnia rite acta*. *Fountaine v. Carmarthen R. Co.*, L. R., 5 Eq. 316. If such security be legally transferable, such an irregularity, and, *a fortiori*, any equity against the original holder, cannot be asserted by the company against a *bonâ fide* transferee for value without notice. *Webb v. Commissioners of Herne Bay*, L. R., 5 Q. B. 642. Nor can such an equity be set up against an equitable transferee, whether the security was transferable at law or not, if by the original conduct of the company in issuing the security, or by their subsequent dealings with the transferee, he has a superior equity. *In re Agra and Masterman's Bank*, L. R., 2 Ch. 391; *In re Blakely, &c. Co.*, L. R., 3 Ch. 154; *Dickson v. Swansea, &c. R. Co.*, L. R., 4 Q. B. 44." Although debentures are payable at a future time if, before the principal money becomes due, the company goes into liquidation, the moment the winding-up commences the money secured by the debentures becomes payable. *Hodson v. Tea Co.*, 14 Ch. D. 859. Where debentures charge the real and personal estate of the company, they are a charge on the property of the company at the time of the winding-up, but not including the uncalled capital. If the bond-holders are not paid in full they may prove with other creditors against the general assets. *In re Colonial Trusts Corporation*, 15 Ch. D. 465.

After the appointment of a receiver, the court will not allow a debenture holder of the company who has obtained a judgment upon the debenture to issue execution upon his judgment, except as a trustee for himself and the other debenture holders. *Bowen v. Brecon, &c. R. Co.*, L. R., 3 Eq. 541. But this case appears to have been doubted by Giffard, L.J., in *In re Potteries, &c. R. Co.*, L. R., 5 Ch. 67.

A mortgage debenture given by a railway company in the form given in schedule C. of "The Companies Clauses Act, 1845," pledges the "undertaking" of the company only as a *going concern*, and this cannot be interfered with by the mortgagee. The expression, "sums of money," means the earnings of the undertaking which may be made available to satisfy the mortgage. *Gardner v. L. C. & D. R. Co.*, L. R., 2 Ch. 201. A receiver of a railway company will be appointed by the court, but not a manager. *Ib.*; *Griffin v. Bishop's Castle R. Co.*, 15 W. R. 1058. See *In re Herne Bay, &c. Co.*, 10 Ch. D. 42.

Where debentures are payable to bearer the holders of them may petition for the winding-up of the company. *In re Olathe, &c. Co.*, 27 Ch. D. 278. But otherwise where there is a bond or covenant by the company to pay to trustees for the bearer and not to the bearer direct. *In re Uruguay, &c. Co.*, 11 Ch. D. 372.

It is, of course, one of the most important duties of directors to prepare and submit to the shareholders fair and proper accounts; but directors are not liable for setting down bad debts as good ones, unless they can be fixed with knowledge of the fact that they *were* bad. *Turquand v. Marshall*, L. R., 4 Ch. 376. A director is not bound to examine entries in the company's books, nor is a knowledge of their contents to be imputed to him. *Re Denham & Co.*, 25 Ch. D. 752. As to fraudulent accounts, for which directors would be criminally

liable, see *post*, p. 459 ; and as to dividends declared on erroneous balance-sheets, see *post*, Sec. 4 of this chapter.

Authority to enter into Contracts.] Contracts made by directors or others on behalf of a company are not, in general, binding on them individually (*Ellis v. Colman*, 25 Bea. 662), but on the company. See *Lindus v. Melrose*, 3 H. & N. 177 ; *Penrose v. Martyr*, E., B. & E. 499 ; *Rashdall v. Ford*, L. R., 2 Eq. 750. But they may contract as principals, and thus bind themselves personally. *Kay v. Johnson*, 2 H. & M. 118. Directors who have power to buy shares in the company, and appoint a manager, cannot delegate to the manager the power to buy shares. *Cartmell's Case*, L. R., 9 Ch. 691.

A non-trading corporation is, as a general rule, bound in equity and at law only by contracts under its common seal. *Taylor v. Dulwich Hosp.*, 1 P. W. 655 ; *Mayor of Ludlow v. Charlton*, 6 M. & W. 815 ; *Smart v. West Ham Union*, 10 Ex. 867 ; *London Dock Co. v. Sinnott*, 8 E. & B. 347. But this rule does not apply to trading corporations. *Henderson v. Austr. &c. Co.*, 5 E. & B. 409 ; *Re Contract Corporation*, L. R., 8 Eq. 14 ; and *S. of Ireland Colliery Co. v. Waddle*, L. R., 3 C. P. 463, 4 C. P. 617, in which the prior authorities on the subject are cited, and see *ante*, p. 78. The directors, who have the chief management of a company, can bind it by affixing its seal in all cases to which their authority extends. *Ex parte Contract Corporation*, L. R., 3 Ch. 105. And if a contract with a non-trading corporation, not under its seal, is not merely executory, but has been in part performed, it may be enforced in equity. *Lon. and Bir. R. Co. v. Winter*, Cr. & Ph. 57 ; *Wilson v. West Hartp. R. Co.*, 2 D., J. & S. 475. So if goods have been supplied to such a corporation under a contract not under seal, the price of them may be recovered at law. *Nicholson v. Bradfield Union*, L. R., 1 Q. B. 620. As to contracts under the Joint Stock Companies Act, 1862, of companies adopting Table A., see clause 53 ; and as to contracts in which directors are interested, *ib.* 57.

By the act of 1867 (30 & 31 Vict. c. 131) it is enacted that—

“(1) Any contract which, if made between private persons, would be by law required to be in writing, and if made according to English law to be under seal, may be made on behalf of the company in writing under the common seal of the company.

“(2) Any contract which, if made between private persons, would be by law required to be in writing and signed by the parties to be charged therewith, may be made on behalf of the company in writing, signed by any person acting under the express or implied authority of the company.

“(3.) Any contract which, if made between private persons, would by law be valid, although made by parol only and not reduced into writing, may be made by parol on behalf of the company by any person acting under the express or implied authority of the company.

“All such contracts may in the same way be varied or discharged” (s. 37).

Contracts made according to these provisions are binding upon the

parties and their representatives. *Ib.* As to the liability of a joint-stock company for goods supplied on the orders of a manager, see *Smith v. Hull Glass Co.*, 11 C. B. 897. A contract by the directors of one company, duly authorized, to purchase the business of another company is binding, if executed, whether the *selling* company has power to sell or not. *Era Ins. Co.*, 1 D., J. & S. 29; *Ang.-Aus. Co. v. Br. Prov. Co.*, 8 Jur., N. S. 628. But not, it would seem, if executory. *Post*, p. 463. As to the rights and liabilities of creditors and shareholders of an old company sold to or amalgamated with a new one, see *post*, Sec. 3 of this chapter. When company A. is amalgamated with and its business transferred to company B., shares being exchanged in the latter for those in the former, although company A. has no power to effect the amalgamation, yet, if all its shareholders consent, the transaction is effectual, company A. will be virtually dissolved, and its shares can no longer be dealt with. *Mellish, L.J., diss. Chappell's Case*, L. R., 6 Ch. 902; *Allen's Case*, L. R., 16 Eq. 449. Irrespective of any statutory prohibition a director cannot avail himself of his position to enter into contracts with the company. *Aberdeen R. Co. v. Blaikie*, 1 Macq. 461; *Flanagan v. Gt. W. R. Co.*, 19 L. T., N. S. 345; see the Act of 1862, Table A. 57, where that applies. And, of course, if the directors of a company appropriate to their own use or otherwise deal with, for their own advantage, any part of the property or shares of the company, the transaction cannot stand. *York, &c. Co. v. Hudson*, 16 Bea. 485. Mere want of judgment in matters in which the directors have full power to act for the shareholders, for instance, in purchasing a business, by reason of which want of judgment great losses are entailed upon the company, will not render the directors liable if they have not acted fraudulently. *Overend & Co. v. Gibb*, L. R., 5 H. L. 480. But if directors *misrepresent* the state of the company, each shareholder may have his remedy against them at law; but the body of the shareholders cannot maintain a suit in equity to recover from the directors the money which they have lost. *Turquand v. Marshall, ib.* 376. It may be observed that there is no presumption of law that a director knows the contents of the books of the company. *Hallmark's Case*, 9 Ch. D. 329.

In *The Land Credit Co. of Ireland v. Ld. Fermoy* (L. R., 5 Ch. 763), where a committee of directors, in order to raise the price of their shares, bought some of them through their secretary, paying for them with money of the company, it was held that such of the directors only as were cognizant of the transaction were liable to repay the money to the company. See *Ferguson v. Wilson*, L. R., 2 Ch. 77. Where shares of a company were (pursuant to an *ultra vires* resolution of the board) purchased and transferred into the name of A., a director, in trust for the company, A. was held entitled to contribution from the directors who concurred in the transaction, for calls which he had paid. *Ashhurst v. Mason, Same v. Fowler*, L. R., 20 Eq. 225. A local director present at a meeting in London, at which the minutes of the previous meeting were read and confirmed, though not present until after the commencement of the proceedings, and denying all

knowledge of the resolution or transaction, was held to have been affected with notice, and liable in respect of the transaction. But another local director, present only at a subsequent meeting, at which the formal minute of approval was confirmed, was held not to have been affected with notice, and not liable, *ib.* Directors are not guilty of a breach of trust or duty to the company in paying up their shares in order to relieve themselves of their personal liability to a bank; such a payment is a valid payment on account of the shares. *Poole, Jackson, and Whyte's Case*, 9 Ch. D. 322. A proviso in the articles of association of a company that the directors may "at any time direct any action, &c., to be commenced on behalf of and in the name of the company or officer, &c.; and may defend or release, &c., any such action; and they shall be indemnified against all costs by reason of such action," does not authorize the application by the directors of the assets of the company in paying the costs of a petition for winding up presented by themselves, but opposed by a number of the shareholders and a minority of the directors. *Smith v. Duke of Manchester*, 24 Ch. D. 611.

Reports—Misrepresentation.] A company is not bound by the misrepresentations of a member or director, unless in making them he is, and acts as, *the agent* of the company. *Burnes v. Pennell*, 2 H. L. C. 497; *Gibson's Case*, 2 D. & J. 275; *Nicol's Case*, 3 D. & J. 387; see *Barwick v. English J. S. Bank*, L. R., 2 Ex. 259; *West Bank of Scot. v. Addie*, L. R., 1 Sc. App. 145; *Oakes v. Turquand*, L. R., 2 H. L. 325. But a company will be bound by the representations or misrepresentations of its agents or directors engaged in managing its affairs, which form the foundation of a contract between the company and third persons. *Henderson v. Lacon*, L. R., 5 Eq. 261; see *Nicol's Case*, *sup.* So a company will be bound by statements or representations embodied in reports, &c., sanctioned and adopted by the company, and afterwards circulated, the reports being the proximate and immediate cause of shares being purchased of the company. See *Barrett's Case*, 3 D., J. & S. 30. But this rule does not apply to mere general statements as to existing or anticipated profits, accompanied by documents which afford the means of testing the accuracy of the statements. *New Bruns. Co. v. Conybeare*, 9 H. L. C. 711; see *Bulch, &c. Co. v. Baynes*, L. R., 2 Ex. 324, stated, *post*, p. 466. A director is not liable for the misrepresentations in a prospectus by brokers employed by himself and other directors to place debentures of the company, none of the mis-statements having been made personally by him or with his authority, or with his cognizance, but on the sole authority of the brokers, Cotton, L.J., diss. *Weir v. Bell*, 3 Ex. D. 238. Neither will he be liable under such circumstances if he has derived a benefit from the transaction by the repayment to him of moneys due to him from the company out of the proceeds of the sale of the debentures, although before such repayment he was aware of the mis-statements, *ib.* 32. *Baldwin's Case*.

In *Jackson v. Turquand* (L. R., 4 H. L. 305), the directors of a banking company, in February, 1864, issued a report declaring a large dividend, a bonus and a large addition to the reserve fund. In June, 1864, they offered to the shareholders the option of taking certain reserved shares at a premium. The report of February, 1864, was in fact utterly erroneous, and in September the bank stopped payment. No evidence of wilfulness on the part of the directors in misrepresenting the affairs of the company was given. It was held that there was not enough on this state of facts to constitute a misrepresentation which would avoid the acceptance of the reserved shares. The liability of a director for misrepresentations does not extend to an erroneous statement as to some matter of law. *Rashdall v. Ford*, L. R., 2 Eq. 750; *Beattie v. Ebury (Ltd.)*, L. R., 7 H. L. 102.

Liability of Directors.] See 24 & 25 Vict. c. 96, as to the liabilities of directors, members, managers and public officers of companies criminally for fraudulently appropriating property of the company (s. 81); for obtaining property of the company otherwise than in payment of a just demand and fraudulently omitting to make an entry thereof (s. 82); for fraudulently destroying, mutilating or falsifying books, papers or valuable securities of the company, or making or concurring in making false entries or omitting to make material entries in books (s. 83); making or circulating false written statements or accounts, or concurring in so doing, with intent to deceive or defraud members or creditors, or to induce persons to become shareholders, or to intrust or advance property to, or become security to the company (s. 84). See also the Companies' Act of 1862, ss. 167, 168.

Irrespective of statutory provisions, directors who agree to publish false statements of the affairs of the company, under such circumstances as show a fraudulent intent to deceive are not only civilly liable to those whom they have deceived and injured, but may be criminally prosecuted and punished. *Burnes v. Pennell*, 2 H. L. C. 497.

SEC. 3.—*Acts ultra and intra Vires of the Company.*

<i>General Principles</i>	459	<i>Transfer—Amalgamation</i>	463
<i>Transactions ultra Vires void</i>	459	<i>When ultra Vires</i>	463
<i>No Ratification of</i>	460	<i>Indemnity to selling Company</i>	463
<i>Company established for one object</i>		<i>Transfer of Liability to new</i>	
<i>cannot carry out others</i>	460, 461	<i>Company</i>	463
<i>Altering Capital</i>	461	<i>Novation</i>	463, 464
<i>Paying Dividends out of Capital</i> ...	462	<i>Who may bring Suit</i>	464
<i>Purchasing Shares of retiring</i>		<i>Power of Majority to bind Minority</i>	464
<i>Shareholders</i>	462	<i>Aquiescence</i>	464

Where a transaction is *ultra vires* of the company, it is not merely voidable, but wholly and totally void, and one which no general meeting can confirm, because it is altogether beyond the power of the

company in every sense. *Zulueta's Claim*, L. R., 5 Ch. 444, 451. In such cases every person who has notice or knowledge that the matter is *ultra vires* deals with the company or directors at his own risk. *Ib.* The resolutions of general meetings of a company cannot authorize or confirm acts which are *ultra vires* of the company. *Phoenix, &c. Co.*, 2 J. & H. 441. The ratification at a half-yearly meeting of a particular act of the directors in excess of authority does not extend the authority of the directors so as to authorize them to do similar acts in future. *Comp. Irvine v. Union Bank of Australia*, L. R., 2 App. C. 366; *Royal British Bank v. Turquand*, 6 El. & Bl. 327. But it has been said that shareholders in a company cannot lie by sanctioning, or by their silence acquiescing in, an arrangement which is *ultra vires* of the company, and watching the results, so as to profit by it if favourable, and repudiate it if unfavourable. *Gregory v. Patchett*, 33 Bea. 595. This would seem applicable to those cases only in which the shareholders alone are interested, and in which, although the act done is *ultra vires*, yet it is of a nature that by conduct they may be estopped from disputing it. See *Houldsworth v. Evans*, L. R., 3 H. L., 263; *Turquand v. Marshall*, L. R., 4 Ch. 376. And a contract by directors with reference to a matter not included in the memorandum of association is *ultra vires* of the directors, and cannot be ratified even by the assent of the whole body of the shareholders. *Ashbury Rail. Car. &c. Co. v. Riche*, L. R., 7 H. L. 653. The purposes for which an incorporated company has been established are to be first considered with reference to any question as to acts being or not being *ultra vires*; for powers granted by parliament for a particular purpose cannot be exercised for other purposes. *Galloway v. Mayor of London*, L. R., 1 H. L. 34.

It has already been mentioned (*ante*, p. 427) that a person applying for shares in a company professing to be formed for one object, is not bound to take them when the scheme of the company is materially changed and its original objects departed from. A somewhat similar question arises when a company already established deviates from the purposes for which it was formed, and endeavours, or the directors endeavour, to change the character of the original undertaking, or add to the branches of its original business. See *J. S. Discount Co. v. Brown*, L. R., 3 Eq. 139, particularly last paragraph of the judgment, p. 151; and *S. C.*, L. R., 8 Eq. 381. In most cases of this description, any single shareholder may apply for the interposition of the Court of Chancery, upon the ground that the acts proposed are *ultra vires* of the company, and not of a nature that a mere majority of the shareholders can sanction. See *Bloxam v. Metr. R. Co.*, L. R., 3 Ch. 337; *Zulueta's Claim*, L. R., 5 Ch. 444. And if money of the company has been applied by the directors of their own authority, and without the knowledge and sanction of the company, for the purpose of carrying out such unauthorized undertakings, the directors must make good the money so misapplied. *J. S. Discount Co. v. Brown*, L. R., 3 Eq. 139; see *Land, &c. Co. v. Ld. Fermoy*, L. R., 5 Ch. 763, *ante*, p. 453. Upon the principle which has been stated, that

companies must not exceed their powers, a company established for life assurance only cannot insure against sea risks. *Phoenix Co. (Burgess' and Stock's Case)*, 2 J. & H. 441. A railway company cannot engage in the business of coal merchants (*Att-Gen. v. Gt. N. R. Co.*, 1 Dr. & S. 154), nor undertake to make a different railway from that for which its act was obtained. *Bagshaw v. E. Un. R. Co.*, 2 Mac. & G. 389. And a company formed to make railway carriages, &c., and carry on the business of engineers and general contractors cannot contract to purchase a concession to make a railway. *Ashbury Co. v. Riche*, L. R., 7 H. L. 653. A railway company, however, may contract to carry goods or passengers beyond its own line. *Wilby v. W. C. R. Co.*, 2 H. & N. 703; *Gt. W. R. Co. v. Blake*, 7 H. & N. 987; *S. Wales R. Co. v. Redmond*, 10 C. B., N. S. 675; and may let parts of their surplus stock, &c., to another company if the latter can only be worked profitably in connection with the former. *A.-G. v. G. E. R. Co.*, 11 Ch. D. 449, Baggallay, L. J., diss. Where a company was established for the purposes of building and carrying on the business of an hotel, it was held to be not *ultra vires* to let a large part of it as offices temporarily to a government body. *Simpson v. West Pal. Hotel Co.*, 2 D., F. & J. 141. And where a company is formed for the purpose of working a patent, it is not *ultra vires* to purchase the patent. *Leifchild's Case*, L. R., 1 Eq. 231. Directors of a joint stock bank, with very extensive powers of management have, when the formation of another company is of importance to the bank, power to guarantee the payment of interest on debentures of that company issued for the purpose of forming it. *Ex parte Booker*, 14 Ch. D. 317. In *London Financial Association v. Kelk*, 26 Ch. D. 107, it was held that directors of a company having most extensive powers of purchasing, investing, &c., might agree to purchase an estate, the other parties agreeing to build (the *Alexandra Palace*), the company to float another company for the purpose of acquiring materials and building the palace. A corporation or company has the same power of compromising claims against it as an individual, and may cancel shares as part of a *bonâ fide* arrangement, but such cancellation cannot affect the rights of creditors previously acquired. *Bath's Case*, 8 Ch. D. 334.

With respect to an alteration in the capital of the company, directors have no power to increase it; but if they do so it will not be *ultra vires* of the company, and the shareholders may sanction the alteration. *Sewell's Case*, L. R., 3 Ch. 131. But where the articles provided that the directors might, with the sanction of a special resolution of the company previously given in general meeting, increase the capital by the issue of new shares, such increase to be made in such manner, with such privileges and conditions as the company in general meeting should think fit, it was held that the company might pass special resolutions authorizing an increase of the capital by the issuing of preferred shares. *Harrison v. Mexican R. C.*, L. R., 19 Eq. 358. An article of a company is invalid if it purport to make part of the capital applicable to purposes not within the objects of the company,

and not conducive to the attainment of those objects. The articles of association of a company cannot, except in the cases provided for by sect. 12 of the Companies Act, 1862, modify the memorandum of association in any of the particulars required by the Act to be stated in the memorandum. *Guinness v. Land Corporation of Ireland*, 22 Ch. D. 349. As to a reduction of capital, see *ante*, p. 417.

A company must not pay dividends out of capital. *MacDougall v. Jersey Hot. Co.*, 2 H. & M. 528. But though directors, by misrepresenting the state of the company, cause greater dividends to be paid than ought to have been paid, the shareholders as a body cannot make the directors liable to repay those dividends. *Turquand v. Marshall*, L. R., 4 Ch. 376 (case of a banking company). But they may be liable, jointly and severally, at the instance of the liquidator of the company on its being wound up, or of a creditor as for a breach of trust. *National Funds Assurance Co.*, 10 Ch. D. 118; *Flitcroft's Case*, 21 Ch. D. 519. Even if the shareholders had known the true facts, so that their ratification of the payment of dividends would have bound themselves individually, they cannot bind the company, for the payment of dividends out of *corpus*, is *ultra vires* the company, and incapable of ratification by the shareholders. A claim of this nature is for a breach of trust, and the Statute of Limitations cannot be set up. *Ib.* No resolution of the company, special or otherwise, can alter the contract made between the company and all the shareholders, and the revenue of the company available for dividend must be applied in the manner originally prescribed by the memorandum of association. *Ashbury v. Watson*, 28 Ch. D. 56; *affd.* W. N., 1885, p. 162.

A company is not empowered to purchase the shares of retiring shareholders (*Hodgkinson v. Nat. Live Stock Ins. Co.*, 4 D. & J. 422), nor its own shares, without a clear and express power for that purpose. *Zulueta's Claim*, L. R., 5 Ch. 444; *Re Marseilles Ex. R. Co.*, L. R., 7 Ch. 161; *Cree v. Somervail*, 4 App. C. 648. Where a company, having 150,000 shares issued and half paid up, passed a special resolution that the directors should have power to apply the company's assets in purchasing from any shareholders willing to sell, any number of shares not exceeding 100,000; and that such shares should not be re-issued by the directors without the authority of a general meeting, and the company had no power under its memorandum of association or articles to purchase or deal in its own shares or accept surrenders: it was held that the scheme was an attempt irregularly to reduce the capital of the company without complying with the provisions of the Companies Act, 1867, ss. 9—13, or a trafficking in the shares of the company which was not authorized by the memorandum of association is *ultra vires*. *Hope v. International, &c., Co.*, 4 Ch. D. 327, questioning the *dictum* in *Teasdale's Case*, L. R., 9 Ch. 58. So a resolution to allot shares as having a certain sum paid up on payment of a less sum is *ultra vires* of the directors. *Barnett's Case*, L. R., 18 Eq. 507. A company is not authorized to issue preference shares, unless such a power is originally contained in the articles of association

Hutton v. Scarborough Cliff Co., 2 Dr. & S. 521 (under the Act of 1862). Nor can a company agree to transfer its business to another company unless originally authorized so to do. *Ernest v. Nicholls*, 6 H. L. C. 401; see *Era Ins. Co.*, 1 D. J. & S. 29, *ante*, p. 457. And if a company has power to amalgamate with, or sell to any other company of a like nature, it cannot do so with, or to, a company having more extended objects, so as to bind a dissentient shareholder. *Ex parte Bagshaw*, L. R., 4 Eq. 341; see *Higgs' Case*, 2 H. & M. 657; *Clinch v. Financial Corp.*, L. R., 4 Ch. 117. A power in a company to sell and transfer their business to another company, there being no power of amalgamation, only authorizes them to sell for some money payment or valuable consideration, and not a transfer merely for exchange of shares from the one into the other company. See *Dougan's Case*, L. R., 8 Ch. 540, 545. A company may expend a portion of its funds in gratuities to servants or directors to advance the interests of the company. But this does not apply to a case where the company has transferred its undertaking to another company and is being wound up. *Hutton v. West Cork R. Co.*, 23 Ch. D. 654; *Hampson v. Price's Patent Candle Co.*, 24 W. R. 754, Cons., *Taunton v. Royal Insurance Co.*, 2 H. & M. 135.

When an amalgamation between a selling and a purchasing company is *ultra vires*, even directors of the selling company, who had also acted in that capacity in the amalgamated company and had shares allotted to them in it, are not liable as contributories of the purchasing company. *Stace and Worth's Case*, L. R., 4 Ch. 682; see the judgment of James, V.-C., in the court below, which is reported, *ib.* 685 (1). An agreement by one company, purchasing under full powers the property of, and amalgamating with, another company, to indemnify the latter against its liabilities, is valid. *Ang.-Aus. Co. v. Br. Prov. Co.*, 8 Jur., N. S. 628. In cases of authorized amalgamation, where the debts and liabilities of the old company are transferred to the new company, strict proof will be required that a creditor of the former, under a special contract, has accepted the liability of the latter. *Re Family Endowment Co.*, L. R., 5 Ch. 118. But if he has done so the former company will be discharged (*Re Merchants, &c. Assoc.*, L. R., 9 Eq. 694), as by taking a bonus from the new company (*Re Times Life Assurance, &c. Co.*, L. R., 5 Ch. 381; *Re Anchor Assurance Co.*, *ib.* 632; *Spencer's Case*, L. R., 6 Ch. 362), by executing the deed of settlement of the new company (*Fleming's Case*, *ib.* 393), or by sending in a claim against it (*In re Lon. & Life Co.*, L. R., 7 Ch. 651; *Re National, &c. Soc.*, L. R., 9 Eq. 306); but not by receiving payment from the new company of an annuity granted by the old one (*ib.*), nor by merely paying premiums or sending in policies for indorsement. *Re Manchester, &c. Assoc.*, L. R., 5 Ch. 640; *Griffith's Case*, 6 Ch. 374. Where A. effected a policy upon his life with an association which was subsequently amalgamated with a society, and ceased to carry on business, and some time afterwards a memorandum under the seal of the society, and signed by two of its directors, was indorsed on the policy, declaring that the funds of the

society should be liable for the payment of the policy money, provided the future premiums were paid to the society, and they were accordingly so paid: it was held that there was a complete novation, and that on the winding up of the two companies, A. had no right of proof against the association. *Miller's Case*, 3 Ch. D. 391. This was in the matter of the European Society, for other cases connected with this society, see *Hort's Case*, *Grain's Case*, 1 Ch. D. 307; *Harman's Case*, *ib.* 326; *Doman's Case*, 3 Ch. D. 21; *Rivington's Case*, *ib.*, 10; *Douse's Case*, *ib.* 384. See also *Even's Claim*, L. R., 16 Eq. 354. When an amalgamation is projected, and a shareholder in one of the companies pays for shares in the other, but the amalgamation is declared *ultra vires*, he is entitled to a return of what he has paid with interest at 5 per cent. *Alison's Case*, L. R., 15 Eq. 394, aff. 9 Ch. 1. In this case an action had been brought by the liquidator on the winding up of the amalgamated company against Alison, who had taken shares, but it was held on a special case that it would not lie as the amalgamation had been declared void. *Bank of Hindostan v. Alison*, L. R., 6 C. P. 54, aff. *ib.* 222. This judgment was upon the ground that the amalgamation had been held void in Chancery, but no mention was made in the special case of a subsequent compromise of the suit, and of an arrangement by which the opposition of dissentient shareholders was bought off and the title of the purchasing company confirmed, see L. R., 9 Ch. 17. The decision L. R., 15 Eq. was affirmed upon the ground that the judgment at law was conclusive. But for this the case might have been different, as in two other cases, *Campbell's Case* and *Hippesley's Case*, L. R., 9 Ch. 1, arising out of the same amalgamation: it was held that as the buying company did really acquire (by a title which, though originally defective as against the dissentient shareholders, had been in the end confirmed), the property of the selling company, and as the shares were issued *bonâ fide*, the holders of the new shares could not afterwards repudiate them.

Where acts are *ultra vires*, one shareholder may sue on behalf of himself and the other shareholders (*Clinch v. Financial Corp.*, L. R., 4 Ch. 117; see *Cramer v. Bird*, L. R., 6 Eq. 143), or in his own name alone. *Hoole v. Gt. W. R. Co.*, L. R., 3 Ch. 262. So if there is something illegal, oppressive or fraudulent on the part of the Company *quâ* Company or of the majority. *Mozley v. Alston*, 1 Ph. 790; *Foss v. Harbottle*, 2 Ha. 461. *MacDougall v. Gardiner*, 1 Ch. D. 13, 22. But a creditor and shareholder cannot sue on behalf of himself and all other creditors and shareholders, if some shareholders have adverse interests to other shareholders. *Ward v. Sittingbourne, &c.*, L. R., 9 Ch. 488. And one shareholder cannot sue for himself and all other shareholders except directors, in a matter affecting only the internal arrangements of the company. *MacDougall v. Gardiner*, 1 Ch. D. 13. But the circumstance that he purchased shares in the company to enable him to file a bill, will not affect his right to do so. *Bloxam v. Met. R. Co.*, L. R. 3 Ch. 337; see *Filder v. Lon. Br. & S. C. R. Co.*, 1 H. & M. 493; *Rogers v. Ox. Wor. & Wol. R. Co.*, 2 D. & J. 662—

664. But otherwise if he has purchased the shares at the instance of a rival company, of which he is a member, by whose direction the suit is instituted, such company indemnifying him against the costs. *Forrest v. Manchester, &c., Co.*, 4 D., F. & J. 126; see *Russell v. Wakefield Comp., L. R.*, 20 Eq. 474. The Attorney-General may sue where the matter affects the public, a stranger to the company being the relator. *Att.-Gen. v. Gt. N. R. Co.*, 1 Drew. & S. 154. Consider, however, the judgments in *Att.-Gen. v. Gt. E. R. Co.*, 11 Ch. D. 449.

Where the acts proposed are *intra vires* of the company, the majority of shareholders have power to bind the minority, for instance, by a resolution to borrow money. *Bryon v. Met. Saloon, &c., Co.*, 3 D. & J. 123. "A court of equity will not interfere to control a majority, unless it sees that the majority has been, or is doing, or is about to do that which it is illegal even for a majority to do." Lindley, Partnership, 3rd ed., p. 935, acc. *MacDougall v. Gardiner, L. R.*, 20 Eq. 394. Transactions which are *ultra vires* of the directors but *intra vires* of the company must, to be valid, be proved to have been duly brought before the shareholders and to have been sanctioned by them; though it would seem that acquiescence in transactions *with knowledge* by the shareholders for many years will be equivalent to an express sanction. Consider *Houldsworth v. Evans, L. R.*, 3 H. L. 263, judgment of Lord Cranworth; and *Turquand v. Marshall, L. R.*, 4 Ch. 376. Acquiescence, to bind all members of a company to a bargain which there is no power to confirm, must be acquiescence by every member of the company. *Imperial Bank of China, &c. v. Bank of Hindustan, L. R.*, 6 Eq. 91.

SEC. 4.—Calls—Dividends.

<i>Calls</i>	465	<i>Dividends</i>	466
<i>How made payable</i>	465	<i>Payable out of Profits only</i> ...	466
<i>Calls in advance</i>	466	<i>Payment out of Capital</i>	467
<i>Interest from call</i>	466	<i>Discretion of Directors</i>	467
<i>Fraud, when a Defence</i>	466	<i>Payment out of borrowed money</i>	467
<i>Legatees of Shares</i>	466	<i>Preference Shares</i>	467

Calls.] A call means an application to the shareholders for money (*Newry, &c., Co. v. Edmunds*, 2 Ex. 119), and may, as a rule, be made payable by instalments (*Ambergate, &c., Co. v. Norcliffe*, 6 Ex. 629); but they must all be due before an action in the statutory form is brought. *Same v. Coulthard*, 5 Ex. 459. See Act of 1862, s. 15, *ante*, p. 419. They must be made by the proper number of directors according to the articles of association. *Bottomley's Case*, 16 Ch. D. 681.

Calls are payable by virtue of the agreement which the shareholders enter into, and are made by the directors from time to time pursuant to such agreement, or when the company is wound up, are made for

the purpose of paying the debts of the company. As to calls under the Act of 1862 in companies adopting Table A., see *ib.* cl. 4 to 7. Notice of a call in a company governed by Table A. of the Act of 1862, claiming interest from the date of the call, instead of from the day fixed for its payment, is bad, and a forfeiture declared for non-payment, is invalid. *Johnson v. Lyttle's Iron Agency*, 5 Ch. D. 687. *Semble*, that the time for payment of a call cannot properly be fixed by a mere verbal direction to the secretary. *Ib.* A petition for winding-up a company which states that a call had been made upon the petitioner, which he had not yet paid, for reasons which he mentioned, but that he was willing to set apart, secure, or pay the amount in such manner as to the court might seem just, is unsustainable on the face of it, and must be dismissed. *In re European Life Assurance Society*, L. R., 10 Eq. 403; *In re Steam Stoker Co.*, L. R., 19 Eq. 416. Directors empowered to receive calls in advance, cannot pay the amount remaining due on their own shares, and appropriate the money in payment of their fees for which there is no other available fund. *Sykes' Case*, L. R., 13 Eq. 255.

In an action for calls by a company, it is a good plea that the defendant was induced to become a shareholder by the fraud of the company, that he has received no benefit from the shares, and that after a knowledge of the fraud he repudiated the shares and gave notice of his repudiation to the company. *Bwlch, &c., Co. v. Baynes*, L. R., 2 Ex. 324. The legatees of shares specifically bequeathed are liable for calls made after their testator's death, but not in general for calls made in the testator's lifetime, payment of which is necessary to perfect the legatee's title. See *Armstrong v. Burnet*, 20 Bea. 435. As to an assignment of calls by companies by way of mortgage, see *ante*, p. 451.

As to the liabilities of contributories on the company being wound up, see *post*, Chap. V.

Dividends.] As to companies under the Act of 1862, which adopt Table A. of that act, see the provisions as to dividends (cl. 72—77). It is scarcely necessary to observe that dividends are properly payable only out of the *profits* of the business of a company, and this is the directory provision contained in Table A. of the Act of 1862 (cl. 73). If directors "may declare a dividend to be paid to the members in proportion to their shares," and by the definition clauses the word "capital" means the capital for the time being of the company, and "shares" the shares into which the capital is divided, the directors cannot competently recommend a dividend to be paid to each shareholder in proportion to the *amount paid up* upon the shares held by him; but that all the shares are entitled to participate equally in dividend, without regard to the amount paid up upon each. *Oakbank Oil Co. v. Crum*, L. R., 8 App. C. 65. Where preference capital carrying a dividend at 10*l.* per cent. per annum, payable half-yearly, is issued, if the profits of any year are insufficient to pay the preference shareholders in full, the deficiency may be made good out of subsequent

profits. *Webb v. Earle*, L. R., 20 Eq. 556 ; see *Henry v. Gt. N. R. Co.*, 1 De G. & J., 606, 648. Dividends to be declared on ordinary shares out of "profits," after deducting certain charges, cannot be declared out of profits irrespective of such charges, and the profits of any year must be applied if necessary in making good the charges of preceding years. But dividends on preference shares "dependent on the profits of a particular year only," are payable less the charges for that year only. *Dent v. Lon. Tram. Co.*, 16 Ch. D. 344. A company will be restrained from paying dividends out of capital where it is subject to the provisions of Table A. (cl. 73) of the Companies' Act of 1862, or of the 8 Vict. c. 16, s. 121, or any similar provision. *MacDougall v. Jersey, &c., Co.*, 2 H. & M. 528 ; *Fawcett v. Laurie*, 1 Dr. & S. 192. And, in such cases, the court has summary power, under the 101st and 165th sections, or the 138th and 165th sections (see *Rance's Case*, L. R., 6 Ch. 104, 115) of the Act of 1862, to order a contributory or director to repay a dividend declared and paid under a delusive and fraudulent balance-sheet. *Stringer's Case*, L. R., 4 Ch. 475, disapproving of *Royal Hotel Co. of Yarmouth*, L. R., 4 Eq. 244. See *National Funds Association Co.*, 10 Ch. D. 118. Even considerable delay in applying to the court under s. 165, will not disentitle a liquidator to make an application against directors who have paid dividends out of capital. *Re Alexandra Palace Co.*, 21 Ch. D. 149. Where unusual, and extraordinary powers were vested in the chairman, through whose instrumentality a dividend was declared, an innocent director was held not responsible for fraudulent reports and balance-sheets issued by his co-directors, and not bound under s. 165 (*post*), to refund a dividend he had received. *Re Denham & Co.*, 25 Ch. D. 752.

If the directors, after a proper investigation of the financial position of the company, declare, and the shareholders agree to, a dividend or bonus, the court will not lightly interfere on the ground that the estimates on which it was founded are erroneous. But where the directors declare a dividend or bonus without proper investigation or professional assistance, and it is afterwards called in question, the burden lies on them to show that it was fairly paid out of profits ; and if they are unable to do so, the court will order them to refund what they have received. *Rance's Case*, *supra*. The mere payment of dividends out of borrowed money is not, it seems, an improper proceeding where the balance-sheet is a fair one and the dividend duly declared upon it, but otherwise where the balance-sheet is delusive. *Stringer's Case*, L. R., 4 Ch. 475. In companies governed by the Act of 1862, preference shares giving a right to priority of dividend cannot be created unless under the original memorandum of association. *Hutton v. Scarborough, &c., Co.*, 2 Dr. & S. 521. See *Ashbury v. Watson*, 28 Ch. D. 56, *aff. W. N.*, 1885, p. 162.

CHAPTER V.

WINDING-UP.

SEC. 1.—*By the Court.*

<i>On the Petition of Creditors</i>	468	<i>30 & 31 Vict. c. 131, s. 40</i>	471
<i>In what Cases</i>	468, 469	<i>Calls in arrear</i>	471, 472
<i>Meaning of the expression "the Court"</i>	469	<i>Holder of fully paid-up Shares</i>	472
<i>County Courts</i>	470	<i>Opinion of Majority as to carrying on Business</i>	472
<i>On petition of Creditors</i>	470	<i>Misconduct of Directors</i>	472
<i>Wishes of Majority</i>	470	<i>Where Resolution for a Voluntary Winding-up</i>	472
<i>On Petition of Contributories</i>	471		

A COMPANY may be wound up (1) by the court; (2) voluntarily; (3) voluntarily, but under the supervision of the court. These subjects will be treated of in the above order, though it has been found convenient occasionally to deviate from the order of the sections of the Acts of 1862 and 1867. Petitions for winding-up may be presented by the company or any creditor or contributory of it (Act of 1862, s. 82). When a petition to wind up a company has been presented, another petition for the same purpose subsequently presented and attached to a different branch of the court will be ordered to be transferred to that branch of the court to which the first petition is attached. *In re West Hartlepool Ironworks Co.*, L. R., 10 Ch. 629.

A company may be wound up, under the act, by the court (s. 79)—(1.) Under a special resolution. (2.) If it does not commence, or if it suspends business for a year. This is not imperative if the delay is properly accounted for. *Met. R. Wareh. Co.*, 36 L. J., Ch. 827. Where a company has been registered for more than a year without commencing business, and has therefore come within the section, the court cannot refuse a winding-up order upon the application of a shareholder, notwithstanding that the company has no money paid up and no debts, and that the order is opposed by a majority of the shareholders. *In re Tumacacori Mining Co.*, L. R., 17 Eq. 534. But an order will not be made on the petition of a shareholder, although a company has suspended its business for more than a year, the motive being merely to wait to carry it on under more favourable circumstances. *In re Middlesborough, &c. Co.*, 14 Ch. D. 104. When a company is incorporated to carry on business in the *United Kingdom* and in other parts of the world, and it has commenced to carry on its business in a foreign country, and there appears a *bonâ fide* intention to commence business in this country, the mere fact that

it has not actually commenced in this country the objects for which it was incorporated within a year from its incorporation is not a sufficient ground for ordering the company to be wound up. *In re Capital Fire Insurance Association*, 21 Ch. D. 209; Cons. *Princess of Reuss v. Bos* (L. R., 5 H. L. 176). (3.) If its members are reduced to less than seven. (4.) When it cannot pay its debts. It is deemed *unable to pay its debts* when, for three weeks after demand, it has neglected to pay or secure a debt exceeding 50*l.* (this provision is not imperative; *Brighton Hotel Co.*, L. R., 6 Eq. 339; see *Re Lon. Wharf, &c. Co.*, 35 Bea. 37), or when execution on a judgment or decree is returned unsatisfied wholly or in part, or when the court is satisfied the company cannot pay its debts (s. 80). See *Re Diamond Fuel Co.*, 13 Ch. D. 400. Where a judgment creditor is told by the solicitors of the company indebted to him that they have no assets on which he can levy, that is such evidence of their inability to pay their debts as relieves him from the necessity of issuing execution. *In re Flagstaff Silver Mining Co. of Utah*, L. R., 20 Eq. 268. The dishonour of a bill accepted by a company in payment of a debt is proof that the company is unable to pay its debts, although the petitioner has not served a demand requiring payment. *In re Globe New Patent Iron and Steel Co.*, *ib.* 337. When a company respondents to a winding-up petition dispute the validity of the petitioner's debt they must adduce on the hearing such evidence as will shew the court that there is a question to be tried. If they fail to do this, a winding-up order ought to be made. *In re Gr. Brit. Mut. Ass. Soc.*, 16 Ch. D. 246. (5.) When the court considers it "just and equitable." These words have reference to matters of the same kind as those previously mentioned. See *Anglo-Greek Steam Co.*, L. R., 2 Eq. 1; *Lon. & County Coal Co.*, L. R., 3 Eq. 355; *Suburban Hotel Co.*, L. R., 2 Ch. 737. In the last of these cases, Lord Cairns, L.J., observed, p. 750, that if the whole of the business which the company was incorporated to carry on had become impossible the court might order the company to be wound up although the large majority of the shareholders desired to continue to carry on the business. See *Re Haven, &c. Co.*, 20 Ch. D. 151; *Re German Date Coffee Co.*, *ib.* 169, and see *post*, p. 470, as to petitioning creditor's debt. Where a petition for winding up a company was presented by three shareholders which did not allege insolvency, but stated circumstances shewing that its condition was not hopeful, and that it had abandoned all but a very small part of its objects, and alleged that it was just and equitable that the company should be wound up; it was held, that as the petition did not allege any of the cases mentioned in the first four sub-sections of sect. 79, and did not contain allegations sufficient to make a case for interference under the 5th sub-section, a winding-up order was not authorized. *In re Langham Skating Rink Co.*, 5 Ch. D. 669.

"The court" means—(1) in the case of mining companies within the Stannaries, the Court of the Vice-Warden, or, in certain cases, the Court of Chancery; see *Re Silver Valley Mines*, 18 Ch. D. 472,

overruling *Re East Botallack Co.*, 34 Bea. 82; (2) in the case of other registered companies in England, the Court of Chancery,—in Ireland, the Court of Chancery,—in Scotland, the Court of Session or a division thereof,—and, in certain cases, the Court of Bankruptcy (s. 81). The jurisdiction of the Court of Chancery in winding-up matters not being taken away by the Judicature Acts, the Chancery Division of the High Court of Justice is the proper division in which all matters relating to winding-up business should be brought; and this applies to the stay of actions in any other division of the court. The same principle applies where a company is being wound up voluntarily. *Needham v. Rivers Protection and Manure Co.*, 1 Ch. D. 253. And the Act of 1867, 30 & 31 Vict. c. 131, ss. 41 to 45 inclusive, contains provisions conferring jurisdiction on the County Court in certain cases.

Where the petitioning creditor's debt is undisputed (see *Re Lon. Wharf &c. Co.*, 35 Bea. 37), and the company is unable to pay its debts, the order to wind-up is almost a matter of course. *Isle of Wight Ferry Co.*, 2 H. & M. 597; *Gen. Rolling, &c. Co.*, 34 Bea. 314; *Re Western of Canada, &c. Co.*, L. R., 17 Eq. 1; see *Bowes v. Hope Assurance Co.*, 11 H. L. C. 389. The court may allow a petition to stand over to enable the company to make arrangements for payment of its debts. *Re Brighton Hotel Co.*, L. R., 6 Eq. 339. And in *Re Langley Mill, &c. Co.* (L. R., 12 Eq. 26), it was held that a winding-up order could not be claimed *ex debito justitiæ* by an unpaid creditor of the company, but that the court would have regard to the wishes of the majority of the creditors, and might, under s. 91 of the Act of 1862 (*post*, p. 481), dismiss a creditor's petition, though the debt had not been paid, when the majority of the creditors desired a voluntary winding-up, which the court thought the preferable course. In *Re Planet, &c. Co.*, L. R., 14 Eq. 441; *Re West Hartlepool Iron Works Co.*, L. R., 10 Ch. 618. Cons. *Re Western of Canada, &c. Co.*, L. R., 17 Eq. 1; *Re St. Thomas' Dock Co.*, 2 Ch. D. 116. A creditor who has served a notice to pay is not entitled to a winding-up order if the company *bonâ fide* dispute the debt, and there is no evidence of the insolvency of the company (other than the non-compliance with the notice), and insolvency is denied on the part of the company. In *re London and Paris Banking Corporation*, L. R., 19 Eq. 444. Although as a general rule an unpaid creditor of a company which cannot pay its debts is entitled to a winding-up order, that order will not be made when it is shown that the petitioning creditor cannot gain anything by a winding-up order, and *à fortiori*, it will not be made under such circumstances if the other creditors oppose it. *Re Uruguay, &c. Co.*, 11 Ch. D. 372; *Re Chapel House Colliery Co.*, 24 Ch. D. 259; compare *Re Gt. Western R. Co.*, 21 Ch. D. 773.

The 91st section of the Act, *post*, p. 481, is not confined to cases where a winding-up order has been made, but applies also where a petition for winding-up is before the court. *Re Chapel Ho. &c. Co.*, *sup.* The court has jurisdiction to restrain by injunction a person claiming to be a creditor of a company from presenting a petition to

wind up the company, where the debt is *bonâ fide* disputed, and the company is solvent. *Cadiz Waterw. Co. v. Barnett*, L. R., 19 Eq. 182; *Cerele Restaurant Co. v. Lavery*, 18 Ch. D. 555; *In re Gold Hill Mines*, 23 Ch. D. 210. A claim against a limited company by a landowner for the amount of purchase and compensation money in respect of land taken, which has been assessed by arbitration under the provisions of the Lands Clauses Act, 1845, does not, until the title has been investigated and accepted by the company, constitute a debt in respect of which the landowner is entitled as an unpaid creditor within the Companies Act, 1862, s. 82, to apply for a winding-up order. *In re Milford Docks Co. Lister's Petition*, 23 Ch. D. 292. Where a winding-up petition is dismissed on the application of the petitioner, shareholders and creditors appearing either to oppose or support the petition are entitled to their costs, if their consent to the dismissal is conditional on payment of them. *In re Nacupai, &c. Co.*, 28 Ch. D. 65, but otherwise if it is not. *In re Jablochkoff Electric Light and Power Co.* (W. N. 1883, p. 189). Where a creditor presented a petition for winding up a company and the company paid part of the debt, and promised to pay the remainder on a certain day, but this was not done, and the creditor proceeded with his petition, and a winding-up order was made upon that petition and another petition, it was held that the creditor must refund the money paid to him. *Ex parte Greenwood*, L. R., 9 Ch. 511. A creditor, petitioning for a winding-up order, is entitled to dismiss his petition with costs. *Re Times Life, &c. Co.*, L. R., 9 Eq. 382; *Re Home Assurance Association*, L. R., 12 Eq. 59; *Re Hereford, &c. Co.*, L. R., 17 Eq. 423.

As to debenture holders, see *ante*, p. 455. By the Act of 1867 (30 & 31 Vict. c. 131), no contributory of a company under the Act of 1862 can present a petition for winding-up, unless the members of the company are reduced to less than seven, or the shares in respect of which he is a contributory, or some of them, either were originally allotted to him or have been held by him for at least six months during the eighteen months previous to the commencement of the winding-up, or have devolved upon him through the death of a former holder. Shares registered in the name of a wife of a contributory or trustees for her during the whole or any part of the six months are to be deemed to have been held in his name (s. 40). A contributory may present a petition to wind up where his name appears on the register as the holder of shares, though a trustee may have been appointed under a liquidation petition filed by such contributory, during the period of six months mentioned in s. 40 of the Companies Act, 1867. The word "held" in this section has no technical meaning, the true meaning of the word being that the name of the contributory has been on the register as the holder of shares for the period in question. *In re Wala, &c. Co.*, 21 Ch. D. 849. See *In re City & County Bank*, L. R., 10 Ch. 470. In *In re European Life Assurance Society*, L. R., 10 Eq. 403, James, V.-C., held that a petition for winding up a company, presented by a shareholder who, at the date of such presentation, is in arrear of payment of calls due from him to the com-

pany, would on that ground be dismissed. But in *Re Diamond Fuel Co.*, 13 Ch. D. 400, his Lordship, as L.J., observed (p. 406), that in the former case he "was rather supplementing the act than interpreting it." In the latter case it was held that the fact that a shareholder is in arrear with calls is not an absolute bar to his petitioning for a winding-up order. Holders of *fully paid-up shares* in a limited company are capable of petitioning as contributories. *National Savings Bank*, L. R., 1 Ch. 547; *Anglesea Coll. Co.*, *ib.*, 555. So persons ordered by the court to be registered as shareholders although not actually registered. *In re Patent Steam Eng. Co.*, 8 Ch. D. 464. A fully paid-up shareholder who presents a petition to wind up the company must both allege in his petition and show by evidence that there are such assets, that in the event of a winding-up he would have a tangible share of surplus to receive. On a winding-up petition, a vague allegation of fraud is not sufficient, but the facts which constitute the fraud must be stated. Whether a winding-up petition by a fully paid-up shareholder can be maintained where the company has no assets except moneys to be recovered by rescinding fraudulent transactions properly alleged in the petition, *quære*. *In re Rica Gold Washing Co.*, 11 Ch. D. 36. In considering the question of the expediency of winding-up, the court will take into consideration the views of the majority, and, if they are of opinion that the undertaking can be successfully carried on, will not in general interfere, if the company is solvent, notwithstanding the misconduct of directors or managers. See *Anglo-Greek Steam Co.*, L. R., 2 Eq. 1; *Re Lon. Suburb. Bank*, L. R., 6 Ch. 641; *Re Professional, &c. Soc.*, *ib.* 856.

It would seem that after a resolution for a voluntary winding up, an order for winding-up by the court will not be made on the application of contributories. *Per Turner, L.J.*, *Bank of Gibraltar*, L. R., 1 Ch. 69; see *Lond. & Merc. Disc. Co.*, L. R., 1 Eq. 277; *Ex parte Wragge*, 37 L. J., Ch. 220. But in *West Sur. Tan. Co.* (L. R., 2 Eq. 737), notwithstanding a resolution of the company (not confirmed) for a voluntary winding up, the court made the usual winding-up order on the application of a shareholder, as one particular shareholder held the greatest number of shares, and had a preponderating influence in consequence. See the cases, *post*, p. 445. Where a limited company alone appeals from a winding-up order without joining any one personally responsible for costs, it will generally be ordered to give security for costs. *Re Diamond Fuel Co.*, 13 Ch. D. 400; *In re Photographic Artists' Assocn.*, 23 Ch. D. 370. The bankruptcy rules as to reputed ownership are not to be applied under sect. 10 of the Judicature Act, 1875, in the winding-up of a limited company. *In re Crumlin Viaduct Works Co.*, 11 Ch. D. 755. By virtue of sect. 24, sub-sect. 7 (*ante*, p. 2), of the Judicature Act, 1873, the court has jurisdiction in a winding-up to enforce a compromise. *In re Gaudet Frères Steamship Co.*, 12 Ch. D. 882.

SEC. 2.—Who are Contributors—Rights and Liabilities of.

<i>Definition in Act</i>	473	<i>Shares in Joint Names</i>	476
<i>Liability of past and actual Mem- bers</i>	473	<i>Policy holders</i>	476
<i>Amount of Liability</i>	474	<i>Subscribers to Memorandum of As- sociation</i>	476
<i>Contribution of Directors with unlimited Liability</i>	474	<i>Shareholders—Fraud</i>	476
<i>Liability a Speciality Debt</i>	475	<i>Contract to take Shares</i>	476
<i>Bankruptcy of Contributory</i>	475	<i>Misrepresentation in Prospectus</i> ...	477
<i>Infants</i>	475	<i>Holders of fully paid-up Shares not</i>	477
<i>Death or Marriage of Contributory</i>	475	<i>Shares to be paid for in cash</i>	477
<i>Married Women</i>	476	<i>Money or Value received</i>	477
		<i>Scapholders, when liable</i>	478

THE word contributory means every person liable to contribute to the assets of the company in the event of its being wound up, and, in proceedings for determining who are to be deemed contributories, includes persons who are *alleged* to be such (s. 74). This definition has not been found so clear and precise as to obviate the necessity of having frequent recourse to judicial interpretation. All present and past members are liable to contribute to debts and liabilities, the expenses of winding-up, and such sums as may be required for the adjustment of their rights amongst themselves, but subject to these qualifications: (1) Past members are not to contribute if they ceased to be members one year before the commencement of the winding-up; (2) Nor in respect of liabilities contracted after they ceased to be members; (3) Nor unless it appears to the court that existing members are unable to satisfy the contributions required; (4, 5) Contributions are limited to the amount unpaid on shares or guarantee; (6) The act is not to affect policies or contracts in which the liability of members is restricted; (7) No sum due to a member by way of dividends, profits or otherwise, shall be deemed a debt in a case of competition between him and a creditor not a member, but shall be taken into account for the purposes of the final adjustment of the rights of contributories amongst themselves (s. 38). A company compulsorily registering itself under sect. 209 is in the same position as if the registration had been voluntary, and the 38th section applies to such a company. *Ramsay's Case*, 3 Ch. D. 388.

Past members, who have ceased to be so within the year, are liable in respect of debts contracted before they became, and while they were members (*Helbert's Case*, L. R., 6 Eq. 509; *affd.* L. R., 5 H. L. C. 28), but not for debts contracted after they ceased to be members. *Weston's Case*, L. R., 6 Eq. 17. Neither can they be placed on the list of contributories until it is ascertained that the amount receivable from existing members will be insufficient to discharge the liabilities. *Needham's Case*, L. R., 4 Eq. 135; *Helbert's Case*, *sup.*; *Andrew's Case*, L. R., 3 Ch. 161. In this case Rolt, L.J., observed that he was satisfied that the act required past as well as present members to be placed upon the list as soon as might be after the winding-up order was made (p. 166), even although ultimately the past members might

have to contribute nothing. *Ib.* p. 165. The liability of past members is not put an end to by their shares being forfeited (*Creykes' Case*, L. R., 5 Ch. 63), or by being forfeited in the hands of their transferees (*Bridger's Case*, *Neill's Case*, L. R., 4 Ch. 266), but this section will still apply. But if their transferees have fully paid up the shares, the liability of their transferors as past members ceases. *Weston's Case*, L. R., 6 Eq. 17. The contributions of past members ought not to be exclusively divided among the old creditors, in respect of whose debts they are made contributories, but form part of the general assets of the company for the payment of all the creditors. *Re Accidental, &c., Corp.*, L. R., 5 Ch. 428. The funds contributed by a past member, or B. contributory, form part of the general assets of the company, and are not to be applied preferentially or exclusively to the payment of debts incurred before that contributory ceased to be a member. *Webb v. Whiffin*, L. R., 5 H. L. 711. But if all such debts are extinguished, for instance, if bought up by the past member and so released to the company, he is not liable to any call. *Brett's Case*, L. R., 8 Ch. 800. And his liability where it exists to contribute in respect of debts contracted before he ceased to be a member does not exceed the residue of those debts *after deducting* or writing off from them the full amount of the dividends paid out of the property in hand and the contributions of present members. *Ib.* *Morris' Case*, L. R., 7 Ch. 200. A shareholder in a cost book mine who has ceased to be a shareholder more than two years before the order for winding up, cannot be put on the list of contributories as a past member, although he had not so ceased for two years before the mine ceased to be worked. *Chynoweth's Case*, 15 Ch. D. 13. See further as to the principles regulating the contribution of past members (*Brett's Case*, L. R., 6 Ch. 800; *Morris' Case*, *sup.*; and *Webb v. Whiffin*, L. R., 5 H. L. C. 711); and as to the liability of a person as past member who has transferred to an infant who has transferred to an adult, see *Gooch's Case*, L. R., 8 Ch. 266. A transferee is bound to indemnify his transferor who has been made liable as a past member. *Killock v. Enthoven*, L. R., 9 Q. B. 241; *Roberts v. Crowe*, L. R., 7 C. P. 629. Compromises between the liquidators and some of the existing members, under the sanction of the court, will not operate as a release to the past members. *Helbert's Case*, *sup.* And a compromise, sanctioned by the court, between the liquidator and a transferee does not operate as a release to the transferor of his liability on the shares as a past member, whether the rights of the liquidator against him have (*Nevill's Case*, L. R., 6 Ch. 43), or have not (*Hudson's Case*, L. R., 12 Eq. 1) been expressly reserved. See s. 160, Act of 1862; *post*, sec. 5. As to an agreement to contribute to debts incurred by some shareholders on behalf of the company, see *McKewan's Case*, 6 Ch. D. 447.

Directors or managers with unlimited liability are liable to contribute as members of an unlimited company. But the contribution is not to exceed that of an ordinary member where they have ceased to hold office one year before the commencement of the winding-up, or

where the debt or liability has been contracted after they ceased to hold office, or where the court does not deem it necessary to require a larger contribution. Act of 1867, s. 5. The liability to contribute creates a debt, in the nature of a specialty, from the time when the liability commenced, payable when calls are made, and, in the event of the bankruptcy of the contributory, his assignees shall represent him and be deemed to be contributories, past calls and the estimated liability to future calls may be proved (Act of 1862, ss. 75—77). A shareholder who became bankrupt, and put down the company as a creditor, was released on obtaining his order of discharge under the Act of 1869. *Ex parte Marshall*, L. R., 7 Ch. 324. Section 175 only applies where the bankruptcy of the contributory is contemporaneous with the winding-up. *Martin's Anchor Co. v. Morton*, L. R., 3 Q. B. 306. Under "The Bankruptcy Act, 1861," s. 154, it was held that a bankrupt must be retained as a contributory if the bankruptcy and discharge preceded the winding-up, the debt not being shown to be capable of valuation, and the assignees having repudiated the shares, which had always remained and continued to be vested in the bankrupt. *Hastie's Case*, L. R., 4 Ch. 274; see *Ex parte Pickering*, *ib.* 58; *Martin's Anchor Co. v. Morton*, L. R., 3 Q. B. 306; and see now "The Bankruptcy Acts, 1869," 32 & 33 Vict. c. 71, s. 31; and 1883, s. 55, *ante*, p. 84. Under the Act of 1869, s. 31, the liability in respect of calls of a liquidating member of a company where the liquidation proceedings commenced prior to the winding-up of the company, and are pending at the time of the winding-up, is a debt or liability which is provable in the liquidation. *Re Mercantile Mutual Marine Insurance Association*, 25 Ch. D. 415; not following *Furdoonjee's Case*, 3 Ch. D. 264. In the winding-up of a company a shareholder who has become bankrupt cannot be placed on the list of present contributories, neither can his trustee in a bankruptcy, whether prior or subsequent to the winding-up, be on the list if he shall have executed a disclaimer under the Bankruptcy Act, 1869, s. 23. *In re West of England Bank*, 12 Ch. D. 288. See under the Act of 1883, *ante*, p. 84. If a contributory becomes bankrupt he is a stranger to the company, and there is no jurisdiction to make any order on his application. *In re Cape Breton Co.*, 19 Ch. D. 77.

As to the effect of a person, otherwise liable as a contributory, being an infant, or having been an infant at the time of his becoming possessed of his shares, see *ante*, p. 69. The personal and real representatives of a deceased contributory are to be deemed contributories (ss. 76, 99, 105). See *Turquand v. Kirby*, L. R., 4 Eq. 123, under the 7 Geo. 4, c. 46; *Baird's Case*, L. R., 5 Ch. 725. Executors who pay a legacy under the will of a shareholder, without providing for contingent liabilities in respect of his shares, are liable to pay the amount of the legacy to the liquidators if the company be eventually wound up. *Taylor v. Taylor*, L. R., 10 Eq. 477. Where a female possessed shares which on her marriage were assigned for her separate use, but the trustees did not accept the trusts, it was held, on the Act of 1856, that the wife, in respect of her separate estate, and also her

husband, were contributories. *Luard's Case*, 1 D., F. & J. 533; see *Mrs. Matthewman's Case*, L. R., 3 Eq. 781.

On the marriage of a female contributory, her husband is to be deemed the contributory (s. 78). Where a woman, being entitled absolutely to shares in a company, married after the Married Women's Property Act, 1874, and before the marriage the shares were settled for her own benefit, upon the winding-up of the company, it was held that the liability of the husband to contribute to the assets of the company was not limited by the Act of 1874, to the interest acquired in right of his wife, but that he was liable as a contributory in his own right under the 78th section of the Companies Act, 1862. *In re West of England Bank*, 12 Ch. D. 284. See now the Act of 1882, ss. 6 and 7, *ante*, p. 361. Where shares were registered in the joint names of two persons, the articles of association being silent as to the liability thereby incurred, it was held under the Joint Stock Companies Act, 1856, that a joint liability only was contracted, and that it survived on the death of one joint owner, who alone was liable to be placed on the list of contributories. *Hill's Case*, L. R., 20 Eq. 585. Where by the constitution of an insurance company (unlimited) the shareholders were to receive 6 per cent. interest on the amounts paid up by them, and the profits were then to be divided, one-fourth to go to the shareholders and three-fourths to the policy-holders, it was held that, though the policy-holders were contributories, they could not be called upon to contribute until the shareholders had been exhausted. *In re Albion Life Assurance Society*, 16 Ch. D. 83; see *Brown's Case*, 18 Ch. D. 639.

Subscribers to the memorandum of association are contributories, although no shares have been expressly allotted to them. *Evans' Case*, L. R., 2 Ch. 427; *Migotti's Case*, L. R., 4 Eq. 238; see *De Beville's Case*, L. R., 7 Eq. 11. If, in fact, there are shares which can be allotted, but not otherwise. *Mackley's Case*, 1 Ch. D. 247. So shareholders who have been properly placed on the register, even, it would seem, if their consent was obtained by fraud. *Oakes v. Turquand*, L. R., 2 H. L. 325; see *Stone v. City & County Bank*, 3 C. P. D. 282, 312. For a contract induced by fraud is voidable, not void; and until a bill is filed to rescind it, it is valid, although, if rescinded, the rescission relates back to the time of the filing of the bill. *Reese River Co. v. Smith*, L. R., 4 H. L. C. 64; see *Henderson v. Lacon*, L. R., 5 Eq. 250, 263. If the names of shareholders ought to have been removed from the register, and the neglect in removing them was on the part of the company, they are not liable, but otherwise where the default is their own. *Fox's Case*, L. R., 5 Eq. 118; *Walker's Case*, L. R., 6 Eq. 30. Where a shareholder had transferred his shares, his transferee being registered, but the name of the latter was afterwards removed from the register by order of the court, upon the ground of his non-acceptance of the shares, the transferor was held liable as a contributory, although his name had not been restored. *Heritage's Case*, L. R., 9 Eq. 5. A person who has agreed to take shares in a company under a contract, complete between himself and the company, will be liable as a contributory. See the cases *ante*,

Application for Shares, p. 420. "But although registered as a shareholder, if a person has never agreed to become a shareholder, and is then told that he is one, it appears to me that it is quite sufficient for him to deny that he ever became a shareholder, and to challenge the company to prove it if they can." Per Mellish, L.J., *Gorrissen's Case*, L. R., 8 Ch. 519. To what extent and under what circumstances a person will be discharged from liability by reason of deviations from, or fraud or misrepresentation in, the prospectus, has already been considered, *ante*, p. 427, *et seq.*

Holders of fully paid-up shares are not in general liable to debts as contributories in a limited company, whether the shares are paid for by money, property or otherwise, if value has *bonâ fide* been given for them (s. 38 (4); *Leifchild's Case*, L. R., 1 Eq. 231); and this is the rule, although the holders may be indebted to the company. *Re Marlborough Club Co.*, L. R., 5 Eq. 365; see *De Berville's Case*, L. R., 7 Eq. 11. But the shares must be fully paid up. *Crawley's Case*, L. R., 4 Ch. 322; see *Migotti's Case*, L. R., 4 Eq. 238. And if the fully paid-up shares have been taken in payment of the goodwill and stock in trade of a business sold to the company, the vendor and shareholder is not liable as a contributory if the contract of sale is unimpeachable. *Drummond's Case*, L. R. 4 Ch. 772; *Pell's Case*, L. R., 5 Ch. 11; *Forbes and Judd's Case*, *ib.* 270; *Re Baglan Hall Colliery Co.*, *ib.* 346; *Jones's Case*, L. R., 6 Ch. 48.

Where the case is subject to the Act of 1867, the shares are to be paid for *in cash*, unless there is a contract to the contrary filed with the registrar under the Act of 1867, 30 & 31 Vict. c. 131, s. 25. But any *bonâ fide* transaction between a company and a shareholder, which, if the company brought an action against him for calls, would support a plea of payment is "payment in cash" within this section. A *bonâ fide* sale of property to the company, and payment (in effect) by the company in shares, is such a transaction. *Spargos' Case*, L. R., 8 Ch. 407. See *Fothergill's Case*, *Ib.* 270; *Dent's Case* and *Forbes' Case*, *Ib.* 768; *Cleland's Case*, L. R., 14 Eq. 387; *Ferrao's Case*, L. R., 9 Ch. 355; *Ex parte Bentley*, 12 Ch. D. 850; *In re Barrow-in-Furness, &c. Co.*, 14 Ch. D. 400. But to bring the transaction within *Spargos' Case*, where the shares are to be given for work done, the work must be completed at the time of the allotment of shares. *Pagin and Gill's Case*, 6 Ch. D. 681. In this case no contract was filed under sec. 25. An agreement by A. to do work for a company, and to accept payment in fully paid-up shares, must be registered, otherwise A. to whom the shares have been allotted must be placed on the list of contributories for unpaid shares. *White's Case*, 12 Ch. D. 511. And where there is a contract for value to give paid-up shares to A. but they are not issued at the time of the winding-up, although the contract is not registered, if A. is placed on the list of contributories he is entitled to prove for damages on the breach to assign the shares, as against his liability to calls. *Mudford's Claim*, 14 Ch. D. 634; *Ex parte Appleyard*, 18 Ch. D. 587. Shares which have been transferred to purchasers without notice that they

are not fully paid-up, and which are registered in the books of the company as paid-up shares, must, as between the company and the transferees, be treated as fully paid-up shares, and the transferees can give a good title to purchasers from them, whether with or without notice. *Barrow's Case*, 14 Ch. D. 432. But if paid-up shares have been issued to promoters or directors, nothing having in fact been paid, but in consideration of services rendered in the formation and management of the company, the holders are liable to calls in respect of them. *Daniell's Case*, 1 D. & J. 372; *Leeke's Case*, L. R., 6 Ch. 469; *Dent's Case*, L. R., 8 Ch. 768; see the cases, *ante*, p. 411. Although fully paid-up shareholders are not in general contributories to pay, they may be to receive their due share of the surplus assets after payment of debts; and where some shareholders have only in part paid up and others fully, a call may be made to adjust the rights and equities of the members of the company *inter se*, though all the debts are paid. *Anglesea Coll. Co.*, L. R., 1 Ch. 555; see *Ex parte Maude*, L. R., 6 Ch. 51; *In re Eclipse Gold Co.*, L. R., 17 Eq. 490.

Scripolders are not liable as contributories (*Ormerod's Case*, L. R., 5 Eq. 110), where they have disposed of their scrip certificates (*Ib.*; *Eustace v. Dublin, &c. Co.*, L. R., 6 Eq. 182; *Shewell's Case*, L. R., 2 Ch. 387; *McIlwraith v. Same*, L. R., 7 Ch. 134), or they have been forfeited (*Ex parte Collum*, L. R., 9 Eq. 236) before the winding-up.

SEC. 3.—Powers of Judge—Court.

<i>In general</i>	478	<i>Ordinary Powers of Court—contd.</i>	
<i>Commencement of Winding-up</i>	478	<i>Over Property of Company</i> ...	482
<i>Staying Proceedings against Company</i>	478	<i>Calls and Debts</i>	482
<i>Wishes of Creditors or Contributories</i>	478	<i>Set-off when allowed</i>	482
<i>Distress for rent—Right of re-entry</i>	479, 480	<i>Bankruptcy of Contributory</i> ...	483
<i>No priority for Year's rent</i> ...	480	<i>Creditors paid rateably</i> ...	483, 484
<i>Rights of Mortgagees</i>	480	<i>Wages—Clerks' Salaries</i>	484
<i>Executions</i>	480	<i>Policy holders</i>	484
<i>Official Liquidators</i>	481	<i>Statute of Limitations</i>	485
<i>Ordinary Powers of Court</i>	482	<i>Shares fully paid up</i>	485
<i>As to Contributories</i>	482	<i>Rights of contributories inter se</i>	485
<i>Estates of Deceased Contributories</i>	482	<i>Costs—Order of Dissolution</i> ...	486
		<i>Sale of Business</i>	486
		<i>Extraordinary Powers of Court</i> ...	486
		<i>To summons Persons</i>	486
		<i>To Examine—To order Arrest</i> .	487

In general.—Any judge of the Court of Chancery may act in chambers (Act of 1862, s. 83). The winding-up commences from the presentation of the petition (s. 84). The court may at any time after the presentation of the petition restrain any proceedings against the company (ss. 85, 86). And on the winding-up order being made, no proceedings shall be commenced or proceeded with against the company unless by leave of the court (s. 87). The court may stay proceedings after the winding-up order (s. 89). After the commence-

ment of the winding-up by, or under the supervision of the court any attachment, sequestration, distress, or execution against its estate or effects is *void* (s. 163). These sections (85, 86, 87, and 163) will be considered together and the decisions upon them. *In re Vron Colliery Co.*, 20 Ch. D. 442, Jessel, M.R., observed (p. 446): "The object of the Act has been well stated by Lord Justice Turner in *Smith, Fleming & Co.'s Case*, L. R., 1 Ch. 538, 545. 'The main purpose of the Act, as I understand it, is the collection and distribution of the assets of companies for the general benefit of and amongst their creditors *pari passu*; and this discretion of the Court ought, therefore, as I think, to be exercised . . . for the benefit of the general body of creditors.'" See also the observations of Jessel, M.R., in *In re Universal Disinfectors Co.*, L. R., 20 Eq. 162, 164, in comparing sections 87 and 163. It is settled that after the winding-up has commenced subsequent proceedings, such as are mentioned in s. 163, are avoided altogether. *Ex parte Fourdrinier*, 21 Ch. D. 510. The court has jurisdiction, under sect. 87 of the Companies Act, 1862, after a winding-up order has been made, to restrain any "suit, action, or other proceeding" commenced against the company in *any part* of the United Kingdom, and has power under sect. 122 of the act to enforce such order when made by injunction. *In re International Pulp and Paper Co.*, 3 Ch. D. 594. And to restrain proceedings where an unregistered company is being wound up, which it will exercise according to its discretion. *Rudow v. Gt. Brit. Life Soc.*, 17 Ch. D. 600.

With respect to distresses for rent a landlord is not entitled to distrain for or be paid in full, rent accrued since the commencement of the winding-up, where the liquidator has done nothing except abstain from trying to get rid of or surrender the property of which the company is lessee. *Re Oak Pits Colliery Co.*, 21 Ch. D. 322. In this case Lindley, L.J., in delivering the judgment of the court, reviewed the authorities on the subject. His lordship said, p. 329, "The decisions may be grouped into two classes, the first relating to rent in arrear, at the commencement of the winding-up; the second relating to rent accruing subsequently to that date. *First*, as to rent in arrear at the commencement of the winding-up. 1. If the landlord is a legal creditor of the company in respect of rent in arrear at the commencement of its winding-up, he is not allowed to distrain for the arrears of rent, but must prove his debt like any other creditor. *In re Traders, &c. Co.*, L. R., 19 Eq. 60; where the distress was for tolls in arrear, *In re Coal Consumers' Association*, 4 Ch. D. 625; where the liquidator retained possession, but not for any purpose of liquidation; *Thomas v. Patent Lionite Co.*, 17 Ch. D. 250, a case of voluntary winding-up followed by a compulsory order. 2. Moreover, in cases of this kind the circumstance that the liquidator has retained possession and carried on the company's works, has been held not to entitle a landlord or mortgagee (with power of distress as and for rent) to distrain for rent in arrear in the winding-up. *In re North Yorks. Iron Co.*, 7 Ch. D. 661; *In re Brown, Bayley & Dixon*, 18

Ch. D. 649; *In re South Kensington Co-operative Stores*, 17 Ch. D. 161. 3. If, however, the landlord is not a legal creditor of the company by reason of the company not being his tenant, he is permitted to distrain even for rent in arrear at the commencement of the winding-up. *In re Exhall Coal Mining Co.*, 4 D. J. & S. 377; see *In re Carriage, &c. Association*, 23 Ch. D. 154. 4. And in such a case he will be allowed to distrain although the liquidator offers to allow the arrears to be proved as a debt in the winding-up. *In re Regent, &c. Stores*, 8 Ch. D. 616. Secondly, as to rent accruing after the commencement of the winding-up. 1. If the liquidator has retained possession for the purposes of winding-up, or if he has used the property for carrying on the company's business, or has kept the property in order to sell it or to do the best he can with it, the landlord will be allowed to distrain for rent which has become due since the winding-up. *In re Lundy Granite Co., L. R.*, 6 Ch. 462; *In re North Yorks. Iron Co., sup.*; *In re Silkstone, &c. Co.*, 17 Ch. D. 158; *In re South Kensington Co-operative Stores, sup.*, and see *In re Brown, Bayley and Dixon, sup.*, per Fry, J. 2. But if he has kept possession by arrangement with the landlord and for his benefit as well as for the benefit of the company, and there is no agreement with the liquidator that he shall pay rent, the landlord is not allowed to distrain. *In re Progress Assurance Co., L. R.*, 9 Eq. 370."

Under a demise to a company which contained a power of re-entry if the rent should be in arrear for thirty days, or if the company "should be wound up voluntarily or by compulsion," it was held that a right to re-enter accrued on the making of a winding-up order, and that, the title of the landlord to re-enter being clear, the court ought to order possession to be given to him, and ought not to put him to the useless expense of bringing an action to which there was no defence. *Gen. Share, &c. Co. v. Wetley, &c. Co.*, 20 Ch. D. 260. The 10th section of the Judicature Act, 1875, *ante*, pp. 38, 39, does not import into winding-up the 34th section of the Bankruptcy Act, 1869, which gives a landlord priority for a year's rent. *Thomas v. Patent Lionite Co.*, 17 Ch. D. 250.

As regards mortgagees when an order has been made to wind up a company, a mortgagee who has commenced an action against the company to realize his security ought to have leave, under sect. 87, to proceed with his action, except under special circumstances, or unless the same relief is given to him in the winding-up as he would obtain in the action. *Lloyd v. David Lloyd & Co.*, 6 Ch. D. 339. Mortgagees having a right of distress to enforce payment of interest will be allowed to distrain after a winding-up for interest accrued while the liquidators were in possession, but not for arrears accrued before the winding-up. *In re Brown, Bayley and Dixon*, 18 Ch. D. 649.

With reference to executions, &c., notwithstanding the terms of sect. 163, the court has power to permit the attachments, &c., commenced before the winding-up, to have due effect. *Gt. Ship Co.*, 33 Law J. Ch. 245; *London Cotton Co., L. R.*, 2 Eq. 53; *Re Bastow & Co., L. R.*, 4 Eq. 68. But in *In re Universal Disinfectors Co., L.*

R., 20 Eq. 162, Jessel, M.R., doubted whether the court had power after the winding-up had commenced to permit executions, &c., to issue. Proceeding to a sale under an execution perfected by seizure before the commencement of a winding-up is a "proceeding" within the 87th section, and will be restrained if the court has reason to doubt the *bona fides* of the transaction. *In re Perkins Beach Lead Mining Co.*, 7 Ch. D. 371. It has been held that where a creditor gives indulgence, this is sufficient for the court to allow him to proceed with an execution. *Re Taylor*, 8 Ch. D. 183; *Re Richards & Co.*, 11 Ch. D. 676. But this was doubted in *In re Vron Coll. Co.*, 20 Ch. D. 442. In *In re Printing, &c. Co.*, 8 Ch. D. 535, it was held that the rule in bankruptcy by which (Bankruptcy Act, 1869, s. 87) an execution creditor for more than 50*l.* loses the benefit of his execution if the sheriff, within fourteen days after a sale, has notice of bankruptcy, applies, under sect. 10 of the Judicature Act, 1875 (*ante*, pp. 38, 39), to a company in liquidation. But this case was overruled by *In re Withernsea Brickworks*, 16 Ch. D. 337. Where an execution against the goods of a company which is being wound up is avoided by the Companies Act, 1862, s. 163, it is avoided altogether, and the creditor retains no interest under it. *Ex parte Fourdrinier*, 21 Ch. D. 510. When a company has in this country been ordered to be wound up, judgment creditors who are in this country, and have proved under the winding-up, will not be allowed to attach property in India belonging to the company. *In re Oriental, &c. Co.*; *Ex parte Scinde R. Co.*, L. R., 9 Ch. 557. If execution has been issued for a sum on which the solicitors of the judgment creditor have a lien, the court will not interfere with the execution to the prejudice of the lien. *Ex parte Smith*, L. R., 3 Ch. 125.

After the winding-up order, the unpaid share capital of guarantee limited companies divided into shares is assets, and in the nature of a specialty debt due to the company (s. 90). The court may have regard to the wishes of creditors or contributories, and may direct meetings to be held to ascertain such wishes (s. 91, *ante*, p. 434). The court may from time to time appoint and remove official liquidators and fix their remuneration (ss. 92, 93). Where there was (1) a winding-up petition; (2) a provisional liquidator appointed; (3) a resolution for voluntary winding-up, continued under the supervision of the court, it was held that the date of the appointment of the provisional liquidator was the commencement of the winding-up. *In re Colonial Trusts Corporation*, 15 Ch. D. 465. The liquidators are to place under their control the property of the company (s. 94), and may, with the sanction of the court, institute or defend legal proceedings; carry on the business of the company, so far as necessary to wind it up; sell and convey the real and personal property of the company; do all acts and execute, &c., all deeds, receipts, and documents and use the company's seal; prove in bankruptcy against the estate of any contributory; draw, &c., bills or notes on behalf of, and raise money on the security of the assets of, the company; take out letters of administration to the estate of a deceased contributory; do all

other things necessary for winding-up; and appoint a solicitor (ss. 95—97). The solicitor appointed by the official liquidator has no claim against him personally for the costs of the winding-up, even though an order has been made on his application that the costs should be taxed and paid by him to the solicitor. *In re Anglo-Moravian, &c. R. Co., Ex parte Watkin*, 1 Ch. D. C. A. 130; *Re Trueman's Estate*, L. R., 14 Eq. 278. There is no jurisdiction to give strangers to the company, being neither creditors nor contributories, and having no charge on the assets, leave to sue in the name of the company. *Cape Breton Co. v. Fenn*, 17 Ch. D. 198. A scheme for the reconstruction of a company is not a sale within s. 95. *Re Albert Co.*, L. R., 6 Ch. 381. In order to give the court jurisdiction to sanction a contract by the liquidator in carrying on the business of the company under this section, it must be shown that its object is the beneficial winding-up of the company, and that it is highly expedient for that purpose, and not that it is to facilitate the reconstruction of the company. *In re Wreck Recovery and Salvage Co.*, 15 Ch. D. 353. And the court may order that any of the above powers may be exercised without the sanction or intervention of the court (s. 96).

Ordinary Powers of the Court.] The court shall settle the list of contributories; rectify register of members, and cause assets to be collected and applied in discharge of liabilities (s. 98). See *Sichell's Case*, L. R., 3 Ch. 119. Also shall distinguish between those who are contributories in their own right and as representatives of others. Where the personal representatives of a deceased contributory are placed on the list, his heirs or devisees need not be unless the court thinks fit (s. 99). The court, after a winding up order is made, may require any contributory on the list, trustee, receiver, banker, or agent or officer of the company, to deliver any property of the company in his hands, to which the company is *prima facie* entitled, to the official liquidator (s. 100). *Ex parte Hawkins*, L. R., 3 Ch. 787. Also may order debts due from a contributory to be paid, exclusive of money due under any call, and may, in unlimited companies, allow a set-off in respect of ordinary debts due to the contributory, not being for *dividend or profit*; and when all creditors are paid in full, a set-off may be allowed against calls, whether the company be limited or unlimited (s. 101). See *Calisher's Case*, L. R., 5 Eq. 214; *Barnett's Case*, L. R., 19 Eq. 449. Whether directors can release a contributory without the sanction of the court. *Qu. James v. May*, L. R., 6 H. L. 328. The point was not decided, although so stated in the head note. See judgment of Lord Cairns, *ib.*, p. 334; cons. the observations of Hall, V.-C., *Heritage v. Paine*, 2 Ch. D. 594, 605.

Where an unlimited company is being wound up by the court, a contributory can set off a debt due to him from the company against calls. *Gibbs' and West's Case*, L. R., 10 Eq. 312, but not where a limited company is being wound up by the court (*Grissell's Case*, L. R., 1 Ch. 528; *Calisher's Case*, L. R., 5 Eq. 214; *Habershon's Case*, *ib.* 286); nor where the company is being voluntarily wound up

under supervision (*Sankey & Co. v. Marsh*, L. R., 6 Ex. 185; *Barnett's Case*, L. R., 19 Eq. 449); *secus*, it has been held where the company is being voluntarily wound up. *Brighton Arcade Co. v. Dowling*, L. R., 3 C. P. 175. But this case was disapproved of in *Black & Co's. Case*, L. R., 8 Ch. 254, and cannot be relied upon. See also *In re Whitehouse & Co.*, 9 Ch. D. 595. Nor can a future dividend be set-off. *Black & Co's Case*, *sup.* An ordinary creditor of a company may set-off his debt against any claim by the company. *Anderson's Case*, L. R., 3 Eq. 337; see *Grissell's Case*, L. R., 1 Ch. 528; *Smith's Case* and *Gledstane's Case*, *ib.* 538. But not a person who has been declared liable to the company under s. 165, *post*, p. 494. *Ex parte Pelly*, 21 Ch. D. 492. *In re Carriage, &c., Association*, 27 Ch. D. 322. A debtor to a company, who at the time of the winding up has no right of set-off, cannot acquire it by subsequently taking a transfer of a debt due by the company. *Ex parte Theys*, 25 Ch. D. 587; see the judgment of the Earl of Selborne, L.-C., *ib.*, p. 592. A set-off was allowed between debts due from *bankrupt* contributories and calls made where the company was being wound up. *Re Duckworth*, L. R., 2 Ch. 578; see *Ex parte Strang*, L. R., 5 Ch. 492; *Anglo-Greek, &c., Co.*, L. R., 4 Ch. 174. This was under the Bankruptcy Act of 1849, s. 171. Section 10 of the Judicature Act, 1875, *ante*, p. 38, imports into the winding up of companies the rules as to set-off in bankruptcy. *Mersey, &c., Co. v. Naylor & Co.*, 9 App. C. 434; *Ex parte Theys*, 25 Ch. D. 587. By the Bankruptcy Act of 1883 (46 & 47 Vict. c. 52), "Where there have been mutual credits, mutual debts, or other mutual dealings between a debtor against whom a receiving order shall have been made under this act, and any other person proving or claiming to prove a debt under such receiving order, an account shall be taken of what is due from the one party to the other in respect of such mutual dealings, and the sum due from the one party shall be set off against any sum due from the other party, and the balance of such account, and no more, shall be claimed or paid on either side respectively; but a person shall not be entitled under this section to claim the benefit of any set-off against the property of a debtor in any case where he had at the time of giving credit to the debtor notice of an act of bankruptcy committed by the debtor and available against him (s. 38). This is substantially the same as secs. 39 of the Act of 1869, and 171 of the 12 & 13 Vict. c. 106, both now repealed. The object of sect. 39 of the Bankruptcy Act, 1869, and of course of sect. 38 of the Act of 1883, which is substantially the same, is that where there are mutual accounts, a secret act of bankruptcy should not stop the currency of those accounts; the existence of mutual dealings and accounts protects the credits and debts on each side from the operation of the act of bankruptcy until notice of it. *Elliott v. Turquand*, 7 App. C. 79. As to a set-off between the company and holders of their debentures, see *Ex parte James*, L. R., 8 Eq. 225. As to the administration of assets by the court under the Judicature Act, 1875, s. 10, see *ante*, p. 38.

When the winding up has commenced, the creditors of the company

of every degree are paid rateably. *Ex parte Ashbury*, L. R., 5 Eq. 223. A creditor, who is also a shareholder, is entitled to receive a dividend on his debt if he has paid all calls. *Grissell's Case*, *sup.*; and the law in that respect has not been altered by the 10th section of the Judicature Act, 1875, *ante*, p. 38. *In re West of England Bank*, 12 Ch. D. 823. But a director is not entitled to receive a dividend on fees due to him, until outside creditors are paid. *Cannon's Case*, W. N., 1885, p. 175. Even servants were not entitled to priority in payment. *Chapman's Case*, L. R., 1 Eq. 346. Now, by the 46 & 47 Vict. c. 28 (in force 1st September, 1883), there shall be paid in priority to other debts, all wages, or salary of any clerk, or servant, in respect of service rendered to the company during *four* months before the commencement of the winding up, not exceeding 50*l.*, and all wages of any labourer or workman in respect of service rendered to the company during *two* months before the commencement of the winding up, all such debts to rank and to abate *inter se* equally (s. 4); and (subject to costs of administration) to be discharged by the liquidator forthwith (s. 5). The limited liability acts have not changed the rights of creditors nor the liability of shareholders, but merely the right of issuing execution into a right to obtain satisfaction by a forced contribution. *Oakes v. Turquand*, L. R., 2 H. L. 325.

A creditor holding security is entitled to prove for the whole amount due to him without regard to part payments *after* his claim is sent in (*Kellock's Case*, L. R., 3 Ch. 769; see *Warrant Finance Company's Case*, L. R., 5 Ch. 86; *Leech's Claim*, L. R., 6 Ch. 388), but he must give credit for part payments received *before* his claim is sent in from other persons liable. *Ex parte Maxoudoff*, L. R., 6 Eq. 582. Where the chief clerk has made a certificate as to debts, so long as the certificate remains unimpeached, the court cannot treat the debts due to outside creditors as not being due from the association, even though the winding up had been ordered under a mistake of law. *In re Arthur Average Association*, 3 Ch. D. 522; in which case *In re London Marine Insurance Association*, L. R., 8 Eq. 176, was questioned. In the case of insurance companies, the amount for which a policy holder is entitled to prove is that which would be required, by a solvent company having the same rate of premium and same capital, to be paid, in order to give the policy holder a policy of the same amount under the same conditions and at the same premium. *Bells and other Cases, Re Albert Co.*, L. R., 9 Eq. 706. Where an insurance company of unlimited liability, formed under 7 & 8 Vict. c. 110, granted policies of insurance, by the terms of which the insured had no claim against the shareholders beyond the amounts unpaid on their shares, and the company was ordered to be wound up, and the assets of the company, including the full amount payable on the shares, were applied in paying the policy-holders and the general creditors *pro rata*, and the balance due to the general creditors was paid by additional calls on the shareholders, it was held that the costs of calling up the unpaid capital, as well as the general costs of the winding up, must be borne wholly by the shareholders, and that

no part was payable out of the limited fund applicable to the claims of the policy-holders. *In re Agriculturist Cattle, &c., Co.*, L. R., 10 Ch. 1; see *In re Accidental Death, &c., Co.*, 7 Ch. D. 568.

A debt due from a company is liable to be barred by the Statute of Limitations and by the laches of the creditor. *Ex parte Forest*, 2 Giff. 42 (on the Acts of 1848—9). In general, however, a winding up order prevents the operation of the Statute of Limitations. See *Wryght's Case*, 5 De G. & S. 244; *In re Gen. Roll. Stock Co.*, L. R., 7 Ch. 646; see Act of 1862, s. 98. The court may make calls to satisfy debts and liabilities and expenses of winding up, and may, in making a call, take into consideration that some of the contributories may partly or wholly fail in making payment (s. 102), and may order payment into the Bank of England (s. 103—4). Estates of a deceased contributory may be administered if his representatives fail to pay calls (s. 105). Orders of court to what extent evidence (s. 106). Creditors not proving within a certain time may be excluded (s. 107). Sec. 108 relates to proceedings in the Stannaries Court on proof of debts. A call may be ordered sufficient to cover claims made though not established. *Contract Corporation*, L. R., 2 Ch. 95. The company must provide for future rent and breaches of covenant under a lease. *Gooch v. London Banking Association*, W. N., 1885, p. 164. The call may be with interest payable from a day named. *Barrow's Case*, L. R., 3 Ch. 784; see *Stocken's Case*, *ib.* 412.

If some shareholders have fully paid up their shares, a call may be made upon those who have not, in order that all may be put on an equality. *Anglesea Co.*, L. R., 1 Ch. 555; *Crookhaven Co.*, L. R., 3 Eq. 69. The court shall adjust the rights of contributories amongst themselves, and distribute any surplus that may remain amongst the parties entitled thereto (s. 109). Under this section the court has jurisdiction to adjust the rights *inter se* of contributories *quâ* contributories; but it cannot enforce equities which persons who, as tortfeasors (being also contributories) have been ordered to pay money under sect. 165, may have against other persons, who happen also to be contributories, to compel them to make good the money so ordered to be paid. *In re Alexandra Palace Co.*, 23 Ch. D. 297. The court will not under the winding-up enforce an alleged contract by the promoters to indemnify persons signing the subscription contract against all liability in respect of the shares by directing a call payable primarily by the promoters only. *Addison's Case*, L. R., 20 Eq. 620. Shareholders who have paid cash for their shares, and shareholders who have their shares fully paid up in consideration of property conveyed to the company, have equal rights to participate in the surplus, although the former may be entitled to a preference in respect of dividend. *London India Rubber Co.*, L. R., 5 Eq. 519. In *In re Bangor, &c. Co.*, L. R., 20 Eq. 59, where a company having full power to increase their capital to such amount and upon such terms as they should deem expedient, raised further capital by the issue of preference shares entitled to a preferential interest of 10 per cent. per annum; the amount of such shares to be repaid on six months' notice with

25 per cent. bonus, such payment of interest, repayment, and bonus to take place before any dividend, interest, or other money was payable to the original shareholders, it was held that the company had conferred a preference as to *capital*, as well as dividend, upon the new shareholders, and that they were entitled on a winding-up to the surplus assets in priority to the original shareholders. Where the articles of association of a limited company whose capital was divided into preferred and deferred shares provided that, subject to the difference in dividing the profits, the preferred and deferred shares should rank equally in the company, and that there should be no difference between a preferred and deferred shareholder in respect to his *status* and liability to the debts and engagements of the company, and the articles also provided for the dissolution of the company, on the voluntary winding-up of the company, it was held that the two classes of shareholders were in the same position, and entitled to the capital *pro ratâ*. *Griffith v. Paget*, 6 Ch. D. 511.

Where the assets are insufficient, the court may order the costs of winding-up to be paid in such order of priority as it thinks fit (s. 110). If the assets of a company in compulsory liquidation are insufficient for payment of the costs of the winding up, the official liquidator is not entitled to any remuneration. *In re Dronfield Silkstone Coal Co.*, 23 Ch. D. 511. It was held also that in such cases the costs of realization are payable out of the assets in priority to costs incurred in internal litigation. But this case has not been followed on the latter point, and is contrary in principle to the prior case of *In re Home Investment Soc.*, 14 Ch. D. 167, and the later one of *In re Dominion of Canada Plumbago Co.*, 27 Ch. D. 33, in which it was held that a successful litigant whose costs are ordered to be paid by the liquidator, is entitled to immediate payment of those costs in priority to the general costs of liquidation including costs of realization.

On the affairs of a company being completely wound up, the court shall order that it be dissolved from the date of the order (s. 111); which is to be reported to the Registrar, and a minute of it made by him (s. 112). The petition for winding-up was a *lis pendens* (s. 114). See *Ex parte Thornton*, L. R., 2 Ch. 171. But this section is repealed. 30 & 31 Vict. c. 47, s. 1.

On a compulsory winding-up, the court has no power to sanction the transfer of the company's business to a new company in consideration of payment by the latter of the debts of the former. *Gen. Exch. Bank*, 15 W. R., 477. But if a company has power to purchase the business of another company, an agreement by the former to pay the debts of the latter is valid. *Re Saxon Life, &c. Co.*, 1 D., J. & S. 29; see *Hunt's Case*, 1 H. & M. 79.

Extraordinary Powers of Court.] These are:—To summon persons known or suspected to have property of, or supposed to be indebted to, the company, or deemed capable of giving information as to its affairs, and to require them to produce books, papers, &c. in

their custody (without prejudice to any lien), and, if necessary, to cause such persons to be apprehended (s. 115). *Massey v. Allen*, 9 Ch. D. 164. The only ground on which a witness summoned to attend for examination can contest the validity of the summons is a want of jurisdiction to issue the summons or make the order. If the jurisdiction exists, a witness has no *locus standi* to appeal against the order. The examination under this section is as a general rule entrusted to the liquidator, but it is discretionary with the judge whether he will entrust either the whole or any part of the examination to creditors or contributories, and whether he will or will not confine that examination within certain limits. *Whitworth's Case*, 19 Ch. D. 118; *In re Penysyflog Mining Co.*, 30 L. T., N. S. 861. To examine persons on oath (s. 117). To cause contributories, about to abscond, or remove or conceal their property, to be arrested, and their books, &c., seized (s. 118). See *Imperial, &c. Co.*, L. R., 5 Eq. 264. The powers given to the court are cumulative, not restrictive (s. 119). As to enforcement of, and appeal from, orders, see ss. 120 to 129. As a general rule an application to discharge an order made in chambers to place a person on the list of contributories of a company in liquidation ought to be made within the time (three weeks) which is limited by s. 124 of the Companies Act, 1862, for bringing an appeal. *Dickson's Case*, 12 Ch. D. 298.

SEC. 4.—Voluntary Winding-up.

<i>Not subject to Supervision of Court</i>	487	<i>Not subject to Supervision of Court</i>	
<i>In what Cases</i>	487	—continued.	
<i>Resolution for</i>	487	<i>Vacancies in Office of Liquidator</i>	489
<i>Commencement of</i>	487	<i>Removal of Liquidator</i>	489
<i>Staying Proceedings against</i>		<i>Dissolution of Company</i>	489
<i>Company</i>	487	<i>Costs of Winding-up</i>	489
<i>Discontinuing Business</i>	487		
<i>Consequences of Winding-up</i> ...	487	<i>Subject to Supervision</i>	489
<i>Liquidators, their Powers and</i>		<i>In what Cases</i>	489
<i>Duties</i>	487	<i>When commences</i>	489
<i>When Liquidators appointed</i>		<i>Appointment of Liquidators</i> ...	489
<i>by Creditors</i>	489	<i>Dispositions, after Commence-</i>	
<i>Application to Court</i>	489	<i>ment of Winding-up, void</i> ...	489

Not subject to Supervision of Court.] A company may be voluntarily wound up (s. 129)—(1.) When the period has arrived, or the event occurs, at or upon which it is to terminate by the articles of association, and a resolution for voluntary winding-up has been passed in general meeting; (2.) When a special resolution is passed for the purpose. Where there was a notice “for the purpose of considering and, if so determined on, of passing a resolution to wind up voluntarily,” followed by a resolution to that effect, it was held that this was invalid as an *extraordinary resolution*, and that as a special resolution it required confirmation at a second meeting. See sec. 51. *In re Bridport Old Brewery Co.*, L. R., 2 Ch. 191. (3.) When an extra-

ordinary resolution is passed that, by reason of liabilities, it cannot continue business, and that a winding-up is advisable. The notice of the meeting should express that it is intended to propose a resolution that the company is unable, by reason of its liabilities, to continue its business. *In re Silkstone Fall Colliery Co.*, 1 Ch. D. 38. When there is a preliminary and confirmatory resolution, the commencement of the winding-up dates from the passing of the second resolution. See sec. 130; *Dawes' Case*, L. R., 6 Eq. 232; acc. *Weston's Case*, L. R., 4 Ch. 20, 25.

On a voluntary winding-up the court has power to stay proceedings against the company. *Keynsham Co.*, 33 Bea. 123; *Sablonière Hotel Co.*, L. R., 3 Eq. 74. After a resolution for voluntary winding-up, the company is to cease to carry on business, except for the purpose of beneficially winding it up, and transfers of shares, except with the sanction of the liquidators, are void (s. 131). See *Biederman v. Stone*, L. R., 2 C. P. 504. The liquidators may refuse their sanction unless the transferor guarantees the liquidators payment by the transferees of all calls. *Clive v. Financial Corporation*, L. R., 16 Eq. 363; *Williams v. Same*, *ib.* In such a case it makes no difference that the winding-up is for the purpose of an amalgamation with another company being effected, the agreement for which is *ultra vires*, *ib.* Notice of the resolution is to be advertised (s. 132). On a voluntary winding-up the following consequences ensue: (1) the property of the company is to be applied in satisfaction of its liabilities *pari passu*, and subject thereto is to be distributed amongst the members, unless otherwise provided by the regulations of the company; (2—5) liquidators are to be appointed in general meeting, on which the powers of directors are to cease, except so far as a general meeting, or liquidators, may sanction the continuance of them. A resolution appointing a liquidator is operative only when there is an effective resolution to wind up. *In re Indian Zoedone Co.*, 26 Ch. D. 70. After a winding-up resolution has been passed liquidators may be appointed at a meeting without special notice of the intention to propose their appointment. *In re Welsh Flannel Co.*, L. R., 20 Eq. 360; (6) where several liquidators are appointed, every power may be exercised by one or more, as may be determined at the time of their appointment,—in default of such determination, by any number not less than two; (7, 8) the liquidators may, *without the sanction of the court*, exercise all powers given to official liquidators, also the powers of the court to settle the list of contributories, every list so settled being *prima facie* evidence of liability; (9, 10) may also exercise other powers corresponding with those given to the court by sections 102 and 109 (*ante*, p. 485) (s. 133). Under this section one liquidator, not having power to act alone at the time of his appointment, cannot use the seal of the company even for the purpose of carrying into effect an agreement made by both liquidators, the validity of which is undisputed, and if one die a new liquidator must be appointed. *Re Metrop. Bank and Jones*, L. R., 2 Ch. D. 366. Nor can one liquidator accept, &c. bills generally so as to bind the company, though authorized to do so by

his co-liquidators. *Ex parte Birmingham, &c. Co.*, L. R., 3 Ch. 651. But all it would seem may authorize the acceptance, &c. by one, of any particular bill. *Bolognesi's Case*, L. R., 5 Ch. 567. Consider, however, *Ex parte Agra, &c. Bank*, L. R., 6 Ch. 206, and the observations, *ib.*, p. 210. The official liquidator is not personally liable for costs to the solicitor in the liquidation. *Re Truman's Estate*, L. R., 14 Eq. 278; see *Ex parte Watkin*, L. R., 1 Ch. D. 130. Sec. 134 is similar to sec. 90 (*ante*, p. 481), as to guarantee companies, the power of the liquidator being substituted for that of the court.

A company in course of voluntary winding-up may delegate to creditors the power of appointing liquidators, and such arrangement is binding on the company if sanctioned by an extraordinary resolution, and on creditors if acceded to by three-fourths in number and value (ss. 135, 136). Any creditor or contributory may, within three weeks of the arrangement, appeal to the court against it (s. 137). Where a company is being wound up voluntarily, the liquidators or any contributory may apply to the court to determine any question arising (s. 138). See *Rance's Case*, L. R., 6 Ch. 104, cited *post*, p. 495. The liquidators may summon general and annual meetings of the company (s. 139). The company may fill up vacancies in the office of liquidators (s. 140), and the court may appoint or remove them (s. 141). The jurisdiction of the court to remove a liquidator for "due cause shown" is not to be exercised in the same way as if the power had been to remove the liquidator "if the court shall think fit." Some unfitness in the liquidator must be shown in order to justify his removal. *In re Sir John Moore Co.*, 12 Ch. D. 325; *Marseilles R. Co.*, L. R., 4 Eq. 692.

When the affairs of the company are fully wound up, the liquidators are to render an account to a general meeting of the company and make a return to the registrar of the meeting having been held. Three months from the registration of the return the company shall be deemed to be dissolved (ss. 142, 143). The dissolution of the company under the last section would seem to deprive the court of its jurisdiction over the company, unless the dissolution can be impeached on the ground of fraud. *In re Pinto Silver Mining Co.*, 8 Ch. D. 273; *In re Lon. &c. Insurance Co.*, 11 Ch. D. 140; see *Crookhaven Mining Co.*, L. R., 3 Eq. 69. The costs of the winding-up have priority of payment (s. 144). The voluntary winding-up is no bar to a winding-up by the court (s. 145), in which case the court may adopt the proceedings under the voluntary winding-up (s. 146).

Subject to the Supervision of the Court.] When a voluntary winding-up has commenced, the court may order it to continue, subject to the supervision of the court, having regard to the wishes of contributories and creditors (ss. 147—149). This order does not avoid all proceedings under the voluntary resolution. *Thomas v. Patent Lionite Co.*, 17 Ch. D. 250. An order continuing the voluntary winding-up of a company under the supervision of the court can only be obtained on a petition by the company, a creditor, or a contributory,

and a claim against a company for unliquidated damages on account of alleged fraudulent representation does not constitute the claimant a creditor. *In re Pen-y-Van Colliery Co.*, 6 Ch. D. 477. If there is a resolution for a voluntary winding up, and afterwards a petition for a compulsory winding up, the commencement of the winding up is from the resolution, per Cotton, L.J.; from the presentation of the petition, per Lindley and Fry, L.JJ. *Re Taurine Co.*, 25 Ch. D. 118. But the court will not interfere in general with a voluntary winding-up on the application of a contributory unless there has been fraud or undue influence in passing the resolution. *In re Lon. and Merc. Dis. Co.*, L. R. 1 Eq. 277; *In re Gold Co.*, 11 Ch. D. 701; *Beaujolais Wine Co.*, L. R., 3 Ch. 15. See *In re Imperial Bank of China*, L. R., 1 Ch. 339.

A voluntary winding-up under supervision, like an ordinary voluntary winding-up, is to be deemed to commence from the date of the second resolution, and not from the presentation of the petition on which the order is founded. *Weston's Case*, L. R., 4 Ch. 20. The court may appoint additional liquidators, remove liquidators, and fill up vacancies (s. 150). See *Marseilles, &c. Co.*, L. R., 4 Eq. 692. The court may appoint a liquidator in the first instance if the contributories do not. *London Quays, &c. Co.*, L. R., 3 Ch. 394. The liquidators may, subject to any restrictions by the court, exercise all their powers as under a voluntary winding-up, but, save as aforesaid, the orders made by the court shall have the same effect for all purposes as if the winding-up were by the court; and the expression "official liquidators" shall mean liquidators in a winding-up under supervision (s. 151). On a change from voluntary to compulsory winding-up, the liquidators under the former may be appointed official liquidators under the latter (s. 152). When a company is being wound up by, or subject to the supervision of, the court, dispositions of the property of the company and transfers of shares between the commencement of, and order for, winding-up, are, unless otherwise ordered, void (s. 153). Sec. 153 does not invalidate contracts for the sale of shares entered into but not completed by transfer before the presentation of a petition for winding-up. *Chapman v. Shepherd, Whitehead v. Izod*, L. R., 2 C. P. 228; *Ex parte Contract Corp.*, L. R., 3 Ch. 105; see *Rudge v. Bowman*, L. R., 3 Q. B. 689. Neither does it invalidate completed dispositions of the property of the company made *bonâ fide* between the time of presenting the petition for, and the time of making, the order; *aliter*, where such dispositions rest in contract only. *Ex parte Pearson, Re Wilts Iron Co.*, L. R., 3 Ch. 443. See *Campbell v. Compagnie Générale, &c.*, 2 Ch. D. 181. A contract to transfer, entered into in ignorance of a petition for winding-up, having been presented, cannot be enforced against the purchaser so as to make him a contributory. *Emmerson's Case*, L. R., 1 Ch. 433.

SEC. 5.—*Miscellaneous Provisions.*

<i>Documents of Company prima facie</i>	491	<i>Dissentient Shareholders</i>	493, 494
<i>Evidence</i>	491	<i>Attachments against Companies</i> ...	494
<i>Assignee of Choses in Action</i>	491	<i>Fraudulent Preference</i>	494
<i>Company Lessee—Rent</i>	491	<i>Repayment of Money by Directors</i>	494, 495
<i>Compromises as to Debts, Calls, &c.</i>	492, 493	<i>Company a Private Partnership</i> ...	495
<i>Three-fourths of Creditors</i>	492	<i>Mutilation, &c., of Documents</i>	495
<i>Sale to another Company</i>	492	<i>Prosecution of Directors, &c.</i>	496

The books and documents of the company are *prima facie* evidence as between the contributories and liquidators (s. 154), and may be inspected, by order of the court, by creditors and contributories (s. 156). Sec. 155 relates to the custody and disposal of books and documents. Persons to whom choses in action of a company are assigned, in pursuance of the act, may sue or defend in their own names (s. 157). Debts of every kind, contingent and otherwise, may be proved against the company (s. 158). A creditor holding security is entitled to prove for the whole amount that is due to him and not merely as in bankruptcy, for the balance remaining due after realizing or valuing his security. A secured creditor is entitled to prove for the amount due at the time when his claim is sent in without regard to securities which have been realized by him between the sending in his claim and its being adjudicated upon. *Kellock's Case, Re Xerxes Wine Co., Ex parte Alliance Bank*, L. R., 3 Ch. 769. A lessor is entitled as against a company lessee, where the lease is not disclaimed, to have entered a claim for the whole future rent, the lessor not to receive more than the lessee might become liable to pay. *Haylor Granite Co.*, L. R., 1 Ch. 77. In *Horsley's Claim*, L. R., 5 Eq. 561, a similar order had been made as in the preceding case, but on a dividend being paid by the liquidators, the lessor was held not entitled to have a sum equal to the dividend upon the amount at which the future rent was estimated impounded to secure payment of such rent. See *In re Gartness Iron Co.*, L. R., 10 Eq. 412. In *Re Telegraph Construction Co.*, *ib.* 384, it was held that when a limited company reduces its capital a lessor is entitled to have a sum impounded to answer future rent. In *Oppenheimer v. Br. & For. &c. Bank*, 6 Ch. D. 744, the lessor was held entitled to have a sum invested in consols, which with half-yearly rents would be sufficient to produce the amount of the rent. And see *Gooch v. Lon. Bank. Assn.*, W. N., 1885, p. 164. In certain cases, with the sanction of the court, or when the winding-up is altogether voluntary, with the sanction of an extraordinary resolution of the company, some creditors may be paid in full and compromises effected as to debts, calls, and liabilities (ss. 159, 160). The court will not sanction a compromise merely because it is approved of by a general meeting without being satisfied as to its propriety. *Ex parte Miller*, L. R., 2 Ch. 692. The court has no jurisdiction to order the liquidator in a winding-up to consent to a compromise with a contributory. *Pearson's Case*, L. R. 7 Ch. 309. Compromises with some of the existing members of a company under a

winding-up effected by the liquidators, with the sanction of the court cannot operate as a release to the past members. The two classes of persons do not stand to each other in the relation of principal and surety. *Helbert v. Banner*, L. R., 5 H. L. 28.

By the 33 & 34 Vict. c. 104, cited as "The Joint-Stock Companies Arrangement Act, 1870" (s. 1), "Where any compromise or arrangement shall be proposed between a company which is, *at the time of the passing of this act or afterwards*, in the course of being wound up, either voluntarily or by or under the supervision of the court, under the Companies Acts, 1862 and 1867, or either of them, and the creditors of such company, or any class of such creditors; it shall be lawful for the court, in addition to any other of its powers, on the application in a summary way of any creditor or the liquidator, to order that a meeting of such creditors or class of creditors shall be summoned in such manner as the court shall direct; and if a majority in number, representing three-fourths in value of such creditors or class of creditors, present either in person or by proxy at such meeting, shall agree to any arrangement or compromise, such arrangement or compromise shall, if sanctioned by an order of the court, be binding on all such creditors or class of creditors, as the case may be, and also on the liquidator and contributories of the said company" (s. 2).

"The word 'company' in this act shall mean any company liable to be wound up under 'The Companies Act, 1862'" (s. 3).

"This act shall be read and construed as part of 'The Companies Act, 1862'" (s. 4).

It is sufficient that the sanction of three-fourths in value of the creditors present at the meeting should be given to any proposed arrangement. *In re Bessemer Steel and Ordnance Co.*, 1 Ch. D. 251. If a scheme of arrangement has received the sanction of the majorities of contributories and creditors required by the acts, and also the sanction of the court, it is not material in what order these sanctions have been obtained. When the arrangement is a fair one, and is likely to be beneficial to all parties, the court will not be astute to find technical defects in the proceedings. *In re Dynvor, &c. Co.*, 11 Ch. D. 605. *In Re Albert Life Co.*, L. R., 6 Ch. 381, it was held that the court had no power under ss. 159 and 160 of the Act of 1862 to sanction an arrangement by which a minority of creditors or contributories were bound to accept a compromise against their will, and that having regard to the difficulties as to the value of policies, &c., it could not exercise its powers under the Act of 1870.

Where a company is being wound up altogether voluntarily (or voluntarily under the supervision of the court. *Re Imperial Mer. Cr. Assn.*, L. R., 12 Eq. 504), and its business proposed to be sold to another company, the liquidators may, under a special resolution, or where there is a winding-up order within the year, with the sanction of the court, receive payment wholly or in part in shares, &c., of the latter, but a dissentient from such an arrangement may require, *within seven days*, the liquidators to abstain from carrying out the arrangement or to purchase his interest, at a price which, if not agreed upon,

is to be settled under the arbitration clauses of "The Companies Clauses Act, 1845," (J. S. Act of 1862, ss. 161, 162).

Sec. 161 clearly contemplates a sale of the assets of the liquidating company for such an equivalent in value as is pointed out in that section, and does not contemplate the subjecting of the shareholders in the liquidating company, without their unanimous consent, to a fresh and original liability in the shape of a guarantee. Per Lord Cairns, L. C., *Clinch v. Financial Corporation*, L. R., 4 Ch. 121. An agreement by a liquidating company, A., to sell to company B., in consideration of shares to be allotted in B. to the shareholders of A., so much to be taken as paid thereon, the assets of A. to be realized and applied first in payment of its debts; then towards payment of the balance of such shares in B.; in the event of a deficiency, a call to be made on the shareholders of A. to make it good,—is void, as being *ultra vires*, and not within s. 161. *Ib.* See *Imp. Bank of China, &c. v. Bank of Hindustan*, L. R., 6 Eq. 91; *Vining's Case*, L. R., 6 Ch. 96; *Ex parte Fox*, *ib.* 176; *Southall v. Br. Mut. &c. Society*, L. R., 6 Ch. 614. *Re Marine Investment Co.*, L. R., 8 Ch. 702. This section only authorizes a sale to a company, not to a person about to form a company. *Bird v. Bird's Patent, &c. Co.*, L. R., 9 Ch. 358. Where at a general meeting of a limited company, having its capital divided into preferred and deferred shares, resolutions were passed by the statutory majority for a voluntary liquidation and transfer of the business to a new company in consideration of shares in the new company being allotted to the two classes of shareholders in the old company so as to give to the preferred shareholders a different proportion of the capital of the new company from that which they were entitled to in the old company, it was held that this section only enabled the general meeting to decide on the nature of the consideration to be accepted, and not on the mode of its distribution. *Griffith v. Paget*, 5 Ch. D. 894. The only proper mode in which such consideration could be divided among the members of a company would be, under sect. 133 of the Act, according to their rights and interests in the company. *Semble, ib.* An agreement under this section entered into by a company about to be wound up voluntarily for the sale and transfer of its business to another company, is binding upon the creditors of the transferring company. The remedy of a creditor who cannot get payment of his debt, is to obtain a winding-up order before the expiration of a year. *In re City and County Investment Co.*, 13 Ch. D. 475.

It is no objection to such an agreement that it contains a stipulation that the purchasing company shall take a portion only of the assets and liabilities of the transferring company, leaving the rest of the debts to be paid by the liquidator of the transferring company; or that it contains a stipulation that the shares in the purchasing company which are to be given as a consideration for the transfer shall be distributed directly among the shareholders of the transferring company, and not given to the liquidator as part of the assets in the winding-up. *Ib.*

The requisition by any dissentient must be contained in the notice of dissent, which the section requires to be in writing and left not later than seven days after the date of the meeting at which the special resolution was passed. *In re Union Bank of Kingston-upon-Hull*, 13 Ch. D. 808.

A clause in an agreement for the amalgamation of two companies, providing that part of the purchase-money shall be paid to the directors of the selling company by way of bonus, is valid. *Southall v. Br. Mut. &c. Soc.*, *sup.* An unregistered company may register under the act, and thus effect an amalgamation. *Ib.* As to the novation of contracts on the sale of the business of one company to another, see *ante*, p. 463.

As to attachments, &c., under (s. 163), see the cases *ante*, p. 479.

Conveyances or other acts relating to property, by a company, which in the case of an individual trader would, in the event of his bankruptcy, be deemed to be by way of fraudulent preference, are, if the company be wound up, invalid. The presentation of a petition for winding-up or resolution for voluntary winding-up shall be equivalent to an act of bankruptcy in the case of an individual. Conveyances of all the estate and effects of a company to trustees for the benefit of creditors are void (s. 164). Where directors were authorized to borrow money, an equitable mortgage by them of the business premises of the company by deposit of the deeds with their banker as security for payment of an overdrawn account is valid, and not a fraudulent preference within this section. *In re Patent File Co.* (L. R., 6 Ch. 83).

The court, in the course of a winding-up, may compel any director or other official to repay any moneys (with interest) misapplied or retained (s. 165). In order that the court may act under this section, the case against the directors or officer must be clear, and there must be no question of law to be determined. *Roy. Hotel Co. &c.*, L. R., 4 Eq. 244. A director or other official being in a fiduciary position to his company cannot retain a consideration received by him from the promoters as an inducement to become a director; and, if the consideration has been a gift of fully paid-up shares, he may be compelled not only to restore the shares, but to account to the company for the highest value to be attributed to them since they have been in his possession and interest. *McKay's Case*, 2 Ch. D. 1; *Pearson's Case*, 5 Ch. D. 336; *Nant-y-glo Co. v. Grave*, 12 Ch. D. 738. The company may proceed under s. 165, or bring an action. *Ib.*; see *Weston's Case*, 10 Ch. D. 579, and the cases *ante*, p. 425, &c. If directors have by their agreement with a promoter disqualified themselves for exercising a discretion as to the payment of preliminary expenses, and have not used due care and caution in examining into the propriety of paying them, the payment to him is a misapplication of the funds of the company, for which they are liable under this section. *In re Englefield Colliery Co.*, 8 Ch. D. 388; see also *Ex parte Pelly*, 21 Ch. D. 492; *Flitcroft's Case*, *ib.* 519. Where a person has been guilty of a misfeasance in relation to the company, the court can, under s. 165,

order him to pay to the liquidator the value of the shares which he has obtained, although, as he had never agreed to take any but paid-up shares, he cannot be placed on the list of contributories in respect of them. *De Ruvigne's Case*, 5 Ch. D. 306. The executors of a director, deceased, not being officials of a company, cannot, but surviving directors can, be proceeded against by summons taken out under the provisions of this section. *Felton's Executor's Case*, L. R., 1 Eq. 219; *Re Br. Guard, &c. Co.*, 14 Ch. D. 335.

But in the following cases the principles laid down in the preceding cases were held not to apply. Where, upon the formation of a company, promotion money had been improperly paid, of which B. was cognisant, though not a party thereto, and he subsequently became a director, but took no steps to recover the money for the company, it was held that he was not liable for wilful default or for misfeasance under this section. *In re Forest of Dean, &c. Co.*, 10 Ch. D. 450. In *Coventry and Dixon's Case*, 14 Ch. D. 660, A. and B. were appointed, and for some time acted, as directors of a company in which the qualification for a director was the holding 100 shares. Neither of them was the holder of any shares. No act of misfeasance was alleged against either of them for which he would have been liable if he had been a duly qualified director. The company was in course of being wound up. It was held that s. 165 created no new right, but merely provided a summary mode of calling directors to account for acts of impropriety, for which they are liable to an action; that to make a person liable under it, he must be shown to have been guilty of some misconduct by which the company has suffered loss; and that A. and B. were not liable under this section. If a company is intended to be worked as a private partnership, considerations may be applicable in the winding-up of such a company which are not in ordinary companies. Thus in *In re British Seamless Paper Box Co.*, 17 Ch. D. 467, the directors allotted shares without consideration to some of their number. It was proved to the satisfaction of the court that it was intended at that time to work the company as a private partnership, and to admit no other members. All the members consented to what was done, and it was sanctioned at a general meeting of the company. No prospectus was issued. Rather more than a year afterwards, the company being in need of more capital, some fresh shareholders were admitted, who alleged that they were not informed of the manner in which the original shares had been allotted. The company was ordered to be wound up. It was held that no fraud had been committed on the company, and that the official liquidator, as representing the company, could not call upon the directors under this section to account for the value of the shares so allotted to them.

An application may be made under this section and section 138 (*ante*, p. 489), in the case of a company being voluntarily wound up, as well as in the case of a company being wound up by the court, or voluntarily under supervision. *Rance's Case*, L. R., 6 Ch. 104; see *Bank of Gibraltar, &c.*, L. R., 1 Ch. 69.

The destruction, mutilation or falsification of any books, documents

or securities by, or false entry in any register, book or document, by or with the privity of any director, officer or contributory of a company wound up under the act, with intent to defraud or deceive, is a misdemeanor, punishable by not more than two years' imprisonment (s. 166).

The court may order or sanction the prosecution of delinquent directors, &c. (ss. 167, 168). The Lord Chancellor and two equity judges may frame rules of procedure and practice in England (s. 170). See the rules, Lindley on Partnership, 1525 *et seq.* Sections 171—173 provide for the framing of similar rules in Scotland, the Stannaries Court, and Ireland. Section 174 relates to the registration office.

CHAPTER VI.

APPLICATION OF ACT OF 1862 TO COMPANIES NOT FORMED UNDER IT.

<i>Application of Act to existing Companies</i>	496	<i>Application to Unregistered Companies</i>	498
<i>Companies authorized to register under the Act</i>	496, 497	<i>Assurance Companies</i>	498
<i>Existing at Time of Act</i>	497	<i>Colonial—Indian</i>	499
<i>Afterwards formed</i>	497	<i>Dock—Tramway</i>	499
<i>Banking Companies</i>	497	<i>Illegal Companies</i>	499
<i>Effect of Registration of old Companies</i>	497	<i>Schedules to Act</i>	499
<i>Unlimited as Limited</i>	498	<i>Table A</i>	499
		<i>Defunct Companies</i>	499

Application of Act to existing Companies.] The act, with certain exceptions and qualifications, is made applicable to companies formed and registered, or registered only, under “The Joint Stock Companies Acts, 1856 and 1856—7,”—“The Joint Stock Banking Companies Act, 1857,” “The Act to enable Joint Stock Banking Companies to be formed on the Principle of Limited Liability,” 19 & 20 Vict. c. 47, 20 & 21 Vict. c. 14, and 21 & 22 Vict. c. 91, all repealed by the Act of 1862, s. 205, in the same manner in the case of a limited company as if it had been formed and registered under the Act of 1862 as a share limited company, and in the case of a company other than a limited company, as if it had been formed and registered under the Act of 1862 as an unlimited company (ss. 175 to 178).

Companies authorized to register under the Act.] With certain exceptions, companies existing at the time of the commencement of the act (including those registered under any of the above-mentioned

Joint Stock Companies Acts) or afterwards formed under an act of parliament or letters patent, or being a mining company subject to the jurisdiction of the Stannaries, consisting of seven or more members, may, subject to certain regulations, register under the act, although merely for the purpose of winding-up (ss. 179—187).

Banking companies, existing at the date of the act intending to register with limited liability, must give notice of their intention to their customers (s. 188). By s. 182 no banking company claiming to issue notes was to be entitled to limited liability in respect of such issue, but this section was repealed by the 42 and 43 Vict. c. 76, s. 6. By this section it is enacted that "A bank of issue registered as a limited company, either before or after the passing of this Act, shall not be entitled to limited liability in respect of its notes; and the members thereof shall continue liable in respect of its notes in the same manner as if it had been registered as an unlimited company; but in case the general assets of the company are, in the event of the company being wound up, insufficient to satisfy the claims of both the note-holders and the general creditors, then the members, after satisfying the remaining demands of the note-holders, shall be liable to contribute towards payment of the debts of the general creditors a sum equal to the amount received by the note-holders out of the general assets of the company. For the purposes of this section the expression 'the general assets of the company' means the funds available for payment of the general creditor as well as the note-holder. It shall be lawful for any bank of issue registered as a limited company to make a statement on its notes to the effect that the limited liability does not extend to its notes, and that the members of the company continue liable in respect of its notes in the same manner as if it had been registered as an unlimited company" (s. 6). Sections 7 and 8 provide for an annual auditing of the accounts of every banking company registered after the passing of the act.

Registration of old companies under the act is not to affect previously-existing rights and liabilities (Act of 1862, ss. 194, 195). See *Ex parte Fountain*, 11 Jur., N. S. 553.

After the registration of old companies under the act the prior regulations of such companies shall continue in force, and the provisions of the act shall also be applicable to them, subject to certain restrictions, in particular that Table A, Sch. 1, unless adopted by special resolution, shall not apply (s. 196).

Sections 197, 198 contain provisions as to staying proceedings against contributories of an old company, registered under the act, after the presentation of a petition for the winding-up the company.

By the 42 & 43 Vict. c. 76, "Subject as in this act mentioned, any company registered before or after the passing of this act as an unlimited company may register under the Companies Acts, 1862 to 1879, as a limited company, or any company already registered as a limited company may re-register under the provisions of this Act. The registration of an unlimited as a limited company in pursuance of this act shall not affect or prejudice any debts, liabilities, obligations, or

contracts, incurred, or entered into by, to, with, or on behalf of such company prior to registration, and such debts, liabilities, contracts, and obligations may be enforced in manner provided by Part VII. of the Companies Act, 1862, in the case of a company registering in pursuance of that Part" (s. 4).

"An unlimited company may, by the resolution passed by the members when assenting to registration as a limited company under the Companies Acts, 1862 to 1879, and for the purpose of such registration or otherwise, increase the nominal amount of its capital by increasing the nominal amount of each of its shares. Provided, that no part of such increased capital shall be capable of being called up, except in the event of and for the purposes of the company being wound up. And, in cases where no such increase of nominal capital may be resolved upon, an unlimited company may, by such resolution as aforesaid, provide that a portion of its uncalled capital shall not be capable of being called up, except in the event of and for the purposes of the company being wound up. A limited company may by a special resolution declare that any portion of its capital which has not been already called up shall not be capable of being called up, except in the event of and for the purpose of the company being wound up; and thereupon such portion of capital shall not be capable of being called up, except in the event of and for the purposes of the company being wound up" (s. 5).

On registration under the act the former registration is to be closed (s. 9).

The registration is authorized notwithstanding any provisions in the instrument regulating the company (s. 10).

Application of Act to Unregistered Companies.] Unregistered partnerships, associations or companies (except railway companies incorporated by act of parliament), consisting of more than seven members, may be wound up under the provisions of the act, but not voluntarily or subject to the supervision of the court. See *Re Bank of London, &c. Insurance Association*, L. R., 6 Ch. 421. The cases in which such companies may be wound up, and the provisions as to winding-up, are, with some variations, similar to those already mentioned with reference to companies formed under the act (ss. 199 to 204). In *In re Hercules Insurance Co.*, L. R., 11 Eq. 321, after the presentation of a petition to wind up an unregistered company, it was registered under "The Companies Act, 1862," with a view to a voluntary winding-up. An order having been subsequently made on the petition; it was held that, notwithstanding the registration, the company was an unregistered company within the meaning of sect. 203 of the Act of 1862. The court by virtue of sect. 2 of the Life Assurance Companies Act, 1870, has jurisdiction to wind up an unregistered mutual life assurance society under the Companies Act, 1862. But the holders of policies in such a society are not liable to contribute to the payment of any debts; and all that can be done in the winding-up is (after payment of the costs) to distribute the funds of the society among the policy-holders in proportion to the

amounts of their respective claims, *semble*. *In re Gr. Brit. Mut. Ass. Soc.*, 16 Ch. D. 246. In this case a committee of policy-holders was formed, who desired that the court should exercise the power given to it by sect. 22 of the Life Assurance Companies Act, 1870, of reducing the amount of the contracts of the society instead of making a winding-up order, it was held that this power could not be exercised so long as the winding-up order remained, and that the order ought to be discharged, and a meeting of the policy-holders summoned in order to ascertain their wishes, *ib*. A joint stock company formed in India, or the colonies, and incorporated by registration under Indian or colonial law, and having its principal place of business there, with an agent and a branch office in England, may be wound up. *In re Commercial Bank of India*, L. R., 6 Eq. 517. *In re Matheson Brothers Limited*, 27 Ch. D. 225. The exception as to railway companies applies only to companies whose principal object is the construction of a railway, and therefore a company whose principal object is the construction of docks is not brought within the exception by reason of having power also to make a branch railway for purposes connected with the docks. *In re Exmouth Docks Co.*, L. R., 17 Eq. 181. An unregistered tramway company incorporated by a special act does not fall within the exception of "railway companies incorporated by act of parliament" in sect. 199, it may therefore be wound up under that section. *In re Brentford and Isleworth Tramways Co.*, 26 Ch. D. 527. Where proceedings are pending for winding-up an unregistered company, all the provisions of Part IV. (*viz.*, ss. 74 to 173 both inclusive) of the act of 1862, other than those expressly excepted are applicable. *Rudow v. Gt. Brit. Life Soc.*, 17 Ch. D. 600. An illegal company or association cannot be wound up. *In re Padstow, &c. Assn.*, 20 Ch. D. 137.

An unregistered society, the members of which formerly exceeded seven in number but were afterwards reduced to four cannot be wound up. *In re Bolton Ben. Loan Soc.*, 12 Ch. D. 679. A company registered under the former Joint Stock Companies Act, may be wound up voluntarily under the supervision of the court without being re-registered under the Act of 1862. *Re London India Rubber Co.*, L. R., 1 Ch. 329. Sections 205 to 212 relate to the repeal of several acts, and contain various temporary provisions.

Schedules.] The first schedule to the act, Table A., contains various provisions relating to the management of share limited companies, and as to shares, calls on shares, transfer, transmission and forfeiture of shares, conversion of shares into stock, increase in capital, general meetings, votes of members, directors, dividends, accounts and notices; forming, in effect, a series of regulations for the complete management of such companies as choose to adopt them. The other schedules contain various forms and a list of repealed statutes.

Defunct Companies.] By the 43 Vict. c. 19, the registrar of joint stock companies has power under certain regulations to strike defunct companies off the register (s. 7).

JOINT TENANCY—TENANCY IN COMMON —COPARCENARY.

CH. 1.—JOINT TENANCY, p. 500.

CH. 2.—TENANCY IN COMMON, p. 505.

CH. 3.—COPARCENARY, p. 507.

CH. 4.—PARTITION, p. 508.



CHAPTER I.

JOINT TENANCY.

<i>Nature of Interest</i>	500	<i>How created—continued.</i>	
<i>Unities of</i>	501	<i>Children—Issue, &c.</i>	502
1. <i>Interest.</i> 2. <i>Title</i>	501	<i>Enlargement of Class</i>	502
3. <i>Time.</i> 4. <i>Possession</i>	501	<i>Substitution</i>	502
<i>Trustees and Executors</i>	501	<i>To Husband and Wife</i>	502, 503
<i>Survivorship</i>	501	<i>Severance of Joint Tenancy</i>	503
<i>How created</i>	501	<i>Conveyance—Mortgage</i>	503
<i>Grant, &c., to two or more sim-</i>		<i>Release—Agreement</i>	503
<i>plicitur</i>	501	<i>Will does not affect</i>	503
<i>Joint Purchasers—Mortgagees.</i>	501	<i>Treating Share as severed</i>	504
<i>Marriage Articles</i>	501	<i>Copyholds</i>	504
<i>Devise or Bequest</i>	502	<i>Effect of Marriage</i>	504
<i>To Classes</i>	502	<i>Action of Account</i>	504

Nature of Interest.] An estate in joint tenancy is created where real or personal property is conveyed or given to two or more to hold in fee, for life, or other estate. See Lit. ss. 277, and n. (2), 280—281. They are seised *per my et per tout*, that is, each is possessed of every part and of the whole. Lit. s. 288. A seisin *per my et per tout* means, it would seem, not of the *half* (as stated 2 Blac. Com. 182) and of the *whole*, but of *nothing* (*i. e.* separately) and yet of the *whole* (jointly), “*et sic totum tenet et nihil tenet*,” &c. (Co. Lit. 186 a; see note to *Murray v. Hall*, 7 C. B. 455), *my* (*mie*) being not a contraction of *moitié*, but a French word signifying in one sense (but in which it is now rarely used) *not* or *none*. Joint tenancy must arise not by descent or act of law but by conveyance, devise, or other

instrument. Blac. Com. 180. Four things are necessary to constitute a joint tenancy. First. *Unity of interest*. Thus two cannot hold the same property as joint tenants, the one for life the other for years. Co. Lit. 188 a. But two may be joint tenants for their lives, with remainder to one in fee or in tail. See Lit. s. 285. Secondly. *Unity of title*. It must be created by one and the same act or instrument. 2 Blac. Com. 181. Thirdly. *Unity of time*. The estate or interest must, as a general rule, vest in all at the same time. *Ib*. There are, however, many exceptions to this rule under deeds and wills. Thus, under a limitation to the use of A. and his future wife, they are jointly seised though coming to the estate at different times. Co. Lit. 188 a; see *Stratton v. Best*, 2 B. C. C. 233; *Kenworthy v. Ward*, 11 Ha. 196, *post*, p. 502. Fourthly. *Unity of possession*. 2 Blac. Com. 182. The possession of one was formerly the possession of all, and sufficient to prevent the Statute of Limitations from running against those out of possession. But this is altered now by the 3 & 4 Will. 4, c. 27, s. 12, *post*, tit. "LIMITATIONS."

It follows from the preceding rules that executors and trustees hold the trust property vested in them as joint tenants. The appointment of a *new trustee* does not affect this principle, as trust property is thereupon conveyed to the old and new trustees, and thus the unity of title is kept up. On the death of one joint tenant the entire interest survives to the others, and the last survivor takes the whole (Lit. s. 280); and in such case the estate which devolves on the survivor will not be liable to the curtesy of the husband (Co. Lit. 183 a) or dower of the wife (Lit. s. 45) of the deceased joint tenant. There may be a wrongful possession by two or more as joint tenants, and the interest of any one acquired by such possession will cease at his death, as in the case of a joint tenancy under a rightful title. *Ward v. Ward*, L. R., 6 Ch. 789.

How created.] As a general rule a grant, conveyance, devise or bequest of real or personal estate to two or more simpliciter makes them joint tenants, and this rule applies, for the most part, whether the limitation be by deed or will. Co. Lit. 180 b. If several purchase in equal shares and take a conveyance to them and their heirs they are joint tenants (*Axceling v. Knipe*, 19 Ves. 441), unless a contrary intention can be collected from the circumstances attending the transaction, in which case they will be tenants in common, though parol evidence of statements of intention are, it seems, inadmissible. *Harrison v. Barton*, 1 J. & H. 287. So they will be tenants in common if they advance their money in unequal shares; and if persons advance money *on mortgage*, though in equal shares, they are tenants in common in equity. See tit. "MORTGAGE."

In marriage articles *executory* agreements for the benefit of children, which import joint tenancy at law, will in general be construed in equity so as to give the children interests as tenants in common (*Taggart v. Taggart*, 1 Sch. & L. 84; *Mayn v. Mayn*, L. R., 5 Eq. 150), but not when they are *executed*. *De Havilland v. De Saumarez*, 14

W. R. 118. A devise or bequest to or for the benefit of two or more simpliciter makes them joint tenants. *Morley v. Bird*, 3 Ves. 629; *Crooke v. De Vandes*, 9 Ves. 197; *Swaine v. Burton*, 15 Ves. 365; *Armstrong v. Armstrong*, L. R., 7 Eq. 518. So where the gift is to a class, as to or for the benefit of children (*Mence v. Bagster*, 4 De G. & Sm. 162; *Williams v. Hensman*, 1 J. & H. 546; *Ruck v. Barwise*, 2 Dr. & Sm. 510; *Armstrong v. Armstrong*, L. R., 7 Eq. 518), issue (*Williams v. Jekyl*, 2 Ves. sen. 681), or family. *Wood v. Wood*, 3 Ha. 65. In the two last cases cited the words used were construed to mean children. Where a testator gave property to his widow for the use of herself and his children, this was construed to be a gift to her and the children as joint tenants. *Newill v. Newill*, 7 W. N. 25. Comp. the cases tit. "TRUSTS," Chap. II.

In general, a joint tenancy will be created by a gift to next of kin. *Withy v. Mangles*, 4 Bea. 358; *Lucas v. Brandreth*, 28 Bea. 274. But under a gift or limitation in a will or settlement to next of kin, by reference to the *Statute of Distributions* the statute defines the persons who are to take, and regulates the nature of the interest which is *in common*. *Bullock v. Downes*, 9 H. L. C. 1; *Ranking's Settlement*, L. R., 6 Eq. 601. The cases of *Horn v. Coleman*, 1 Sm. & G. 169, and *Re Greenwood*, 3 Giff. 390, are *contra*, but not followed. When the bequest is to several jointly, a gift over of the share of one on the happening of a contingency does not create a tenancy in common. *Edwardes v. Jones*, 33 Bea. 348. But in *Ryves v. Ryves*, L. R., 11 Eq. 539, a devise to A. and B., their heirs, &c., with a gift over of the share of A. to B. on A.'s dying in the lifetime of B. without issue, was held to be a devise to A. and B. as tenants in common, and that on A. predeceasing the testator his share lapsed. A gift to a class being, in general, a gift in joint tenancy is not affected, because the class may be enlarged, after the gift has vested in some members of it, by others being afterwards born. *Kenworthy v. Ward*, 11 Ha. 196; see *Oates v. Jackson*, 2 Str. 1172; *Amies v. Skillern*, 14 Sim. 428; *M'Gregor v. M'Gregor*, 1 D., F. & J. 63. See *Woodgate v. Unwin*, 4 Sim. 129, the principle of which is *contra*, but is disapproved of. Under a gift to the children of A. as they shall come of age they take as tenants in common. *Hand v. North*, 10 Jur., N. S. 7; see *Re Groves*, 3 Giff. 575. Children taking their parents' share *by substitution* take *inter se* as joint tenants, though the parents may take as tenants in common (*Bridge v. Yates*, 12 Sim. 645; *Leak v. MacDowall*, 32 Bea. 28; *Penny v. Clarke*, 1 D., F. & J. 425), unless the words creating a tenancy in common between the parents extend to the issue as well. *Hodges v. Grant*, L. R., 4 Eq. 140. Shares *accruing* by the death of one tenant in common vest in the others as joint tenants. *Jones v. Hall*, 16 Sim. 500; *Leigh v. Mosley*, 14 Bea. 605. Where there is a limitation to husband and wife they take *by entirety*, the effect being that neither can sever the joint interest by a *separate* conveyance. *Doe v. Parratt*, 5 T. R. 652, 654. Under a gift or limitation to husband and wife and another or others, of real or personal estate, by words creating a joint tenancy, the husband and wife are considered as one person, and

take together but one share. Lit. s. 291 ; *Bricker v. Whatly*, 1 Ver. 233 ; *Gordon v. Whieldon*, 11 Bea. 170. So it has been held where the words are such as ordinarily would create a tenancy in common. *Re Wylde*, 2 D., M. & G. 724. But any indication, however slight, that each shall take separately, has been held sufficient to defeat the application of this doctrine. *Dias v. De Livera*, 5 App. Ca. 123, 136. See *Paine v. Wagner*, 12 Sim. 184 ; *Warrington v. Warrington*, 2 Ha. 54 ; *Marchant v. Cragg*, 31 Bea. 398. This rule of construction is not affected by the Married Women's Property Act, 1882, where the case is under a will made before the act and coming into operation afterwards. *Mander v. Harris*, 27 Ch. D. 166. As to the construction, if the will had been made after the act came into operation, Qu. *Ib.* It is perhaps scarcely necessary to observe that a devise to the first, second, and other sons of a person in tail does not make them joint tenants, but they take successively. *Lewis v. Waters*, 6 Ea. 337 ; *Cradock v. Cradock*, 4 Jur., N. S. 626.

An estate may be, and frequently is created, which is *joint* for the lives of two or more, but the inheritances are several. Thus, under a limitation to two in tail, whether both males or both females, or both persons who from consanguinity cannot marry, they are joint tenants for their lives with *several* inheritances in tail. There is no survivorship as to the inheritance ; the heirs in tail hold as tenants in common, and on failure of the issue of either his moiety reverts to the donor. Lit. s. 283 ; see *Re Tirerton Market Act*, 20 Bea. 374. But under a limitation to a man and his wife, or to a man and woman capable of marrying, and the heirs of their bodies, an estate tail special will be created. Lit. s. 16 ; Co. Lit. 20 b.

Severance of Joint Tenancy.] A conveyance (Lit. s. 292) or mortgage (*York v. Stone*, 1 Salk. 158) by one of several joint tenants, will sever the joint tenancy as to his share, and the grantee or mortgagee will hold *in common* with the others, but *they* will, *inter se*, continue joint tenants (Lit. s. 294) of their shares ; and there may be severance of some shares from others, but the former may still, *inter se*, be joint, as may also be the latter *inter se*. *Williams v. Hensman*, 1 J. & H. 546.

A severance will also be effected by one of several joint tenants releasing or granting (*Chester v. Willan*, 2 Saun. 96) his share to one of the others, but only as to the *share released*, the others being still joint tenants of the remainder. Lit. s. 304. A severance will be effected in equity by one joint tenant agreeing to sell his share. *Brown v. Raindle*, 3 Ves. 257 ; see *Kingsford v. Ball*, 2 Giff. App. 1. In *Caldwell v. Fellowes*, (L. R., 9 Eq. 410), and *Baillie v. Treharne*, 17 Ch. D. 388, an agreement to settle real and personal estate to which the intended wife was or might become entitled, and which the intended husband, or husband and wife, covenanted to settle accordingly, was held to sever a joint tenancy in reversionary real estate. In *May v. Hook* (Co. Lit. 246 a, n. 1), an agreement in marriage articles by an *infant*, for the settlement of freeholds and chattels real,

was held not to sever a joint tenancy. See *Partriche v. Poulet*, 2 Atk. 54. Where a marriage settlement contained a proviso for the settlement of the present and after-acquired property of the intended wife, who was *an infant*, and she was then entitled in remainder jointly with two others to a share in bank annuities standing in the names of trustees. It was held, that the joint tenancy was severed. *Burnaby v. Eq. Rev. Int. Soc.*, 28 Ch. D. 416. See the judgment in which *May v. Hook*, *supra*, is distinguished, also *Smith v. Lucas*, 18 Ch. D. 531. A severance will be made by the execution of deeds treating the shares as several, the deeds being subsequently acted upon. *Harrison v. Barton*, 1 J. & H. 287. So by the agreement of one joint tenant to convey the share of the other as he may require. *Gould v. Kemp*, 2 M. & K. 304. There must, however, in general, be an actual disposition, *inter vivos*, to effect a severance (*Partriche v. Poulet*, 2 Atk. 54), a disposition by will is ineffectual. Lit. s. 287. Where leasehold property was given by will to two sisters as joint tenants, and they mutually agreed to bequeath it in trust for each other for life, and for their nieces after the death of the survivor, and one sister died, and the survivor made a will giving the property in a different manner, it was held that the agreement between the sisters, carried out by the making of the wills, severed the joint tenancy, and that the property must be administered on the footing of a tenancy in common. *Taylor v. Taylor*, 11 Ch. D. 267.

A surrender of copyholds to the use of the will of a joint tenant, and his subsequent will during the joint tenancy operated as a severance. *Gale v. Gale*, 2 Cox, 136; see *Edwards v. Champion*, 3 D., M. & G. 202. By the 53 Geo. 3, c. 192, a devise of copyhold lands, though not surrendered to the use of a will, is as valid as if a surrender had been made. This statute is repealed by the 1 Vict. c. 26, ss. 2, 34; see tit. "WILLS."

With respect to the effect of marriage on the interests of the wife held in joint tenancy, where nothing has been done during the marriage to sever it, it has been held, that as between husband and wife and third persons, his right by survivorship (*ante*, p. 349) extends to such *choses in action* as she was possessed of as joint tenant, and the right to which vests in him at the time of or during the marriage, for in such case the marriage is a severance of the joint tenancy. See Co. Lit. 185 b, and *ante*, tit. "HUSBAND AND WIFE," Chaps. VI. and VII. But it is otherwise in the case of chattels real (*ib.*), or reversionary *choses in action*, for if the wife predeceases the other joint tenant, the latter will be entitled to the exclusion of the husband. *Re Barton's Will*, 10 Ha. 12; *Armstrong v. Armstrong*, L. R., 7 Eq. 518; as to partition, see *post*, Chap. IV.

Actions of Account.] By the 4 & 5 Anne, c. 3 (Ruffhead, 16), actions of account may be brought by one joint tenant and tenant in common against the other as bailiff, for receiving more than comes to his just share; and the auditors appointed by the court where such action shall be depending shall be and are hereby empowered to administer

on oath and examine the parties, and for their troubles in auditing and taking such account have such allowance as the court shall adjudge to be reasonable, to be paid by the party on whose side the balance of the account shall appear to be. (S. 27.) See *Shirton v. Richardson*, 13 M. & W. 17; *Henderson v. Eason*, 17 Q. B. 701; *Gorley v. Gorley*, 1 H. & N. 144; *Jacobs v. Seward*, L. R., 5 H. L. 464.

CHAPTER II.

TENANCY IN COMMON.

<i>Nature of Interest</i>	505	<i>Joint and several Interests</i>	506
<i>How created</i>	505	<i>Gifts by reference</i>	506
<i>Expressions which indicate equality</i>		<i>Joint Life Interests in Income</i>	506
<i>or division</i>	505	<i>Of Party-walls—Of a House</i>	506

TENANTS in common are seised of *one* estate, but their rights to it are several and separate. Thus, where the estate is freehold, they have *several* freeholds, whereas joint tenants have but *one joint freehold*; the only property common to both interests is that the occupation is *undivided*, and neither knoweth his part in severalty. Co. Lit. 189 a. Thus, if there are two, each is seised or possessed of an *undivided moiety* of the whole. They may hold by one title, as under one deed or will, or by several titles, and there is no survivorship between them. 2 Blac. Com. 194. A tenancy in common is created in a deed by a conveyance to two or more to hold as tenants in common, or to hold one moiety to one and the other moiety to the other (Lit. s. 298); and the conveyance by a joint tenant of his interest creates an interest in common in his alienee with the other joint tenant or tenants. *Ante*, p. 503. In a will, expressions indicating *division* (*Ackerman v. Burrows*, 3 V. & B. 54), whether into equal (*Stones v. Heurtly*, 1 Ves. sen. 165; *Lucas v. Goldsmid*, 29 Bea. 657) or unequal shares (*Gibbon v. Warner*, 14 Vin. Abr. 484) create a tenancy in common; and, generally, expressions indicating *equality* as “equally” (*Lewen v. Dodd*, Cro. El. 443), “share and share alike” (*Perry v. Woods*, 3 Ves. 204), but not where there is an express joint tenancy. *Armstrong v. Eldridge*, 3 B. C. C. 215. But a gift to two “jointly and between them” is a tenancy in common. *Perkins v. Baynton*, 1 B. C. C. 118; *Richardson v. Richardson*, 14 Sim. 526. So a gift “between or amongst” persons. *Campbell v. Campbell*, 4 B. C. C. 15; *Lashbrook v. Cock*, 2 Mer. 70; *Att.-Gen. v. Fletcher*, L. R., 13 Eq. 128. Or to them “severally.” *Sheppard v. Gibbons*, 2 Atk. 441. So, where the word “respectively” is used. *Re Moore*, 10 W. R. 315. Though

in a gift to several, with remainder as to the share of each to their children *respectively*, the latter will take as joint tenants, the word "respectively" having reference to the parents. *Re Hodgson*, 1 K. & J. 178; comp. *Folkes v. Western*, 9 Ves. 456; *Ive v. King*, 16 Bea. 46; *Shepherdson v. Dale*, 12 Jur., N. S. 156.

A. direction that A. shall *participate* in property with B. makes them tenants in common of the property. *Robertson v. Fraser*, L. R., 6 Ch. 696. The expression "to be divided" means *equally*, and creates a tenancy in common (*Peat v. Chapman*, 1 Ves. sen. 542; see *Re Phené's Trusts*, L. R., 5 Eq. 346); even where there is a direction *to divide* among several as *joint tenants*. *Booth v. Alington*, 3 Jur., N. S. 835; see *Cookson v. Bingham*, 3 D., M. & G. 668; *Eames v. Godwin*, 31 Bea. 25. The words "equally to be divided" create a tenancy in common in a will (*Prince v. Heylin*, 1 Atk. 493) or in a deed operating under the Statute of Uses (*Fisher v. Wigg*, 1 P. W. 14; *Regden v. Vallier*, 2 Ves. sen. 257); *secus*, it has been held in common law conveyances. *Stones v. Heurtly*, 1 Ves. sen. 165. Where there is a devise to A. and B. and their respective heirs, they take as joint tenants for life, with several inheritances in fee. *Ex parte Tanner*, 20 Beav. 374. And under a devise to the children of A. and to the heirs of their respective bodies, the children take as joint tenants for their lives with several inheritances in tail; but under a devise to them and the heirs of their bodies respectively, they take as tenants in common in tail. *Ib.*

There may be a joint and several interest in different parts of the same property. Thus, a devise to trustees for a term, upon trust to pay annuities, and subject thereto to pay the surplus rents to A. and B. *in equal shares*, and subject thereto to A. and B. in fee, makes them tenants in common of the surplus rents and joint tenants of the fee. *Brown v. Oakshott*, 24 Bea. 254; comp. *Stratton v. Best*, 2 B. C. C. 233. Under a gift by will to a class by words creating a tenancy in common, as "equally to be divided," and a gift by codicil to the same class "in like manner," as directed by the will, the class will take both gifts as tenants in common. *Re Wilder*, 27 Beav. 418. And if the income of property be given to A. and B., &c. (two or more) *equally to be divided*, or *share and share alike* for their lives, and after the decease of the *survivor* of them, or *after* the decease of the said A. and B., the capital to go to their children, there will be a joint tenancy of the income until the death of the last survivor. *Armstrong v. Eldridge*, 3 B. C. C. 215; see the cases *ante*, p. 15. The possession of one tenant in common is no longer the possession of the other, tenant or tenants, in common. 3 & 4 Will. 4, c. 27, s. 12.

If one of the two tenants in common of a "party-wall" or wall of which the two adjoining owners are tenants in common, excludes the other from the use of it by placing an obstruction on it, the only remedy of the excluded tenant is to remove the obstruction. *Watson v. Gray*, 14 Ch. D. 192. One tenant in common of a house who expends money on ordinary repairs, not being such as are necessary

to prevent the house from going to ruin, has no right of action against his co-tenant for contribution. *Leigh v. Dickeson*, 15 Q. B. D. 60. As to actions of account, see *ante*, p. 504.

CHAPTER III.

COPARCENARY.

<i>At Common Law</i>	507	<i>Coparceners by Custom—Partition.</i>	507
<i>Females taking by descent</i>	507	<i>Possession of one not of all</i>	507

Nature of Interest.] Parceners or coparceners hold according to the course of common law or according to custom. Lit. s. 241. Parceners of the former class are females who, upon an intestacy, take by descent failing a nearer heir male. Thus where a father dies intestate and seised of real estate of inheritance, leaving daughters but no son, the daughters will take as parceners. *Ib.* They are seised jointly as regards strangers; but severally as regards each other. Therefore, on the death of any one parcener intestate, there is no survivorship to the others; but her heir will take her share. Co. Lit. 164 b; Lit. s. 280; see *Cooper v. France*, 14 Jur. 214; Josh. Wms. R. P., App. B., 14th Ed. 527. And if she makes a will devising her interest, it will pass. Lit. s. 287. So if she aliens, her devisee or alienee will be tenant in common with the others. Co. Lit. 175 a. Parceners always take by descent, never by purchase. Lit. s. 254. Parceners by custom are the heirs of a person dying intestate seised of gavelkind lands, all the sons being equally entitled. Lit. s. 265. Parceners, unlike joint tenants and tenants in common, could always, by the common law, be compelled to make partition, and are indeed termed parceners from the writ *breve de participatione facienda*. Lit. s. 241. This writ had long become obsolete and is now abolished. 3 & 4 Will. 4, c. 27, s. 36, the jurisdiction to decree a partition being now an equitable one. After a partition (*post*, Chap. IV.) between coparceners, each holds as before, *by descent*, not *by purchase*. Com. Dig. "Parceners," c. 15. So if one aliens her share, and the alienee and other parcener make partition, the latter will still hold by descent. *Crosthwaite v. Dixon*, 5 A. & E. 834. As in the case of joint tenants and tenants in common, the possession of one coparcener is no longer the possession of the other or others of them. 3 & 4 Will. 4, c. 27, s. 12.

CHAPTER IV.

PARTITION.

<i>By the Court</i>	508	<i>Purchase of Share of Applicant</i> ...	511
<i>Statutory right</i>	508	<i>Parties interested may bid</i>	511
<i>Where Interests limited</i>	508	<i>Costs—Partition—Sale</i>	512
<i>Shares to be ascertained</i>	508	<i>Questions of Title</i>	512
<i>What may be subject of</i>	508	<i>Absence of Party abroad</i>	512
<i>Infants or Lunatics interested</i>	509	<i>Infants</i>	512
<i>Trustee Act</i>	509	<i>Conversion—Realty or Personalty</i> .	512
<i>Principle of Partition</i>	509	<i>Who Bound by Decree</i>	513
<i>All Circumstances to be considered</i> .	509	<i>As to Unborn Persons</i>	513
<i>Joint Owner in Occupation</i>	509	<i>39 & 40 Vict. c. 17</i>	513
<i>Sum for Owelty</i>	509	<i>Dispensing with Service</i>	513
<i>Custody of Deeds</i>	509	<i>Married Woman—Infants</i>	514
<i>Without a Commission</i>	509	<i>Lunatics</i>	514
<i>Statutory Powers of Inclosure Com-</i>		<i>Persons not sui juris</i>	514
<i>missioners</i>	509	<i>When no Jurisdiction</i>	514
<i>Sale under 31 & 32 Vict. c. 40</i>	510	<i>Trustee Act</i>	514
<i>Court may direct Sale instead of</i>		<i>Trust for Sale—Power of Sale</i>	515
<i>Partition</i>	510, 511	<i>Partition by Agreement</i>	515

ALTHOUGH joint tenants and tenants in common could not, at the common law, be compelled to make partition, they were by the 31 Hen. 8, c. 1, placed on the same footing, in this respect, as coparceners. *Ante*, p. 507. And by the 32 Hen. 8, c. 32, the right to claim partition was extended in favour of joint tenants and tenants in common for lives or years, who held with others having estates of inheritance of freehold. This right, at the present day, is an equitable one. And where the interest of the parties is limited, as for years or life, a partition will only be decreed in respect of such limited interest. *Baring v. Nash*, 1 V. & B. 551; *Gaskell v. Gaskell*, 6 Sim. 643. Remaindermen will be bound by a decree made against a tenant for life. *Wills v. Slade*, 6 Ves. 498; *Gaskell v. Gaskell*, 6 Sim. 643. The shares in which the parties are interested must be ascertained before the partition can be made. *Cole v. Sewell*, 15 Sim. 284. Where one only of several is desirous of a partition, part may be allotted to him and the remainder be held, jointly or in common, by the others, as before *Hobson v. Sherwood*, 4 Bea. 184. The property in respect of which partition may be made under the 31 Hen. 8, c. 1, comprises "manors, lands, tenements and hereditaments," of joint tenants or tenants in common of estates of inheritance, in their own right or in the right of their wives, in England or Wales (s. 2). Manors are expressly named. And see *Ley v. Cox*, stated 14 Bea. 157; *Hanbury v. Hussey*, *ib.* 153; *Cattley v. Arnold*, 4 K. & J. 595. Advowsons are within the

act; the right of nomination being determined by lot. *Johnstone v. Baber*, 6 D., M. & G. 439. Prior to the 4 & 5 Vict. c. 35, a court of equity had no jurisdiction to decree a partition of copyholds or customary freeholds. *Scott v. Fawcett*, Dick. 299; *Horncastle v. Charlesworth*, 11 Sim. 315; *Jope v. Morshead*, *ib.* 213. By this statute, however, courts of equity have the same jurisdiction to decree a partition of lands of copyhold or customary tenure as of freeholds (s. 85).

Where infants and lunatics are interested they may be declared trustees of the shares of the others, under the Trustee Act, 1850, 13 & 14 Vict. c. 60, s. 30. *Bowra v. Wright*, 4 De G. & S. 265; *Re Bloomar*, 2 De G. & J. 88; see *Cox v. Cox*, 3 K. & J. 554; *Cole v. Sewell*, 17 Sim. 40. On a decree for a partition or exchange, the court may declare any party to the suit a trustee; or, concerning the interests of unborn persons, that upon coming into existence they would be trustees, and make orders accordingly. 13 & 14 Vict. c. 60 (Trustee Act, 1850), s. 30. The difficulty of making the partition is no objection to it, and a decree for it must be made notwithstanding (*Warner v. Baynes*, Amb. 589), even where it is for the partition of a single house. *Turner v. Morgan*, 8 Ves. 143; see *Agar v. Fairfax*, 17 Ves. 533. The principle of partition is not to give each a part of every single house or field where there are more than one, but to divide the property as conveniently as may be, giving one distinct part to one and another part to another, according to the value of their shares. *E. Clarendon v. Hornby*, 1 P. W. 446; see *Watson v. D. of Northumberland*, 11 Ves. 162. The commissioners should take all the circumstances into consideration on making the partition: for instance, whether one of the parties has other property near that which is to be divided, with the view to give him that part which is most convenient for him; or whether, if there is a family mansion, it can be conveniently given to an elder branch of the family, or the like. *Canning v. Canning*, 2 Drew. 434, 437. As a last resort, the commissioners may draw lots. *Ib.* One joint owner in exclusive occupation will in general be charged with an occupation rent, and be entitled to compensation for repairs and improvements. *Teasdale v. Sanderson*, 33 Bea. 534. The court (but not the commissioners) may order a sum of money to be paid for owelty of partition. *Mole v. Mansfield*, 15 Sim. 41; *Peers v. Needham*, 19 Bea. 316.

The deeds solely relating to any allotted part are delivered to the allottee of such part; deeds common to all the parts are delivered to the owner of the largest interest, or if the shares are equal, to the plaintiff in the suit. See *Elton v. Elton*, 27 Bea. 633; *Jones v. Robinson*, 3 D., M. & G. 910. The court may approve of a partition without a commission on evidence being given of the value of the shares. *Greenwood v. Percy*, 26 Bea. 572; see *Brassey v. Chalmers*, 4 D., M. & G. 528; *Clarke v. Clayton*, 2 Giff. 333.

By various acts, viz., the 8 & 9 Vict. c. 118, ss. 90, 91; 11 & 12 Vict. c. 99, ss. 13, 14; 20 & 21 Vict. c. 31, ss. 7—11; 22 & 23 Vict. c. 43, ss. 10, 11, the inclosure commissioners have power to make

partitions. Even before the 31 & 32 Vict. c. 40, presently noticed, the court had power to direct a sale, though one party interested was an infant, if the other parties desired it. *Davis v. Turvey*, 32 Bea. 554; *Hubbard v. Hubbard*, 2 H. & M. 38. But if one declined to sell, he could have insisted on a partition. *Griffies v. Griffies*, 11 W. R. 943.

By the 31 & 32 Vict. c. 40, it is enacted, that in a suit for partition where, if this act had not been passed, a decree for partition might have been made if it appears to the court that by reason of the nature of the property to which the suit relates, or of the number of the parties interested or presumptively interested therein, or of the absence or disability of some of those parties, or of any other circumstance, a sale of the property and a distribution of the proceeds would be more beneficial for the parties interested than a division of the property between or among them, the court may, on the request of any of the parties interested, and notwithstanding the dissent or disability of any others of them, direct a sale of the property accordingly, and may give all necessary or proper consequential directions (s. 3). In *Young v. Young*, L. R., 13 Eq. 175, and *France v. France*, *ib.* 173, in which infants only were interested, a bill was filed for a partition, and on the hearing a request made for a sale, which was ordered, and the costs of all parties were declared to be a charge upon their shares in the lands. But in *Davey v. Wietlisbach*, L. R., 15 Eq. 269, a sale only was directed, the question as to costs being reserved. See *Drinkwater v. Ratcliffe*, L. R., 20 Eq. 528, where the property was divisible into thirty-six shares. A party asking for a sale is not compellable to part with his share on a valuation. Thus, where owners of three-sixteenths of a property sought to have a sale of it, and owners of thirteen-sixteenths objected to a sale and offered to purchase the shares of the others at a valuation, it was held that the case fell under the 3rd section of the act, and that the 5th section did not qualify or control the 3rd, nor operate as a proviso upon it, and a sale was directed, Lord Hatherley dissenting. *Pitts v. Jones*, 5 App. C. 651. The court, in ordering a sale at the request of the parties to the action, will not, in the absence of the other parties interested, preface the judgment order for sale with an expression of its opinion that a sale is more beneficial than a partition. *Pragnell v. Batten*, 16 Ch. D. 360. See *Sykes v. Schofield*, 14 Ch. D. 629. Where a tenant in common of a freehold messuage subject to a mortgage in fee, had procured a transfer of the mortgage to himself and was in possession thereunder, his co-tenant in common was held entitled in a partition action to a sale of the property, subject to the mortgage. *Waite v. Bingley*, 21 Ch. D. 674. See *In re Hardiman*, 16 Ch. D. 360.

In such a suit if the party or parties interested individually or collectively to the extent of one moiety or upwards in the property to which the suit relates, request the court to direct a sale of the property and a distribution of the proceeds instead of a division of the property between or among the parties interested, the court shall, unless it sees good reason to the contrary, direct a sale of the property

accordingly, and give all necessary or proper consequential directions (s. 4.) It is not a "good reason to the contrary," merely that the owners of a moiety *object* to a sale. *Pemberton v. Barnes*, L. R., 6 Ch. 685. Upon the request of a plaintiff entitled to a moiety the court decreed a sale instead of a partition of ten leasehold houses held under one lease, although it was objected on behalf of an infant defendant entitled to the other moiety that his income would be thereby materially diminished, and that a partition could be conveniently made. *Rowe v. Gray*, 5 Ch. D. 263. Where one tenant in common desired a partition under which a mansion-house and part of the land contiguous thereto should be allotted to him, alleging that its value would be depreciated if severed from the larger estate, and offering to pay what should be necessary for equality of partition, but the other tenant in common, who was also a neighbouring landowner, desired a sale, and had offered to submit to an immediate decree for sale; it was held that, as "no good reason to the contrary" of a sale had been adduced, a sale must be directed. *Porter v. Lopes*, 7 Ch. D. 358. The fact that the owner of one moiety of an estate is yearly tenant of the whole property, and occupies it for commercial purposes, and also resides thereon, is no sufficient reason why a sale of the property should not be decreed under s. 4. *Wilkinson v. Joberns*, L. R., 16 Eq. 14.

In such a suit if any party interested in the property to which the suit relates requests the court to direct a sale of the property and a distribution of the proceeds instead of a division of the property between or among the parties interested, the court may, if he thinks fit, unless the other parties interested in the property, or some of them, undertake to purchase the share of the party requesting a sale, direct a sale of the property, and give all necessary or consequential directions; and in case of such undertaking being given, the court may order a valuation of the share of the party requesting a sale in such manner as the court thinks fit, and may give all necessary or proper consequential directions (s. 5).

The 3rd and 4th sections are not controlled in their operation by the 5th section. The undertaking to purchase mentioned in the 5th section cannot be given by a married woman whose husband does not join therein. *Drinkwater v. Ratcliffe*, L. R., 20 Eq. 528. Where in a partition suit, one of the part owners asks for sale and others ask for partition, the Court has not, under s. 5, power to order that the part owner who asks for a sale shall sell to the others his share at a valuation, and to order that a partition amongst the others shall then be made. *Williams v. Games*, L. R., 10 Ch. 204.

On any sale under the act the court may allow any of the parties interested in the property to bid at the sale, on such terms as to non-payments of deposit, or as to setting off, or accounting for the purchase-money, or any part thereof, instead of paying the same, or as to any other matters as to the court seems reasonable (s. 6).

Sect. 30 of "The Trustee Act, 1850," shall apply where the court directs a sale (s. 7). See tit. "Trusts." Sects. 23 to 25 of "The

Leases and Sales of Settled Estates Act," 19 & 20 Vict. c. 120, shall apply to the money received on any sale (s. 8). The 19 & 20 Vict. c. 120, is repealed by the 40 & 41 Vict. c. 18, s. 58. See *Foster v. Foster*, 1 Ch. D. 588. *In re Barker*, 17 Ch. D. 241. All persons who if the act had not been passed would have been necessary parties to the suit, shall be served with notice of the decree or order on the hearing, and after such notice shall be bound by the proceedings, but they may have liberty to attend and apply to add to the decree or order (s. 9). See Act of 1876, *infra*. The county courts have jurisdiction where the property does not exceed 500*l.* in value (s. 12).

The court may direct the costs of the suit to be paid out of the estate. *Osborn v. Osborn*, L. R., 6 Eq. 338; *Miller v. Marriott*, L. R., 7 Eq. 1; comp. *Landell v. Baker*, L. R., 6 Eq. 268. In the absence of special circumstances they should be borne by the several parties in proportion to their interests. *Cannon v. Johnson*, L. R., 11 Eq. 90. A decree may be made for partition of part and sale of the rest. *Roebuck v. Chadebet*, L. R., 8 Eq. 127. A partition as well as sale should be asked for. *Holland v. Holland*, L. R., 13 Eq. 406. The court will not in a partition suit decide the legal title to the land. *Giffard v. Williams*, L. R., 5 Ch. 547. In this case the court retained the bill for a year, with liberty to the plaintiffs to bring such action as they might be advised. Where one of the parties entitled to a small fraction of the estate was out of the jurisdiction and had not been served, and it did not appear that any attempt had been made to serve him, it was held by James, V.-C., that a decree for sale could not be made in his absence. *Hurry v. Hurry*, L. R., 10 Eq. 348. In the prior case of *Silver v. Udall*, L. R., 9 Eq. 227, it would seem that his Honor considered that if it had been proved that some of the parties were abroad, he could make an immediate decree for a sale, notwithstanding their absence. The point as to service did not arise. In a suit under the act for the confirmation of a conditional contract for sale of certain land to which the infant plaintiff and the infant defendant were entitled as co-heiresses, subject to the dower of their mother, an order was made confirming the conditional contract and directing a sale, and the decree was prefaced by a recital that a sale appeared more beneficial than a division, and that the infant plaintiff requested a sale. *Grove v. Comyn*, L. R., 18 Eq. 387; see *post*, p. 513, under the Act of 1876. Where in a partition suit a sale was directed of certain real estate, part of which belonged to A. and the remainder to a married woman, in fee, and A. having subsequently agreed to purchase the other share, an order was made directing that A. should pay the purchase-money into court which he did; but before any conveyance was executed the married woman died, it was held that the purchase-money must be treated as realty. *Mildmay v. Quicke*, 6 Ch. D. 553; see *Foster v. Foster*, 1 Ch. D. 588. Comp. *Turner v. Nicholson*, W. N. 1885, p. 137, *post*, p. 514.

If real estate is held by a complicated title under which the parties interested are very numerous, and unborn issue may become entitled

to legal estates, and all persons in existence interested in the estate are parties to a suit for partition, and the title is proved at the hearing, an immediate decree for sale may be made without any preliminary inquiry, and a declaration made that the parties to the suit are, and that unborn issue upon coming into existence will be, trustees of their shares and interests within the meaning of the Trustee Act, 1850; but the appointment of a new trustee, and consequent vesting order, must be the subject of a subsequent application. *Lees v. Coulton*; *Lees v. Clutton*, L. R., 20 Eq. 20. Where under a will an undivided share of real estate stood limited in remainder after certain life estates and estates tail to the right heirs of A., in a partition suit to which A. was a party, a decree for sale was made under the act, and that the interests of the persons or person who on the death of A. would become the right heirs or right heir of A. were bound in equity by the decree; also that such persons were "unborn" persons within the meaning of the Trustee Act, 1850, s. 30. *Basnett v. Moxon*, L. R., 20 Eq. 182.

Where a decree in a partition suit directed inquiries as to the persons interested, also whether a sale would be more beneficial than a partition, and if so found directed a sale, and the sale took place before the certificate was made, it was held that the purchaser was entitled to be discharged, but that the decree was not wrong in directing a sale without reserving further consideration. *Powell v. Powell*, L. R., 10 Ch. 130. In this case it was also held that the vendors could not avail themselves of the condition enabling them if unwilling, or unable to remove or comply with any objection or requisition, to rescind on repayment of the deposit without interest and without costs on either side; and that the discharged purchaser was entitled to the stock arising from his deposit, which had been paid into court and invested, with the dividends thereon, or the actual amount of deposit and the produce; with costs, charges, and expenses. *S. C.*, L. R., 19 Eq. 422.

By the Amending Act, 39 & 40 Vict., c. 17, 27 June, 1876, the court may dispense with service of the notice mentioned in s. 9 of the prior act, *ante*, p. 512, and may direct advertisements to be published calling upon persons claiming to be interested in the property to come in and establish their claims within a limited time, after which they will be bound and the court may direct a sale (s. 3).

When service is dispensed with, (1) the proceeds of sale shall be paid into court (2) and distributed. (3) Notices by advertisement or otherwise are to be given of the sale, intended distribution of proceeds, and time within which claims to participate must be made; (4) at the expiration of which distribution is to be made. (5) If the interests of all persons interested have not been ascertained without disproportionate expense, the court may distribute according to the rights of the persons whose claims have been established, with such reservations as the court may think fit (s. 4). Sect. 5 contains provisions in the event of there being successive sales. A request for a sale may be made, or an undertaking to purchase given, on behalf of

a married woman, infant, lunatic, or person under any other disability, but the court is not bound to comply with it on the part of an infant unless it is for his benefit (s. 6). An action for partition includes an action for sale and distribution of proceeds (s. 7).

In a partition action a request for sale on the part of a married woman, under sect. 6 of the Partition Act, 1876, should be made by a person specially authorized to act on her behalf in the action; a request by her counsel is not sufficient. *Wallace v. Greenwood*, 16 Ch. D. 362, not following *Crookes v. Whitworth*, 10 Ch. D. 289. It should be a writing signed by her authorizing and requesting her solicitor to instruct counsel to ask for a sale. *Grange v. White*, 18 Ch. D. 612. Where, in a partition action, the share of a married woman in the proceeds of sale of real estate is under 200*l.*, the court will order the same to be paid out to her upon her separate receipt and upon an affidavit of no settlement, and will dispense with her separate examination as to her election to take the money as personal estate. *Wallace v. Greenwood*, 16 Ch. D. 362; in this case *In re Shaw*, 49 L. J., Ch. 213, was not followed.

In a partition action the request for sale on the part of an infant may be made by his next friend or guardian *ad litem*, as being the "person authorized to act" on his behalf in the action: the word "guardian" in the section meaning guardian *ad litem*. *Rimington v. Hartley*, 14 Ch. D. 630, not following *Platt v. Platt*, 28 W. R. 533. The court will not comply with a request for sale made on behalf of an infant under the above section unless it is satisfied that a sale is for the benefit of the infant. *Ib.*

Where a lunatic was tenant in tail of an undivided share of an estate, and an action was brought for the partition of the estate, the court, under the 6th section, authorized the committee of the lunatic to request a sale and to join in conveying the estate to the purchaser, but directed that the proceeds of the sale should be subject to the same uses as the lunatic's estate was subject to before the sale. *In re Pares*, 12 Ch. D. 333. The 124th section of the Lunacy Regulation Act, 1853, does not give jurisdiction to authorize the committee of a lunatic to sell the lunatic's undivided share of land to the owner of the other shares. *In re Weld, a Lunatic*, 28 Ch. D. 514. In *Turner v. Nicholson*, W. N. 1885, p. 137, property was sold, to a share of the proceeds of which A. was entitled, and she was duly served with all proceedings, and an order made for payment of her share to her. The money was not received by her but remained in court, and she was afterwards declared of unsound mind. On her subsequently dying intestate, it was held that the sale effected a conversion as between her real and personal representatives.

Where some of the parties beneficially interested are not *sui juris*, and the trustees have no power of sale under their trust deed, there is no jurisdiction to order a sale out of court. *Strugnell v. Strugnell*, 27 Ch. D. 258. Sect. 1 of the Trustee Extension Act, 1852 (15 & 16 Vict. c. 55), applies to sales under the Partition Acts, 1868 and 1876, and is not limited to cases of persons under disability. *Beckett v.*

Sutton, 19 Ch. D. 646. The Order XVI., rule 7, of the Rules of Court, 1875, enabling trustees to represent their beneficiaries in an action, applies to an action under the Partition Acts, 1868 and 1876. *Simpson v. Denny*, L. R., 10 Ch. D. 28.

Where under a will two persons were equally entitled to real property for life with remainder to their children and issue, who were not yet ascertained, and the trustees of the will had, during the lives of the tenants for life, powers of working a quarry on the estate, and making roads over the property for the purpose, and were directed to work the quarry and divide the profits among the persons entitled, it was held that, while the overriding power and trust existed, the court had no jurisdiction to make a decree for partition or sale under the Partition Acts. *Taylor v. Grange*, 15 Ch. D. 165. When the testator has himself fixed the period at which the trustees of his will are to sell his real estate and divide the proceeds, the court has no jurisdiction to anticipate that period by directing a sale in a partition action at the request of persons equitably entitled to an undivided moiety of the property. *Swaine v. Denby*, 14 Ch. D. 326. Where a testator directed trustees at such times and in such manner as they should think fit to sell his estate, and to hold the proceeds in trust for his widow for life, and after her death for his children, and he left six children, all of whom attained a vested interest and were *sui juris*, and the widow and three children brought an action for partition of the estate; but the other children objected, it was held that the trustees had a trust for sale, not a mere power; and that it was not put an end to by all the reversioners attaining a vested interest; and therefore the court had no jurisdiction to decree a partition under the act. *Biggs v. Peacock*, 22 Ch. D. 284. A decree for partition can be made notwithstanding trustees have a power of sale for the purposes of division. *Boyd v. Allen*, 24 Ch. D. 622; comp. *Biggs v. Peacock*, *supra*.

A partition by agreement must, in ordinary cases, be effected by deed, otherwise it is void. 8 & 9 Vict. c. 106, s. 3. But if parties agree upon a partition, though by parol, and act upon it by taking possession for upwards of twenty years, it will be binding upon them. *Paine v. Ryder*, 24 Bea. 151; see *Williams v. Hensman*, 1 J. & H. 546.

JUDGMENTS, DECREES, AND CHARGING ORDERS.

CH. 1.—JUDGMENTS AND DECREES, p. 516.

CH. 2.—CHARGING ORDERS, p. 523.

CHAPTER I.

JUDGMENTS AND DECREES.

<i>Operation of, formerly</i>	516	<i>Interest of Debtor only effected</i>	519
<i>Writ of Elegit</i>	516	<i>23 & 24 Vict. c. 38</i>	519
<i>Copyholds—Leaseholds</i>	517	<i>Judgments against Deceased Persons</i>	519
<i>1 & 2 Vict. c. 110</i>	517	<i>27 & 28 Vict. c. 112</i>	520
<i>Registered Judgment a Charge</i>	517	<i>Priorities under</i>	520
<i>Proceedings in Equity</i>	517, 518	<i>Equitable Interests</i>	520
<i>Decrees and Orders</i>	518	<i>Registration in Register Counties</i> ..	521
<i>Registration</i>	518, 519	<i>Registration in Yorkshire</i>	521
<i>Re-registration</i>	519	<i>Priorities of Judgments</i>	522
<i>Effect of Notice</i>	519	<i>31 & 32 Vict. c. 54</i>	522
<i>Omission to Register</i>	519	<i>Search under Judicature Act</i>	523

QUESTIONS relating to the operation of judgments and decrees, particularly as affecting real estate and chattels real, arise so frequently, and are of so much importance, that it has been found convenient to consider the subject under a separate title, and at the same time the analogous subject of charging orders. As regards judgments, it would not come within the province of this work to enter into questions relating to executions upon them in respect of personal property, as such questions do not often arise in a court of equity.

Prior to the Statute of Westminster 2nd, 13 Edw. 1, stat. 1, c. 18, a judgment creditor had no remedy against the land of his debtor, but only against the growing profits under a writ of *levari facias*. By the operation of this statute the judgment creditor had his choice either of a writ of *levari facias* or of the delivery to him of all the chattels (except oxen and beasts of the plough) and *one half* of his debtor's land. The writ issued under this statute was termed a writ of *elegit*, as it stated the creditor had elected to pursue his remedy under the statute. Co. Lit. 289 b. Practically a judgment under this act was, until it was satisfied, a lien upon the lands of the debtor at the time of the judgment or afterwards purchased. See Sug. V. &

P. 520, 14th Ed., and authorities there cited. For the protection of purchasers an alphabetical docket, or index of judgments, was provided by the 4 & 5 W. & M. c. 20 (perpetual, 7 & 8 Will. 3, c. 36). These dockets are now closed (2 & 3 Vict. c. 11, ss. 1, 2), a register of judgments having been substituted for them. 1 & 2 Vict. c. 110, s. 19. A judgment creditor could not enforce his security against the debtor's equitable interest, without first suing out an *elegit*. *Neate v. D. of Marlborough*, 3 M. & C. 407; see *Gore v. Bousser*, 3 Sm. & G. 1; aff. 24 L. J., Ch. 440. See further as to the effect of a docketed judgment, *Doswell v. Reece*, 11 Jur., N. S. 764.

Judgments under the 13 Edw. 1, stat. 1, c. 18, did not affect copyhold lands. 1 Scriv. Cops. 47, 48. Leaseholds, under the old law, were liable to be taken in execution as goods and chattels on a judgment, but as goods and chattels they were not *bound* until the delivery of a writ of execution to the sheriff. 29 Car. 2, c. 3, s. 16. *Westbrook v. Blythe*, 3 E. & B. 737. Considerable alterations were made in the law as to judgments by the statute next cited.

By the 1 & 2 Vict. c. 110 (16 Aug., 1838), it is in substance enacted, that execution on judgments may be delivered of *all* such lands, tenements, rectories, tithes, rents and hereditaments, *including* lands and hereditaments of *copyhold* or *customary tenure*, as the person against whom execution is so sued, or any person in trust for him, shall have been seised or possessed of at the time of entering up the said judgment, or at any time afterwards, or over which such person shall at the time of entering up such judgment, or at any time afterwards, have any disposing power which he might, without the assent of any other person, exercise for his own benefit, in like manner as execution of *one moiety* might formerly have been delivered (s. 11).

A judgment already entered up, or hereafter entered up, against any person in any of her Majesty's superior courts at Westminster, *shall operate as a charge upon all lands, tenements, rectories, advowsons, tithes, rents and hereditaments (including lands and hereditaments of copyhold or customary tenure), of or to which such person shall at the time of entering up such judgment, or at any time afterwards, be seised, possessed of, or entitled for any estate or interest whatever, at law or in equity, in possession, reversion, remainder or expectancy, or over which such person shall at the time of entering up such judgment, or at any time afterwards, have any disposing power which he might, without the assent of any other person, exercise for his own benefit, and shall be binding as against the person against whom judgment shall be so entered up, and against all persons claiming under him after such judgment, and the issue of his body, and all other persons whom he might, without the assent of any other person, bar; and every judgment creditor shall have such and the same remedies in a court of equity against the hereditaments so charged as if such judgment debtor had power to charge the same hereditaments, and had by writing under his hand agreed to charge the same, with the amount of such judgment debt and interest thereon: such charge not to be enforced until after the expiration of one year, and in cases*

of bankruptcy, judgment must have been entered up one year at least before the bankruptcy. There is a provision in favour of prior purchasers, mortgagees or creditors, and nothing is to affect any doctrine of courts of equity whereby protection is given to purchasers for valuable consideration without notice (s. 13). The local registry acts are intended to apply only to dealings at law or in equity with the land itself. An incumbrancer upon a share in the *proceeds* of real estate in Middlesex, obtains no priority over other incumbrancers on such share by registering his mortgage deed, and the priorities of such incumbrancers rank according to the dates of their respective notices to the trustees. *Arden v. Arden*, 29 Ch. D. 702.

In *Re D. of Newcastle* (L. R., 8 Eq. 700, 706), Lord Romilly, M.R., observed that it was doubtful whether the 13th section of the 1 & 2 Vict. c. 110, had not been repealed, or, if not, how far it was reconcilable with the provisions of the 27 & 28 Vict. c. 112. *Post*, p. 520. This, it is considered, must mean so far as regards judgments registered since the latter act, as judgments duly registered under the former and re-registered would still be subject to the provisions of the 1 & 2 Vict. c. 110; the 27 & 28 Vict. c. 112, being prospective only. *Re Isle of Wight Ferry Co.*, 11 Jur., N. S. 279. The provision as to not proceeding in equity until one year after judgment entered up does not extend to a bill by a tenant by elegit to redeem a mortgage. *Barnes v. Thrupp*, 3 Jur., N. S. 1242; see *Godfrey v. Tucker*, 33 Bea. 280. And a judgment creditor was entitled, within the year, to obtain the benefit of his charge, so as to have the life interest of his debtor in lands at once impounded for his protection. *Yescombe v. Landor*, 28 Bea. 80; see *Partridge v. Foster*, 34 Bea. 1; *Re D. of Newcastle*, L. R., 8 Eq. 700. All decrees and orders of courts of equity, and all rules of courts of common law, and all orders in bankruptcy and lunacy, whereby any sum of money, or any costs, charges or expenses shall be payable to any person, shall have the effect of judgments in the superior courts of common law, and all powers hereby given to the judges of the superior courts of common law, with respect to matters depending in the same courts, shall and may be exercised by courts of equity with respect to matters therein depending, and by the Lord Chancellor and the Court of Review in matters of bankruptcy, and by the Lord Chancellor in matters of lunacy; and all remedies hereby given to judgment creditors are in like manner given to persons to whom any monies or costs, charges or expenses are by such orders or rules respectively directed to be paid (s. 18). A rule for taxation of costs and allocatur thereon was not within the 1 & 2 Vict. c. 110, s. 18 (*Shaw v. Neale*, 6 H. L. 581); nor an order of the Probate Court. *Pratt v. Bull*, 4 Giff. 117; aff. 9 Jur., N. S. 239. By the 20 & 21 Vict. c. 85, s. 52, decrees and orders of the Divorce Court are to be enforced in the same manner as decrees of chancery. See, as to the effect of this provision, *Ex parte Holden*, 13 C. B., N. S. 641.

Judgments, under the 1 & 2 Vict. c. 110, are to be registered in the Common Pleas (s. 19); and, by the 2 & 3 Vict. c. 11 (4th June, 1839),

re-registered every five years, or they will be void against purchasers, mortgagees or creditors (s. 4). But this was held not to apply to creditors *generally* who had no interest in the debtor's lands. *Simpson v. Morley*, 2 K. & J. 71. Under the 1 & 2 Vict. c. 110, as against purchasers and mortgagees without notice, judgments, &c., were not, although duly registered, to affect lands further than judgments before that act would have done if duly docketed under the old law. See *Doswell v. Reece*, 11 Jur., N. S. 764. By the 3 & 4 Vict. c. 82, s. 2 (7th August, 1840), and 18 & 19 Vict. c. 15, s. 4 (26th April, 1855), notice of any judgment is not to affect a purchaser until the memorandum of it is left for registration. Re-registration of a judgment is effectual against purchasers, mortgagees and creditors if made five years before the conveyance, &c. to them, although not registered within five years of the *preceding registration*. 18 & 19 Vict. c. 15, s. 6. As between two judgment creditors, A. and B., both having registered and A. having priority, his omission to re-register within the five years does not affect his priority, though B. does re-register within the five years. The omission to re-register has no effect on previous purchasers, mortgagees or creditors. *Beavan v. Ld. Oxford*, 6 D., M. & G. 492; *Bacon v. Ford*, 29 Ch. D. 527; see 18 & 19 Vict. c. 18, s. 6, *supra*. The judgment only affects the interest of the debtor, and if that be subject to any charge, for instance, a prior equitable mortgage, the judgment can only operate subject to it. *Whitworth v. Gaugain*, Cr. & Ph. 325; see *Kinderley v. Jervis*, 22 Bea. 1; *Benham v. Keane*, 3 D., F. & J. 318; *Cathrow v. Eade*, 1 Sm. & G. 423; *Eyre v. M'Dowell*, 9 H. L. C. 620; comp. *Watts v. Porter*, 3 E. & B. 743; *Beavan v. Ld. Oxford*, 6 D., M. & G. 492, (cases on charging orders,) see *post*, p. 523. See further as to the effect of judgments and remedy of judgment creditors under the 1 & 2 Vict. c. 110, s. 13, *Smith v. Hurst*, 10 Ha. 30, 50; *Messer v. Boyle*, 21 Bea. 559; *Drummond v. Tracy*, Johns. 608; *Thomas v. Cross*, 2 Dr. & S. 423.

By the 23 & 24 Vict. c. 38 (23rd July, 1860), it was enacted, that judgments, &c. *entered up after the passing of the act*, should not affect any purchaser or mortgagee, although he had notice, unless a writ of execution had been issued and registered in the name of the judgment creditor, referring to the judgment, and not then unless the writ of execution was put in force within three months of the registration of it (ss. 1, 2). The act applies whether the debtor has a legal or an equitable interest only. *Wallis v. Morris*, 10 Jur., N. S. 741; see *Re D. of Newcastle*, L. R., 8 Eq. 700, *post*, p. 520 (on the 27 & 28 Vict. c. 112). See as to this section not being retrospective, *Isle of Wight Ferry Co.*, 11 Jur., N. S. 279 (on the 27 & 28 Vict. c. 112). As regards the operation of judgments in respect of the estates of testators and intestates, it has already been stated that judgments against them must be registered to give priority. *Ante*, p. 38; 23 & 24 Vict. c. 38, s. 3; *Waller v. Turner*, 10 Jur., N. S. 147; *Van Gheluive v. Nerinx*, 21 Ch. D. 189. By section 4 of the same act, such judgments, to retain their preference, must be duly re-registered, as provided for by that section and as directed by the 2

& 3 Vict. c. 11, and 18 & 19 Vict. c. 15 (*ante*, p. 519). The 23 & 24 Vict. c. 38, is not retrospective. *Evans v. Williams*, 2 Dr. & Sm. 324.

By the 27 & 28 Vict. c. 112 (29th July, 1864), "No judgment, statute or recognizance to be *entered up after the passing of this act* shall affect any land (of whatever tenure) until such land shall have been actually delivered in execution by virtue of a writ of *elegit* or other lawful authority, in pursuance of such judgment, statute or recognizance" (s. 1). The appointment of a receiver is a delivery of execution by lawful authority within the meaning of the 27 & 28 Vict. c. 112; *Anglo-Italian Bank v. Davies*, 9 Ch. D. 275; *Ex parte Evans*, 13 Ch. D. 252. See *Coney v. Bennett*, 29 Ch. D. 993.

"Judgment" includes registered decrees, orders of courts of equity and bankruptcy, and other orders having the operation of a judgment; "land" includes all hereditaments, corporeal or incorporeal, or any interest therein; "debtor" includes husbands of married women, assignees of bankrupts, committees of lunatics, and the heirs or devisees of deceased persons (s. 2).

Writs of execution are to be registered in manner prescribed by the 23 & 24 Vict. c. 38, in the name of the *debtor* against whom such writ or process is issued, *instead of*, as under the said act, in the name of the *creditor* (s. 3).

Creditors to whom land is delivered in execution, to be entitled to obtain summary order from Court of Chancery for sale (s. 4).

Where there are other creditors, notice of sale is to be served upon them (s. 5).

Parties claiming interest through debtors, to be bound by order for sale (s. 6).

This act does not extend to Ireland (s. 7).

Under the 27 & 28 Vict. c. 112, priorities are determined not by the date of the judgment, but according to the date at which the writs are placed in the hands of the sheriff. *Guest v. Cowbridge R. Co.*, L. R., 6 Eq. 619. A judgment creditor under the act cannot present a petition under s. 4 for a sale of the debtor's lands in a summary way, where they have already been extended and delivered to another judgment creditor; but he may file a bill to redeem, and when he has got rid of the prior *elegit* he may petition under the act. *Re Cowbridge R. Co.*, L. R., 5 Eq. 413. In *Re D. of Newcastle* (L. R., 8 Eq. 700), it was held, that as an equitable interest in property could not be taken in execution, since the actual possession of it could not be obtained, the court could not give effect by sale to a judgment against the person entitled to such equitable interest. See *Gore v. Bowser*, 3 Sm. & G. 1. But in *Hatton v. Haywood*, L. R., 9 Ch. 229, it was held that equitable interests in land were within the act, and that if a judgment creditor who had sued out an *elegit* was unable to obtain delivery by the sheriff of his debtor's lands by reason of the legal estate being outstanding, he must apply to the Court of Chancery to remove the impediment, and the order of the court would be a delivery in execution within the statute. A judgment creditor, who has sued

out an *elegit* but is unable to obtain delivery by the sheriff of the debtor's lands by reason of the legal estate being outstanding and the existence of prior incumbrances, is not bound to redeem such prior incumbrances, but may obtain a decree for the appointment of a receiver and a sale in a suit to which the debtor and subsequent incumbrancers only are parties. *Wells v. Kilpin*, L. R., 18 Eq. 298; see form of decree in such a case, *ib.*, p. 300. Possession by sequestrators under a writ of sequestration does not entitle the creditors obtaining the writ to an order for sale under the act. *Johnson v. Burgess*, L. R., 15 Eq. 398. The interest of a railway company in its railway is not of that nature that the railway can be sold under s. 4. *In re Bishop's Waltham R. Co.*, L. R., 2 Ch. 382. See *Gardner v. L. C. D. R. Co.*, *ib.*, 201.

The operation of judgments in the register counties has now to be considered. Formerly no judgment, statute or recognizance (except to the crown), affected any hereditaments in the West Riding (5 & 6 Anne, c. 20 (18 Ed. Ruff.), s. 4), the East Riding and Kingston-upon-Hull (6 Anne, c. 62 (c. 35, Ed. Ruff.), s. 19), or in Middlesex (7 Anne, c. 20, s. 18), but from the time that a memorandum thereof was entered in the registry offices of those places respectively; but as to hereditaments in the West and East Ridings, if registered within thirty days after the acknowledgment or signing thereof, they bound the lands of the defendant or cognizor at the time of such acknowledgment or signing. 5 & 6 Anne, *sup.*, s. 11; 6 Anne, *sup.*, s. 28.

By the 6 Anne, c. 62 (35 Ed. Ruff.), s. 34, the provisions, matters and things in that act concerning the East Riding and Kingston-upon-Hull, not provided for in the West Riding acts, were extended to hereditaments in the West Riding, the mortgage or purchase whereof exceeded 50*l.* And by the 8 Geo. 2, c. 6, s. 1, as to hereditaments in the North Riding, judgments, &c., unless registered, are made void against subsequent conveyances, mortgages, judgments, &c. for value which are registered, but if registered within twenty days after the acknowledgment or signing of such judgments bind the lands of the defendant or cognizor at the time of such acknowledgment or signing (s. 33). See, as to these acts, *Johnson v. Holdsworth*, 1 Sim. N. S. 106. The preceding acts as regards registration in Yorkshire were repealed by the 47 & 48 Vict. c. 54 (subject to matters, &c., done under them), s. 51. By this act (in operation 1st January, 1885), which applies to the three Ridings and Kingston-upon-Hull, the expression "order of a court" means any judgment, decree, writ of execution or sequestration, adjudication in bankruptcy, or other order or process of or issuing from a court of competent jurisdiction or any order of the Charity Commissioners whereby any interest in any land is or may be affected (s. 3). On receipt of any instrument or memorial for registration, an entry is made in the case of an order of court the title of the cause or matter wherein it purports to be made, and the names of the parties thereto, if any (s. 5, sub 3). In the case of an order of a court, the memorial shall be under the hand and seal of some party claiming to be interested in some lands affected thereby within the Riding, and shall contain (s. 6, sub 3):—

- (a.) "The date of the order or certificate ;
- (b.) The title of the cause or matter wherein the same purports to be made ;
- (c.) The names of the parties (if any) to such cause or matter ;
- (d.) So much of the order or certificate itself as affects any lands within the Riding, or describes or defines such lands ;
- (e.) The name and description of the residence and occupation of the person on whose behalf the memorial is to be registered."

With respect to the operation of judgments in register counties prior to the 23 & 24 Vict. c. 38, and 27 & 28 Vict. c. 112, it was held that they bound lands in such counties, if duly registered in the Common Pleas, from the time of their being registered in the county; their priorities being determined according to the date of *registration in the county*. *Westbrook v. Blythe*, 3 E. & B. 737; *Benham v. Keane*, 3 D. F. & J. 318. Therefore where a judgment was registered in the Common Pleas, and a later judgment registered in the Common Pleas and county, and afterwards the first judgment was registered in the county, it was postponed to the other which had first been registered there. *Hughes v. Lumley*, 4 E. & B. 274. And where a judgment was registered in the county, then another judgment registered in the county and the Common Pleas, and afterwards the first judgment was registered in the Common Pleas, it was held to have priority over the other judgment. *Neve v. Flood*, 33 Bea. 666.

The doctrine of notice was held not to apply as between judgment creditors; so that registration of a judgment in Middlesex was not affected by notice of a prior unregistered judgment there. *Benham v. Keane*, *sup.* But otherwise as between judgment creditors and mortgagees. *Ib.*; *Lee v. Green*, 6 D., M. & G. 155.

Since the 27 & 28 Vict. c. 112, it would seem that judgments, or the registration of judgments, cannot affect lands in any way until actually delivered in execution, or what is equivalent in equity to delivery in execution, *ante*, p. 520. "A judgment creditor who has not issued execution has no interest in the land," per Malins, V.-C. E. *Cook v. Russell*, L. R., 13 Eq. 210, 216. Priorities of judgments *inter se* in register counties would now, therefore, seem to be quite unaffected by any mere registration in the Common Pleas. What precise effect this act may have upon the operation of judgments duly registered in register counties may perhaps call for judicial determination hereafter.

By the 31 & 32 Vict. c. 54, facilities have been given for enforcing judgments obtained in one part of the United Kingdom in the courts of another part. When judgment has been obtained in the courts at Westminster, a certificate thereof registered in Ireland, and *vice versa*, shall have the effect of a judgment of the court in which it is so registered (s. 1). Where judgment has been obtained in the courts at Westminster or at Dublin, a certificate thereof registered in Scotland shall have the effect of a decret of the Court of Session (s. 2). Where decret has been obtained in the Court of Session, a

certificate of an extract thereof registered in England or Ireland shall have the effect of a judgment of the court in which it is so registered (s. 3). The above-mentioned courts shall have control over registered judgments or decreets in so far as relates to execution (s. 4). No security for costs need be given where a plaintiff resides in a different part of the kingdom, unless the court shall otherwise (s. 5). Costs are not to be allowed in actions on judgments or decreets where the judgment or decret might be registered in the country in which the action is brought, unless by order of court (s. 6). Rules may be made for the execution of the act (s. 7). By the 45 & 46 Vict. c. 31, certificates of judgment, decrees, or orders of the inferior courts of England, Scotland, or Ireland, may be registered in other inferior courts (ss. 3, 4), and executed like other judgments of such courts (s. 5), subject to certain regulations (s. 9, 10). By the 45 & 46 Vict. c. 39, search may be made for judgments through the proper officer of the Supreme Court of Judicature, who shall give a certificate showing the result (s. 2).

CHAPTER II.

CHARGING ORDERS.

<i>What are</i>	523	<i>Contingent Interest may be charged</i>	524
<i>Dividends may be stopped</i>	524	<i>As to Pensions</i>	524
<i>Order absolute—Order nisi</i>	524	<i>Shares in Companies held by</i>	
<i>Priorities in respect of</i>	524	<i>Trustees may be charged</i>	524

By the 1 & 2 Vict. c. 110, it is enacted, "that if any person against whom any judgment shall have been entered up in any of her Majesty's superior courts at Westminster, shall have any *government stock, funds or annuities, or any stock or shares of or in any public company in England* (whether incorporated or not), standing in his name in his own right, or in the name of *any person in trust for him*, it shall be lawful for a judge of one of the superior courts, on the application of any judgment creditor, to order that such stock, funds, annuities or shares, or such of them or such part thereof respectively as he shall think fit, shall stand charged with the payment of the amount for which judgment shall have been so recovered, and interest thereon, and such order shall entitle the judgment creditor to all such remedies as he would have been entitled to if such charge had been made in his favour by the judgment debtor; provided that no proceedings shall be taken to have the benefit of such charge until after the expiration of six calendar months from the date of such order" (s. 14).

The proviso at the end of the section does not operate so as to

prevent a creditor from procuring a stop order, under which the debtor may be restrained from receiving the dividends payable within the six months; though no steps can be taken to enforce the creditor's security until the expiration of the six months. *Watts v. Jefferyes*, 3 Mac. & G. 372; see *Bristed v. Wilkins*, 3 Ha. 235.

A chancery judge is not a judge of one of the superior courts at Westminster within the meaning of this section. *Miles v. Presland*, 4 M. & C. 431. But under it, and by virtue of the 3 & 4 Vict. c. 82, s. 1, he has jurisdiction in matters depending in courts of equity. *Marq. Hastings v. Beavan*, 10 W. R. 206. The last cited act recites the 1 & 2 Vict. c. 110, s. 14, and extends its provisions to the *dividends and interest* of the above-mentioned securities, and also to stock standing in the name of the accountant-general and dividends on it, in which the judgment debtor has an interest.

By the 1 & 2 Vict. c. 110, to prevent any judgment debtor from transferring any stock or shares, &c. authorized to be charged, every charging order of a judge shall be made in the first instance *ex parte*, and on notice to the bank or company to operate as a distringas (s. 15).

Arresting the judgment debtor is a relinquishment of the benefit of the charge (s. 16). By the 3 & 4 Vict. c. 82, the provisions of the 1 & 2 Vict. c. 110, shall be taken to extend to the debtor's interest in stock, &c., in remainder or reversion, and whether vested or contingent; also if standing in the name of the accountant-general (s. 1). As to an ordinary writ of distringas on stock, see J. Wms., *Personal Prop.*, 12th Ed., 334; *Re Cross*, 1 Dr. & Sm. 580.

A charging order, when made absolute, has relation back to the making of the order *nisi*. *Haly v. Barry*, L. R., 3 Ch. 452, explaining *Warburton v. Hill*, Kay, 470. As between judgment creditors and mortgagees of stock or other property capable of being affected by a charging order, a mortgage *subsequent* to the judgment but *prior* to the *charging order*, though without notice of the mortgage to the trustees of the fund, has priority over the judgment and charging order, though the judgment creditor has given notice to the trustees. *Scott v. Ld. Hastings*, 4 K. & J. 633; and see *Brearcliff v. Dorrington*, 4 De G. & Sm. 122; *Dunster v. E. Glengall*, 3 Ir. Ch. R. 47; *Beavan v. Ld. Oxford*, 6 D., M. & G. 525, 532. *Watts v. Porter*, 3 E. & B. 743, is *contra*, in which case, however, Erle, J., dissented from the judgment of the rest of the court.

The contingent nature of the interest forms no objection to the charge if the property is of a nature properly chargeable. *Baker v. Tynte*, 2 E. & E. 897.

A government pension cannot be charged (*Taylor v. Turnbull*, 4 H. & N. 495), nor a pension granted by the East India Company. *Morris v. Manesty*, 7 Q. B. 674.

"The Companies Act, 1862" (25 & 26 Vict. c. 89), s. 20, enacts that notices of trusts shall not be entered on the register of companies incorporated under that act, and the court will not set aside a charging order on shares in such a company, though the holder is in fact a

trustee only. *Cragg v. Taylor*, L. R., 1 Ex. 148 ; see *S. C.*, L. R., 2 Ex. 131. As to banking companies, see *Macintyre v. Connell*, 1 Sim., N. S. 225 ; and as to mining companies on the cost-book principle, see *Nicholls v. Rosewarne*, 5 Jur., N. S. 1266.

A charging order has no greater effect than an instrument of charge executed by the judgment debtor would have had.

Accordingly, where A., after the passing of the Infants' Relief Act, 1874, obtained judgment by default against B. for a debt which was in fact for money lent to B. during his infancy, and A. subsequently obtained a charging order upon a fund in court, belonging to B. ; it was held, that inasmuch as the debt on which the judgment and charging order were founded was void, the charging order was inoperative. *In re Onslow's Trusts*, L. R., 20 Eq. 677.

LANDLORD AND TENANT—LEASE.

- CH. 1.—AGREEMENTS FOR LEASES, p. 526.
- CH. 2.—OF LEASES IN GENERAL, p. 532.
- CH. 3.—OF LESSORS AND LESSEES—SPECIAL STATUTORY PROVISIONS, p. 536.
- CH. 4.—PARCELS—TERM—RENT, p. 542.
- CH. 5.—COVENANTS IN LEASES AND PROVISIO FOR RE-ENTRY, p. 545.
- SEC. 1.—TO PAY RENT, RATES, AND TAXES, p. 545.
- SEC. 2.—TO INSURE, p. 547.
- SEC. 3.—TO REPAIR, p. 548.
- SEC. 4.—AS TO CARRYING ON TRADE, p. 549.
- SEC. 5.—NOT TO ASSIGN WITHOUT LICENCE, p. 551.
- SEC. 6.—OF THE LESSOR'S COVENANTS—FOR QUIET ENJOYMENT, &c., p. 553.
- SEC. 7.—COVENANTS RUNNING OR NOT RUNNING WITH THE LAND, p. 554.
- SEC. 8.—REMEDY IN EQUITY FOR BREACH OF COVENANT, p. 556.
- SEC. 9.—WAIVER OF BREACH OF COVENANT—LICENCE, p. 558.
- SEC. 10.—PROVISIO FOR RE-ENTRY, p. 558.
- CH. 6.—ASSIGNMENT AND DEVOLUTION OF INTEREST OF LESSOR OR LESSEE, p. 561.
- CH. 7.—DETERMINATION OF LEASE, p. 564.

CHAPTER I.

AGREEMENTS FOR LEASES.

<i>Generally</i>	527	<i>Generally—continued.</i>	
<i>Agreement implies Title in</i>		<i>Lease at Law may be Agree-</i>	
<i>Lessor</i>	527	<i>ment in Equity</i>	528
<i>Condition Precedent</i>	527	<i>Option to take</i>	528
<i>Lease or Agreement</i>	527	<i>Intended Lessee in Possession</i>	528

<i>Generally—continued.</i>		<i>Form of Lease to be granted</i>	530
<i>Committing Breach of Covenant</i>	529	<i>What are or not usual Covenants and Provisions</i>	530
<i>Insolvent circumstances of intended Lessee</i>	529	<i>Not to assign without Licence</i> ..	530
<i>Bankruptcy of</i>	529	<i>To repair</i>	530
<i>Agreement as to Underlease</i> ...	529	<i>Damage by Fire excepted</i>	530
<i>Yearly Tenancy</i>	529	<i>Restrictive of particular Trades</i> ..	530
<i>Tenancy just expired</i>	529	<i>Lessee becoming Bankrupt</i>	530
<i>Provisions as to Repairs, &c.</i> 529, 530		<i>Building Materials</i>	530
		<i>Covenants by Trustees</i>	531

Generally.] Under the previous title, "CONTRACTS," ante, the chief points relating to agreements generally and the doctrine of the court with respect to specific performance have been considered. An agreement to grant or take a lease must either be in writing, under the Statute of Frauds, or in part performed, although a lease, if for a term not exceeding three years, may be granted by parol. *Edge v. Strafford*, 1 Cr. & J. 391. The reader is referred to tit. "VENDOR AND PURCHASER," which treats of the requisites of contracts under that statute. In the present Chapter it is assumed that the person, whether intended lessor or intended lessee, who claims the aid of the court, does so under a contract binding under the statute, and such also as equity, according to its general principles, will enforce. A person who contracts to grant a lease assumes to have title to do so, and if he has not he will be liable to an action at the suit of the intended lessee. *Stranks v. St. John*, L. R., 2 C. P. 376; see *Lock v. Furze*, L. R., 1 C. P. 441. Where there is a condition precedent to the right to enforce specific performance of an agreement to take a lease, the condition must be performed before the right can be enforced in equity. *Counter v. Macpherson*, 5 Moo. P. C. 83.

It is sometimes difficult to determine whether an instrument is a lease or a mere agreement for one. This depends upon the intention of the parties as expressed in the instrument. *Poole v. Bentley*, 12 Ea. 168; *Doe v. Powell*, 7 M. & Gr. 980. The cases on the subject are not, however, altogether reconcilable with each other. Where A. agreed to let and B. to take, it was held to be an actual lease, these being words of present demise. *Poole v. Bentley*, sup.; see *Staniforth v. Fox*, 7 Bing. 592; *Doe v. Ries*, 8 Bing. 178. Even where the preparation of a future lease is provided for, an agreement that the lessee shall enter and pay rent is a present demise. *Pinero v. Judson*, 6 Bing. 206; see *Doe v. Benjamin*, 9 A. & E. 644; *Anderson v. Mid. R. Co.*, 3 E. & E. 614. On the other hand, the instrument will operate as an agreement only where there is an express stipulation to that effect. *Perring v. Brook*, 1 Moo. & R. 510. So where some future act is to be done before the relation of landlord and tenant is established. *Doe v. Ashburner*, 5 T. R. 163; see *Bicknell v. Hood*, 5 M. & W. 104; *Doe v. Clarke*, 7 Q. B. 211; *Rawson v. Eicke*, 7 A. & E. 451; *Doe v. Foster*, 3 C. B. 215. Since the Judicature Acts the rule no longer holds that a person occupying under an executory agreement for a lease is only made tenant from year to year at law by the payment of rent, but he is to be treated in every court as holding on the terms of the agreement. The tenant,

therefore, holding under an agreement is subject to the same right of distress as if a lease had been granted, and if under the terms of the lease a year's rent would be payable in advance on demand a distress for that is lawful. *Walsh v. Lonsdale*, 21 Ch. D. 9.

But although an agreement may amount to an actual lease at law, it will be treated as an agreement in equity if a further instrument be necessary to carry out the intentions of the parties. *Fenner v. Hepburn*, 2 Y. & C. C. C. 159. An agreement for a lease for seven, fourteen, or twenty-one years gives the option to the lessee alone. *Price v. Dyer*, 17 Ves. 363. Where there was an agreement for a three years' tenancy, with, at the expiration of that term, an agreement to grant a lease for a further term of seven, fourteen, or twenty-one years, and the representatives of the lessee occupied for four years after the expiration of the three years without asking for a renewal, it was held that they were nevertheless entitled to such renewal. *Moss v. Barton*, L. R., 1 Eq. 474; *Buckland v. Papillon*, L. R., 2 Ch. 67; see *Bogg v. Midland R. Co.*, 36 L. J., Ch. 440. It sometimes happens that the intended lessee is let into possession of the premises which are to be demised, under an agreement only, but referring to the stipulations of the intended lease, the preparation of the lease being deferred. In such cases it becomes a question, and often one of difficulty, what particular stipulations are to be in force. See *Bowes v. Croll*, 6 E. & B. 255; *Bennett v. Ireland*, E., B. & E. 326; *Doe v. Amey*, 12 A. & E. 476, *post*, p. 530. Where by an agreement not under seal A. agreed to grant to B. a lease at a certain rent of a piece of land so soon as the latter should have erected upon it a messuage, and B. undertook until the execution of the lease to "hold the said piece of land and other the premises at the rent and subject to the conditions to be contained" in the lease, and B. never entered upon or took possession of the piece of land, it was held, that although the articles of agreement did not operate as a demise, yet B. by a collateral contract to the intended lease had undertaken to pay the amount of the rent, and that it was immaterial that he had never entered upon possession of the land. *Adams v. Hagger*, 4 Q. B. D. 480. See *Mss. Camden v. Batterbury*, 5 C. B., N. S. 808.

Money expended on property agreed to be demised, and which the intended lessor agrees to repay if no lease be granted, is a lien upon his interest in the property. *Middleton v. Magnay*, 2 H. & M. 233. Where the landlord refuses to grant the lease after the tenant has been in possession under a valid agreement, and gives the tenant notice to quit and brings an action of ejectment upon it, the tenant will be entitled to an injunction against the action and specific performance of the agreement. See *Pain v. Coombs*, 1 D. & J. 34; *Davis v. Shepherd*, L. R., 1 Ch. 410. Equity will not, however, in every case decree specific performance at the instance of a tenant who has been in possession under an agreement for a lease, if, during such possession, he has committed breaches of the covenants to be contained in the lease, for which the landlord would have been entitled to re-enter if the lease had been executed. *Hill v. Barclay*, 18 Ves. 63; *Lewis*

v. Bond, 18 Bea. 85; *Gregory v. Wilson*, 9 Ha. 683. But in such cases the court must be quite satisfied that breaches of covenant have been committed and have not been waived; and it may be observed that very generally at the present day the practice is to decree performance, the lease to be *ante-dated*, so as to bear date at the time it ought to have been executed, and on the breach of covenant, if any, the lessor may proceed at law. *Pain v. Coombs*, 1 D. & J. 34; *Rankin v. Lay*, 2 D., F. & J. 65; *Poyntz v. Fortune*, 27 Bea. 393. In such cases the tenant must admit that the lease was executed on the day it bears date. As to the necessity for this, see *Shaw v. Kay*, 1 Ex. 412, *post*, p. 544. The insolvent circumstances and continuing embarrassments of the intended lessee are matters of great weight in a question of specific performance of an agreement for a lease. See *O'Hertihy v. Hedges*, 1 Sch. & L. 123; *Buckland v. Hall*, 8 Ves. 92; *Neale v. Muckenzie*, 1 Ke. 474; *Pearson v. Knapp*, 1 M. & K. 312; *Price v. Assheton*, 1 Y. & C., Ex. 441; *Plunkett v. Dease*, 10 Ir. Eq. Rep. 124. The insolvency of the intended lessee is no answer to a bill by his assignee, where there is no evidence that the agreement was made out of considerations personal to the former. *Crosbie v. Tooke*, 1 M. & K. 431. An agreement for a lease is in general of an assignable nature (*ante*, p. 82), and even the bankruptcy of the intended lessee would not prevent his interest, including an option to have a lease granted if such an option is given, passing to his assignees or trustees (and their vendee) under the Bankruptcy Act, 1849. See ss. 141, 142, and Act of 1861, s. 131; *Buckland v. Papillon*, L. R., 2 Ch. 67; *Morgan v. Rhodes*, 1 M. & K. 435, and the Bankruptcy Acts of 1869, 32 & 33 Vict. c. 71, ss. 4, 15, 22, 25, and 1883, s. 44. But the trustee in bankruptcy may disclaim, *ante*, p. 84, and *post*, p. 567. As to the assignment of an agreement for a lease which is to contain a covenant against assignment without licence, see *ante*, p. 83, and *Dowell v. Dew*, 12 L. J. (N. S.) Ch. 158, 165.

A person who enters into an agreement for an underlease has constructive notice of all usual covenants in the original lease; but it may be doubtful whether he has such notice of unusual covenants. *Flight v. Barton*, 3 M. & K. 282. In this case it was held that a vendor of an underlease, who is informed by the purchaser of the nature of the business which he meant to carry on, against which there is a prohibitive covenant in the original lease, must state that fact, or he will by his silence be held to represent that there is no such covenant. See now as to constructive notice, Conveyancing Act, 1882, 45 & 46 Vict. c. 39, s. 3, *post*, tit. Vendors and Purchasers. A contract for a tenancy from year to year will not be enforced (*Clayton v. Illingworth*, 10 Ha. 451), nor an agreement to grant or assign a lease when the term has expired. *Walters v. Northern Coal Co.*, 5 D., M. & G. 629, 639. See further as to contracts to grant a lease, Conveyancing Act, 1881, s. 13, *post*, tit. Vendors and Purchasers.

If it be intended that repairs shall be done by one party or the other, prior to the granting of the lease, there should be clear and express provisions to that effect. In the absence of any express agree-

ment on the subject, a person who agrees to take a house must take it as it stands, and cannot call on the lessor to put it into a condition which makes it fit for living in. *Chappell v. Gregory*, 34 Bea. 250. But where the intended lessor does agree to put it into repair or to finish it, he must perform his agreement in a proper manner, or the intended lessee will not be bound. *Tildesley v. Clarkson*, 30 Bea. 419.

Form of Lease to be granted.] The court does not usually, in making the decree for specific performance, give any special directions as to the covenants to be inserted in the lease. See *Seton on Decrees*, 620; *Onions v. Cohen*, 2 H. & M. 354; *Beadel v. Pitt*, 11 Jur., N. S. 152. If the parties cannot agree, the lease is settled by the chief clerk, subject to an appeal to the judge. *Jenkins v. Green*, 27 Bea. 440; *Parish v. Sleeman*, 1 D., F. & J. 326. An agreement for a lease should, and usually does, state what covenants are to be contained in the lease. Sometimes the clause as to this is general, merely specifying that all common or usual covenants shall be inserted; and although an agreement for a lease may not provide that the lease shall contain usual covenants, each party is entitled to have such covenants inserted, as are incidental to and necessary to protect the rights given or reserved to him. See *Church v. Brown*, 15 Ves. 258; *Blakesley v. Whieldon*, 1 Hare, 179, 181.

Under an agreement for a lease to contain common and usual covenants, the lessor is not entitled to a covenant restraining assignment or underletting without licence. *Church v. Brown*, 15 Ves. 258; *Brown v. Raban*, *ib.* 528; *Buckland v. Papillon*, L. R., 1 Eq. 477. *Hodgkinson v. Crowe*, L. R., 19 Eq. 591; 10 Ch. 622; *Hampshire v. Wickens*, 7 Ch. D. 555. Where a lessee subject to such a covenant having obtained his landlord's consent, agrees to grant an underlease to contain the like provisions as the lease; in the underlease the *under lessor* is the person whose consent should be required. *Williamson v. Williamson*, L. R., 9 Ch. 729. A covenant to repair, though not qualified by the words "damage by fire excepted," is a usual covenant. *Kendall v. Hill*, 6 Jur., N. S. 968; *Sharp v. Milligan*, 23 Bea. 419. Covenants restraining the carrying on of particular trades in trading localities are not usual covenants. *Propert v. Parker*, 3 M. & K. 280; *Wilbraham v. Livesey*, 18 Bea. 206; see *Bennett v. Womack*, 7 B. & C. 627. In the lease of a farm a covenant not to mow meadow land more than once a year is not unusual. *Hyde v. Warden*, 3 Ex. D. 72. In an agreement to grant a lease of an hotel with usual covenants, the court authorized a proviso for re-entry on the lessee becoming bankrupt. *Haines v. Burnett*, 27 Bea. 500. But in *Hyde v. Warden*, 3 Ex. D. 72, it was held that a power of re-entry if the lessee and his assigns became bankrupt, or made a composition with creditors, or if execution should issue against either of them, is unusual, and an intended assignee is not bound to accept an assignment of a lease containing such a covenant.

Sometimes in building leases there is a provision for forfeiture of the

building materials to the landlord on the bankruptcy of the builder; such a provision is void, as contrary to the policy of the bankruptcy law, and the materials are the property of the trustee in the liquidation. *Ex parte Jay*, 14 Ch. D. 19. See also *Ex parte Mackay*, L. R., 8 Ch. 643; *Ex parte Williams*, 7 Ch. D. 138. These cases rest on the principle that there can be no valid contract that a man's property shall remain his until his bankruptcy and then go over to some one else and be taken from his creditors. *Higinbotham v. Holme*, 19 Ves. 88. But where from the time of such a contract the landlord has a lien on the chattels, to be taken in the event of bankruptcy, the contract will be good. *Brown v. Bateman*, L. R., 2 C. P. 272; *Ex parte Dicken*, 4 Ch. D. 524. A provision that underleases and assignments shall be left with the ground landlord's solicitor on payment of a fee is unusual. *Brookes v. Drysdale*, 3 C. P. D. 52.

Under an agreement for a lease to contain "all usual and customary mining clauses," the landlord is not entitled to have inserted in the lease a proviso for re-entry on breach of any of the covenants by the lessee, or otherwise than on non-payment of rent. And it would seem that the rule is not limited to mining leases. *Hodgkinson v. Crowe*, L. R., 10 Ch. 622. In the lease of a colliery, independently of a special custom, a provision that the lessee shall be entitled to determine the lease when the mine is incapable of being worked at a profit is not a usual clause. *Strelley v. Pearson*, 15 Ch. D. 113. See *Lord Abinger v. Ashton*, L. R., 17 Eq. 358.

Usually on a lease being granted there is a counterpart which should be an exact copy of the lease. Where there is a manifest clerical error in the lease, the counterpart may be looked at to ascertain where the mistake lies. *Burchell v. Clark*, 2 C. P. D. 88.

Trustees granting or renewing leases under agreements are, as a general rule, only bound to enter into covenants against incumbrances. *Worley v. Frampton*, 5 Ha. 560. But to the extent of their beneficial interest, however, if they have any, they are bound to enter into such covenants as the person whom they represent would have been bound to enter into. *Page v. Broom*, 3 Bea. 36.

CHAPTER II.

OF LEASES IN GENERAL.

<i>Leases for Terms certain, not being from Year to Year</i>	532	<i>Tenancies from Year to Year</i>	533
<i>Generally</i>	532	<i>Entry under Agreement</i>	533
<i>Building Leases</i>	532	<i>Holding over</i>	533
<i>Underlease—Assignment</i>	532	<i>As to payment of Rent</i>	533, 534
<i>Licence, how determined</i>	532	<i>Assignable</i>	534
<i>Tenant cannot dispute Landlord's Title</i>	532	<i>Determination of</i>	534
<i>Loss of Lease</i>	533	<i>Notice</i>	534
<i>Statute of Frauds</i>	533	<i>Tenancy at Will</i>	534
<i>Exceeding Three Years</i>	533	<i>How created</i>	534
<i>Not exceeding three Years</i>	533	<i>Payment of Rent</i>	534
<i>If exceeding three Years must be by Deed</i>	533	<i>Assignment</i>	534
<i>Operating as Agreement</i>	533	<i>Determination of</i>	535
		<i>By notice—Death</i>	535
		<i>Tenancy at Sufferance</i>	535
		<i>How arises</i>	535

Leases for Terms certain, not being from Year to Year.] A lease of property of any kind capable of being held on lease may be, of course, for any term which the lessor (being able) is willing to grant and the lessee is willing to accept. In ordinary cases leases reserving rent are not granted for terms exceeding ninety-nine years. When granted for such or similar terms they are usually leases at a ground rent, the lessee, in effect, purchasing the term and paying a low rent. Where the ground on which a house is to be erected is demised for building purposes, the lessee, in general, has it rent free for two or three years, and for the remainder of the term at a ground rent.

An underlease is a lease by a lessee for some part of his own term. If, through inadvertence, the lessee's whole term be assigned, it will nevertheless be construed to be an underlease to effect the intention of the parties (*Pollock v. Stacy*, 9 Q. B. 1033), though there will be no right to distrain for the rent, as there is no reversion. See *Preece v. Corrie*, 5 Bing. 24; *Beardman v. Wilson*, L. R., 4 C. P. 57. A licence, though for a term and at a rent, is distinguishable from a lease. *Ward v. Day*, 4 B. & S. 337; see *Bird v. G. E. R. Co.*, 19 C. B., N. S. 268. A mere licence, though under seal, is revocable (*Wood v. Leadbitter*, 13 M. & W. 838; see *Hyde v. Graham*, 1 H. & C. 593), and is determinable by an assignment of the subject-matter in respect of which the privilege is to be enjoyed. *Coleman v. Foster*, 1 H. & N. 37. While the relation of landlord and tenant subsists, the tenant cannot dispute his landlord's title in equity (*White v. Foljambe*, 11 Ves. 344; *Att.-Gen. v. L. Hotham*, 3 Russ. 415; *Hawksbee v. Hawksbee*, 11 Ha. 230; *Langford v. Selmes*, 3 K. & J. 220) any

more than he can at law. But he may show that his interest has determined. *Ib.* A lessor who has lost his counterpart has a right to a discovery from his tenant, and the tenant refusing to permit a copy of his lease to be made on the landlord's application and at his expense, must pay the costs of the bill of discovery. *Perry v. Newenham*, 1 Mol. 72.

By the Statute of Frauds (29 Car. 2, c. 3), leases for terms exceeding three years were required to be in writing, signed by the parties or their agents authorized *by writing*, otherwise they had the effect of leases *at will* only (s. 1), or from *year to year* after entry under it. *Doe v. Bell*, 5 T. R. 471, see *infra*. Leases for periods not exceeding three years from the making might be verbal if the rent reserved amounted to two-thirds of the full improved value (s. 2). Now, leases required by law to be in writing, *i.e.* leases exceeding three years from the making, must be *by deed*. 8 & 9 Vict. c. 106, s. 3. But the leases mentioned in sect. 2 of the Statute of Frauds are not affected and may still therefore be verbal or in writing not under seal; and leases for more than three years, though not by deed, may nevertheless be valid as *agreements* to grant leases. *Bond v. Rosling*, 1 B. & S. 371; *Tidey v. Mollett*, 16 C. B., N. S. 298; *Parker v. Taswell*, 2 D. & J. 559; overruling *Stratton v. Pettit*, 16 C. B. 420; and see *Tress v. Savage*, 4 E. & B. 36. The Statute of Frauds cannot be pleaded to a verbal agreement to allow the occupation of a leasehold house for life on payment merely of ground rent, rates, and taxes, if there has been a part performance by possession under the agreement and the agreement has affected the mode of living of the occupying party. *Coles v. Pilkington*, L. R., 19 Eq. 174. This case was decided in accordance with *Loffus v. Mau*, 3 Giff. 592, which, however, was disapproved of in, or perhaps it may be stated was overruled by *Maddison v. Alderson*, 8 App. C. 467. A lease, not under seal, for an original term of less than three years, whether by parol or in writing, is not invalid, although it gives a right to the lessee to continue the holding beyond three years from the making of the lease. *Hand v. Hall*, 2 Ex. D. 355. Tenancies from year to year and for less terms will be considered separately. The demise of an incorporeal hereditament must be by deed. *Bird v. Higginson*, 6 A. & E. 824.

Tenancies from Year to Year.] A tenancy from year to year arises either by express agreement, which may be verbal, or by implication; thus where a person enters under a void lease or under a contract to take a lease (*Doe v. Bell*, 5 T. R. 471), or *holds over* or continues in possession after the determination of his tenancy (see *Bishop v. Howard*, 2 B. & C. 100; *Mayor of Thetford v. Tyler*, 8 Q. B. 95; *Oakley v. Monck*, L. R., 1 Ex. 159; *Smith v. Widlake*, 3 C. P. D. 10), and pays rent with reference to a *yearly holding* (per Parke, B., *Braythwayte v. Hitchcock*, 10 M. & W. 497; *Tress v. Savage*, 4 E. & B. 36), a tenancy from year to year will be created. As a general rule, a person who entered under an agreement for a lease,

which was to contain certain stipulations, and paid rent, was a yearly tenant, subject to such stipulations. *Doe v. Amey*, 12 A. & E. 476. But payment of rent is no longer necessary. *Walsh v. Lonsdale*, 21 Ch. D. 9.

A tenancy from year to year is assignable. Whether it must be assigned by *deed*, though it may be created by parol, is not altogether clear from the wording of the 8 & 9 Vict. c. 106, s. 3, enacting that an assignment of a chattel interest, not being copyhold, in any tenements or hereditaments, and surrender in writing of any interest in any tenements or hereditaments, not being a copyhold interest and not being an interest which might by law have been created without writing, shall be void at law unless made by deed. This may in effect put an assignment and a surrender upon the same footing, in which case either by parol would be good, if the original lease could have been created by parol, or this construction may be applicable to *surrenders* only. In *Allcock v. Moorhouse*, L. R., 9 Q. B. D. 366, Jessel, M.R., observed as to a yearly tenancy, "I think it would have been assignable as a present interest at common law, if not under s. 6," *ib.* p. 376, that is as a future interest *by deed*. The tenancy may be determined by effluxion of time, where by express agreement it is to cease at a fixed period, or by surrender, or by act and operation of law, like any other tenancy (see *post*, Ch. VII.); or by half-a-year's notice to quit, expiring at the end of the first or some subsequent year of the tenancy (*Doe v. Smaridge*, 7 Q. B. 957), unless some other notice be agreed upon. A tenancy from year to year is not to be considered as a continuous tenancy, but as commencing every year. *Gandy v. Jubber*, 5 B. & S. 78. When a tenancy from year to year arises under an express agreement, the agreement may of course contain stipulations similar to the covenants contained in ordinary leases, having regard to the more limited duration of the term.

Tenancy at Will.] A tenancy at will is an estate determinable at the will either of the landlord or tenant. Co. Lit. 55 a. It may be created by agreement. *Richardson v. Langridge*, 4 Taun. 128; *Bayley v. Fitzmaurice*, 8 E. & B. 679; 9 H. L. C. 78. A mere permission to occupy creates a tenancy at will. *Doe v. Wood*, 14 M. & W. 682. So it may be created by implication: as where a person enters into possession under an agreement to take a lease. *Saunders v. Musgrave*, 6 B. & C. 524. But when rent was paid, a tenancy from year to year was in general created, but payment of rent is no longer necessary in such cases (see *supra*); and if a person enters into possession under a contract to purchase, he will be tenant at will to the vendor. *Right v. Beard*, 13 Ea. 210. There is no implied contract by a vendor, who continues in possession after he has executed the conveyance, that he should hold as tenant to the purchaser. *Tew v. Jones*, 13 M. & W. 13. There may be a tenancy at will at a fixed rent, giving the lessor a right to distrain. *Anderson v. Mid. R. Co.*, 7 Jur., N. S. 411; see *Doe v. Cox*, 11 Q. B. 122. A

tenant at will cannot, by assigning or underletting, constitute his assignee or sub-lessee tenant to the original landlord, though a tenancy may be created as against himself. *Per* Patteson, J., *Doe v. Carter*, 9 Q. B. 865; see *Pinkhorn v. Souster*, 8 Ex. 768. A demand of possession by the landlord (*Doe v. Price*, 9 Bing. 356; see *Doe v. Cox*, 11 Q. B. 122), or acts of ownership by him inconsistent with the relation of landlord and tenant (*Doe v. Turner*, 9 M. & W. 643; *Locke v. Matthews*, 13 C. B., N. S. 753), or a conveyance of his interest, of which the tenant has notice (*Doe v. Thomas*, 6 Ex. 858; see *Ball v. Cullimore*, 2 C., M. & R. 120), will determine the tenancy. The tenant may also determine his tenancy by notice and by giving up possession. Co. Lit. 55 b, n. (15). If after such determination the tenant remains in possession he is tenant at sufferance. *Doe v. Turner*, 7 M. & W. 226; aff. 9 M. & W. 643. The death of the lessor or lessee determines the tenancy. *James v. Dean*, 11 Ves. 391. But where there are two lessors and two lessees, the death of one lessor or one lessee does not. Co. Litt. 55 b.

Tenancy at Sufferance.—A tenancy at sufferance arises where the tenant originally held by a lawful title which is at an end, and continues wrongfully to hold over (Co. Lit. 57 b; see *ib.* 270 b; *Doe v. Watts*, 7 T. R. 83; *Doe v. Morse*, 1 B. & Ad. 365); as where tenant for years, or from year to year, or at will, holds over after his term has expired or interest been determined, without any fresh agreement or any rent being paid. See *Doe v. Turner*, 7 M. & W. 226, *sup.*; *Doe v. D. of Beaufort*, 6 Ex. 498. A tenancy of this kind cannot be assigned, for one tenant at sufferance cannot make another. *Per* Ellenborough, C.J., *Thunder v. Belcher*, 3 Ea. 451. A tenant at sufferance may maintain *trespass* against a *wrongdoer*, but not *ejectment*. *Graham v. Peat*, 1 Ea. 244; see *Doe v. Barber*, 2 T. R. 749; *Randall v. Stevens*, 2 E. & B. 641. If the owner assent to the holding it becomes a tenancy at will. *Doe v. Turner*, 9 M. & W. 646.

As to leases under Powers, see that title.

CHAPTER III.

OF LESSORS AND LESSEES—SPECIAL STATUTORY PROVISIONS.

<i>In general</i>	536	<i>Aliens</i>	538
<i>Joint Tenants and Tenants in Com-</i>		<i>Tenants in Tail</i>	538
<i>mon</i>	536	<i>Tenants for Life</i>	538
<i>Copyholders</i>	536, 537	<i>Corporations</i>	539
<i>Executors—Trustees</i>	537	<i>Universities—Colleges</i>	539
<i>Infants—Confirmation</i>	538	<i>Ecclesiastical Leases</i>	539
<i>Lunatics</i>	538	<i>Eleemosynary Leases</i>	539
<i>Married Women</i>	538	<i>Agricultural Holdings Act</i>	560

IN considering the subject of leases, the ordinary form of a lease and the arrangement of its several parts, indicate the order in which it may most conveniently be considered. In general any person can be a lessor or lessee with the exceptions and qualifications hereafter mentioned. Joint tenants and tenants in common may either join or sever in granting leases, and such leases take effect according to their interests. *Bac. Abr. Joint Ten. and Ten. in Com. (H. 1)*. In leases by tenants in common each is entitled to his proportion of the rent, for that is capable of being severed, but not of any reservation that cannot be severed. *Lit. s. 314; Thompson v. Hakewill, 19 C. B., N. S. 713*. And on the death of one tenant in common his right to such proportionate share of the rent devolves upon his representatives. *Beer v. Beer, 12 C. B. 60*.

Where joint tenants join in one demise at one single rent, the interest survives, and the survivor is entitled to the whole rent (*Hensstead's Case, 5 Rep. 10 b; Doe v. Summersett, 1 B. & A. 135*), survivorship being one important incident of joint tenancy. *Ante, tit. "JOINT TENANTS," &c.* But if one of two joint tenants alone grants a lease, this is binding in respect of his share on the survivor, and the rent goes to the representative of the lessor. *Co. Lit. 191 b*. Where a covenant with tenants in common is in relation to some subject-matter of an indivisible nature, for instance, a covenant to repair, all the tenants in common must join in the action, and on the death of any, his representatives with the survivors. *Foley v. Addenbrooke, 4 Q. B. 197; Thompson v. Hakewill, 19 C. B., N. S. 713*. With respect to covenants which may be joint or several according to circumstances, see *ib.*, and the observations, *J. W. Smith's Land. and Ten. 3rd. ed., p. 68, et seq.*

It has already been mentioned (*ante, p. 228*) that a copyholder can-

not, without incurring a forfeiture, grant a lease for more than one year, unless by special custom or by licence from the lord *himself* (Coke, Cop. s. 44; *Lutterl v. Weston*, Cro. Jac. 308; *Frosel v. Welsh*, *ib.* 403), or the steward under a special authority or by custom; and see *Doe v. Wilson*, 11 Ea. 56; Scriv. Cop. 459. The term authorized must not be exceeded, or the lease will be void *in toto* (*Jackson v. Neal*, Cro. El. 395), though it need not be for the whole of the permitted term. *Goodwin v. Longhurst*, *ib.* 535. It may be assigned without further licence. *Johnson v. Smart*, 1 Roll. Ab. 508, pl. 14. The lease, though void for want of a licence, is binding on the parties to it. *Wells v. Partridge*, Cro. El. 469; *Salisbury v. Hurd*, Cowp. 481. Nothing in the "Leases and Sales of Settled Estates Act," 19 & 20 Vict. c. 120 (*post*), is to affect or prejudice the rights of lords of manors, *ib.* s. 48. And by the amending act, 21 & 22 Vict. c. 27, the powers in these acts to authorize and to grant leases shall be deemed to include powers to lords of manors to give licences to their tenants to grant leases to the same extent and for the same purposes as leases may be authorized or granted of freehold hereditaments under these acts. *ib.* s. 3. Both of these acts are repealed by the 40 & 41 Vict. c. 18, s. 58 (28 June, 1877), see *post*, tit. "SETTLED ESTATES ACTS." A lease for a year by a copyholder, with a covenant to grant a new lease at the end of each year during a certain term, does not create a forfeiture. *Lufkin v. Nunn*, 11 Ves. 170; see 4 Byth. Conv. by Sweet, 232 *et seq.* It has already been mentioned that leases by executors or administrators are, in general, valid when beneficial to the parties interested in the testator's or intestate's estate. See *ante*, p. 276; *Dyot v. Morgan*, cited 13 Ves. 268. In the event of the death of a sole executor, the legal right to the rent devolves upon *his* personal representatives, not upon the parties beneficially entitled or upon the administrators *de bonis non* of the original testator or intestate. *Drew v. Bayly*, 2 Lev. 100; *Davie v. Drury*, cited 1 Ver. 94. Of course, however, if the lessor's estate be assigned to the parties beneficially interested, the right to the rent, &c. will follow.

In *Naylor v. Arnitt* (1 R. & My. 501), it was held, that a trustee of lands, in which there were successive life estates, might grant a reasonable lease for a term of years (in the case cited ten years), without an express power for that purpose. But in *Wood v. Patteson* (10 Bea. 541, 544), Lord Langdale observed, in substance, that if trustees unauthorized might grant a lease for ten years, they might for sixty years, and that he should be afraid to act upon *Naylor v. Arnitt*, and it was not followed in *Re Shaw's Trusts*, L. R., 12 Eq. 124. If trustees take a lease they and not the *cestuis que trust* will be liable, at law and in equity, for the rent and performance of the covenants. *Walters v. N. Coal Mining Co.*, 5 D., M. & G. 629. A lease by an infant is not void, only voidable and capable of confirmation on his attaining his majority. Lit. s. 547; *Story v. Johnson*, 2 Y. & C., Ex. 586; *Slator v. Brady*, 14 Ir. C. L. R. 61; *Same v. Trimble*, *ib.* 342. The rule is the same, although the lease is by

deed (*Zouch v. Parsons*, 3 Burr, 1794), and a voidable deed is valid until some act is done to avoid it, and those who claim in opposition to the deed must show that such an act has been done. *Allen v. Allen*, 2 Dr. & War. 307. If the infant receives rent after attaining his majority, this confirms the lease. *Ashfield v. Ashfield*, Wm. Jones, 157. But the lease of an infant, to be capable of confirmation, must be *his own* personal act, not that of an agent. *Doe v. Roberts*, 16 M. & W. 778. By the 11 Geo. 4 & 1 Will. 4, c. 65, ss. 16 and 17, the Court of Chancery may authorize the granting of leases of infants' property, and may empower infants to grant renewals of leases. And see the Settled Estates Act, s. 36, *post*. Leases to infants, like leases by infants, are voidable only on their attaining their majority; they may avoid or confirm them. *N. W. R. Co. v. M'Michael*, 5 Ex. 114, 128; see *Holmes v. Blogg*, 8 Taun. 35. By the 11 Geo. 4 & 1 Will. 4, c. 65, s. 12, under the direction of the Court of Chancery, leases to which infants or *femes covertes* are entitled may be surrendered and renewed. As to surrenders to trustees for infants, see *ante*, p. 318. Committees of lunatics may, under an order of the Lord Chancellor, surrender leases for lives or years, and accept new leases. 16 & 17 Vict. c. 70, s. 113. And where they have power to execute leases, they may sign, seal, and deliver in their own names, *Lawrie v. Lees*, L. R., 7 App. Ca. 19. A married woman, having separate estate, may be a lessee. *Gaston v. Frankum*, 2 De G. & S. 561; and see *ante*, p. 360 *et seq.* As to leases by a husband entitled in right of his wife, see tit. "SETTLED ESTATES ACTS."

As to the rights of aliens to take and hold property, see 33 & 34 Vict. c. 14, *ante*, p. 108.

Originally leases by tenants in tail were not binding on their issue. By the 32 Hen. 8, c. 28 (rep. 19 & 20 Vict. c. 120, s. 35, which was repealed by the 40 & 41 Vict. c. 18, s. 58), they were rendered binding on the issue, if by deed (see *Osborn v. D. of Marlborough*, 12 Jur., N. S. 559), and for not more than twenty-one years or three lives from the making thereof. By the operation of the 3 & 4 Will. 4, c. 74, ss. 15, 40 and 41 (*ante*, pp. 210, 214), leases by tenants in tail for terms not exceeding twenty-one years from the date, or twelve months from the date at rack rent, or not less than five-sixth parts of rack rent, are valid against all persons whom the tenant can bar, and do not require enrolment. A tenant in tail could also grant leases under the 19 & 20 Vict. c. 120, s. 32, and see now the Settled Estates and Settled Land Acts, *post*. A voidable lease by tenant in tail may be confirmed by a subsequent heir in tail, so far as regards his own interest, by acceptance of rent. *Doe v. Jenkins*, 5 Bing. 469. In the case cited the rent had been received for ten years.

A tenant for life may grant leases for his own life. Also by the 19 & 20 Vict. c. 120, any person entitled to the possession or to the receipt of the rents and profits of any *settled estate* (and see ss. 2—16), for an estate for life, or for years determinable with his life, or for any greater estate, was enabled to grant leases, s. 32. This act is repealed by the 40 & 41 Vict. c. 18, the 46th section of which corre-

sponds very nearly with s. 32 of the repealed act. See tit. "SETTLED ESTATES ACT," and "SETTLED LAND ACT," *post*.

S. 32 of the 19 & 20 Vict. c. 120, only applies to settlements made after the act came into operation (1st November, 1856, ss. 44, 46). Leases under this section are valid against the lessor and persons entitled under the settlement (if any), or claiming *under* the husband or wife of the lessor (s. 33), and against the *wife* of the lessor. 21 & 22 Vict. c. 77, s. 8. Although a lease by the husband and wife of the wife's land of which she is seised in fee may not be in accordance with this section, and not being duly acknowledged under the 3 & 4 Will. 4, c. 74, s. 79 (Amended Conveyancing Act, 1882, s. 7), is not valid under those acts, it may nevertheless be operative if the husband and wife during their lives, and the wife after the death of her husband, treat it as subsisting. *Toler v. Slater*, L. R., 3 Q. B. 42.

Municipal corporations may grant such leases as are mentioned in the 45 & 46 Vict. c. 50, ss. 108, 109, 110. This Act repealed the 5 & 6 Will. 4, c. 76.

The leasing powers of the universities and colleges are chiefly regulated by the Universities and College Estates Acts of 1858 (21 & 22 Vict. c. 44) and 1860 (23 & 24 Vict. c. 59).

The statutes regulating ecclesiastical leases are very numerous, the principal being the 32 Hen. 8, c. 28; 1 Eliz. c. 19; 13 Eliz. c. 10; 14 Eliz. cc. 11, 14; 18 Eliz. c. 11; 43 Eliz. c. 29; 1 Jac. 1, c. 3; 5 Geo. 3, c. 17; 39 & 40 Geo. 3, c. 41; 6 & 7 Will. 4, c. 20, s. 64, and several very important acts of the present reign, viz., the 5 Vict. c. 27; 5 & 6 Vict. c. 108; 21 & 22 Vict. c. 57; 24 & 25 Vict. c. 105; 25 & 26 Vict. c. 52. And see Statute Law Digest (9th ed., pp. 689, 690).

An eleemosynary corporation is within the meaning and operation of 13 Eliz. c. 10. A lease, of land belonging to such a corporation, which is not in conformity with the provisions of the third section of that statute, is absolutely void (*Magdalen Hosp. v. Knotts*, 4 App. C. 324).

For leases under the Settled Estates Acts see that title, *post*.

The Agricultural Holdings Act, 1883, 46 & 47 Vict. c. 61 (in force 1 Jan., 1884) is limited in its objects, and only in a comparatively slight degree comes within the scope of this work. It repeals the prior acts of 1875 and 1876 relating to the same matters subject to things done or proceedings pending under them (s. 62). A tenant who has made on his holding any improvement comprised in the 1st Schedule shall be entitled to such sum as compensation at the end of such holding from his landlord as fairly represents the value of the improvement to an incoming tenant *not taking into account* what is justly due to the inherent capabilities of the soil (s. 1). Compensation is not (with some exceptions) payable for improvements made before the commencement of the act (1 Jan., 1884) (s. 2). Compensation under the act is not payable in respect of improvements mentioned in the 1st part of the 1st Schedule and made after the commencement of the act unless with the written consent of the

landlord or his agent, which may be unconditional or upon terms, as to compensation or otherwise. Any such compensation shall be substituted for compensation under the act (s. 3). Compensation under the act is not payable to the tenant in respect of improvements mentioned in the 2nd part of the 1st Schedule and made after the commencement of the act unless he has not more than three nor less than two months before beginning to execute such improvements given to the landlord or his agent written notice of his intention so to do, and of the proposed mode. The landlord and tenant may then agree on terms as to compensation or otherwise. Any such compensation shall be substituted for compensation under the act, or the landlord may undertake to execute the improvements, charging the tenant interest as mentioned in the act on the outlay, which is recoverable as rent. Notice may be dispensed with by agreement (s. 4). In certain exceptional cases compensation in respect of improvements and otherwise provided for is to be substituted for compensation under the act (s. 5). In ascertaining the amount of compensation on the one hand certain benefits to the tenant are to be taken into account, and on the other certain sums payable to the tenant for the landlord's breach of covenant or agreement (s. 6). The act then provides for ascertaining the amount of compensation by reference to arbitration (ss. 7—28). The landlord, on paying the compensation, may obtain a charge on the land, and the case of a trustee paying the charge is provided for, and also of a company advancing money (ss. 29, 32). A year's notice to quit is substituted for half a year's notice where that was prior to the act necessary and sufficient, unless there is an agreement to the contrary (s. 33). *Six months'* notice by agreement is not half a year's notice within this section of the act (*Barlow v. Teal*, 15 Q. B. D. 501. See *Wilkinson v. Calvert*, 3 C. P. D. 360. Where a tenant affixes machinery, fixtures, or buildings to his holding for which he is not entitled to compensation and which are not affixed in pursuance of some obligation, or in place of fixtures, &c., belonging to his landlord, they are to be his property, and removable before or within a reasonable time after the end of his tenancy.

This right of removal is subject to the due payment of rent and performance of obligations, to his making good damage consequent upon the removal to his giving a month's notice of removal and to the right of his landlord to purchase the fixtures, &c. (s. 34). There are provisions as to the application of the act to the crown lands (ss. 35—37), and to ecclesiastical and charity lands (ss. 38, 40). Under a tenancy from year to year a notice to quit part of the premises may be given by the landlord in certain specified cases, subject to a proportionate reduction of rent, &c. (s. 41). There are provisions relating to distresses for rent, by which the right of distress in respect of holdings under the act is *in general* limited to rent accrued not more than one year before the distress (s. 44). Live stock and agricultural machinery of other persons, on the premises, are wholly or partially protected from distress (s. 45).

The act applies only to holdings wholly agricultural or pastoral, or

in part one the residue the other, or wholly or in part a market garden, or held by a tenant during his continuance in any employment under his landlord (s. 54). Agreements by a tenant depriving him of his right to compensation under the act for improvements mentioned in the 1st Schedule (except those giving him substitutionary compensation), are in respect of such deprivation wholly void (s. 55). An incoming tenant who has, with the written consent of his landlord, paid compensation for improvements to an outgoing tenant, is placed in the position of the latter with respect to such compensation (s. 56). Tenants are only entitled to compensation as authorized by the act, if not so entitled they may recover it by virtue of any other act, agreement, or custom (s. 57). Changes of tenancy are not to affect the rights of a tenant to compensation who continues his holding during such changes (s. 58). There are restrictions in respect of improvements made by a tenant about to quit and his right to compensation for them (s. 59).

The 1st Schedule is as follows :—

Part 1. Improvements to which consent of landlord is required ;
1. Erection or enlargement of buildings ; 2. Formation of silos ; 3. Laying down of permanent pasture ; 4. Making and planting of osier beds ; 5. Making of water meadows or works of irrigation ; 6. Making of gardens ; 7. Making or improving of roads or bridges ; 8. Making or improving of watercourses, ponds, wells, or reservoirs, or of works for the application of water power or for supply of water for agricultural or domestic purposes ; 9. Making of fences ; 10. Planting of hops ; 11. Planting of orchards or fruit bushes ; 12. Reclaiming of waste land ; 13. Warping of land ; 14. Embankment and sluices against floods.

Part 2. Improvements in respect to which notice to landlord is required. 15. Drainage.

Part 3. Improvements to which consent of landlord is not required :
16. Boning of land with undissolved bones ; 17. Chalking of land ; 18. Clayburning ; 19. Claying of land ; 20. Liming of land ; 21. Marling of land ; 22. Application to land of purchased artificial or other purchased manure ; 23. Consumption on the holding by cattle, sheep, or pigs, of cake or other feeding stuff not produced on the holding.

CHAPTER IV.

PARCELS—TERM—RENT.

<i>Parcels</i>	542	<i>Term</i>	543
<i>What may be demised</i>	542	<i>Commencement of</i>	543
<i>Map is part of Title</i>	542	<i>Interesse termini</i>	543
<i>Reference to Occupation</i>	542	<i>Habendum</i>	544
<i>Words "belonging or appertaining"</i>	542	<i>Impossible Date</i>	544
<i>Land, Woods, &c.</i>	542	<i>Duration</i>	544
<i>Messuage House</i>	543	<i>Months—Calendar</i>	544
<i>Exceptions out of Demise</i>	543	<i>Determinable on Lives</i>	544
<i>Reservations</i>	543	<i>Option</i>	544
<i>By Acreage</i>	543	<i>Rent</i>	544
<i>Mines—Minerals</i>	543	<i>Reservation of Rent</i>	544
<i>Surface over Mines</i>	543	<i>Payable in advance</i>	544
<i>Boundaries</i>	543	<i>General Reservation</i>	545
		<i>Income Tax</i>	545

Parcels.] Corporeal and incorporeal hereditaments of every kind are capable of being demised. But leases of the former species of property have principally been made the subject-matter of judicial determination. A map on the lease is part of the title. *Brown v. Wales*, L. R., 15 Eq. 142, 147.

The parcels should be clearly stated. Not unfrequently they are described by reference to the occupation of the lessee himself or to that of a previous tenant. These are words of identification only. And if, in the case of a previous tenant, there has been a restriction on his right of enjoyment as tenant, for instance, on his right to use the roof of a house or shop, there must be corresponding words of restriction in the case of a fresh tenant. Mere words of reference to the occupation of the previous tenant, for instance, "as late in his occupation," are insufficient. *Martyr v. Lawrence*, 2 D., J. & S. 261, K. Bruce, L.J., *diss.*; comp. *Francis v. Hayward*, 22 Ch. D. 177; and see *Doe v. Burt*, 1 T. R. 701; *Wilkinson v. Malin*, 2 Cr. & J. 636; *Dyne v. Nutley*, 14 C. B. 122. As to the words "belonging or appertaining," and words of like import, see *Kingsmill v. Millard*, 11 Ex. 313; *Maitland v. Mackinnon*, 1 H. & C. 607. A right, if really appurtenant to the property demised, will pass, though not expressly mentioned. *Skull v. Glenister*, 16 C. B., N. S. 81. As to what is included under the word "land," see Co. Lit. 4 a; "woods," "wood," "trees," see *Stanley v. White*, 14 Ea. 332; *Shep. Touch.* by Pres. 94. Where trees are excepted, the lessor has a right to cut and take them away. *Ib.* 100. The exception does not extend to fruit trees, unless speci-

ally named. *Wyndham v. Way*, 4 Taun. 316; *Bullen v. Denning*, 5 B. & C. 842. As to what are timber trees, see 4 Byth. Conv. by Sweet, 318. "Messuage (*maison*), or house," will pass outhouses belonging to, though not attached to, the house; also the curtilage, garden and orchard. See *Doe v. Collins*, 2 T. R. 502; *Scholes v. Hargreaves*, 5 T. R. 48; comp. *Hebbert v. Thomas*, 1 C., M. & R. 861. As to ways, see *Kooystra v. Lucas*, 1 D. & Ry. 506, and *ante*, tit. "EASEMENTS."

An exception in a lease is always of some part of the subject-matter of the demise and of a thing *in esse*, and which, but for the exception, would pass with it. See Co. Lit. 47 a. A very common subject of an exception is timber. See *Pannell v. Mill*, 3 C. B. 625. Also mines, minerals and quarries. See *Proud v. Bates*, 11 Jur., N. S. 441. A reservation, strictly speaking, applies to some right or profit to arise from the subject-matter of the demise, which had previously no separate existence but is newly created. Co. Lit. 47 a; see *Doe v. Lock*, 2 A. & E. 743. Very often, however, the words "excepting or reserved" are used together in a lease, and frequently in the same sense. As to a reservation of the free running of water and soil coming from adjacent premises, see *Chadwick v. Marsden*, L. R., 2 Ex. 285. As to reservations of mines and minerals and the right to work them, see *Ramsay v. Blair*, 1 App. C. 701. A reservation of mines, minerals, sand, quarries of stone, brick earth and gravel pits does not operate so as to preclude the lessee from removing according to the custom of the country flints coming to the surface of the land. *Tucker v. Linger*, 21 Ch. D. 18.

Under an agreement to demise land by acreage, except a certain number of acres, the intended lessor has the right of selection; though under a lease the lessee may select. *Jenkins v. Green*, 27 Bea. 437. Where the lessor has the right it should be exercised fairly, not oppressively. *Ib.* In a demise of surface land over mines, the mines being excepted, with power to win the minerals, the lessor is entitled to an *absolute* underground right of way, and the lessee is entitled to support for the surface. *Proud v. Bates*, 11 Jur., N. S. 441. A tenant is bound to preserve the boundaries, and if he permit them to be destroyed so that the lessor's land cannot be distinguished from *his*, he is bound to restore them specifically, or to substitute land of equal value. *Att.-Gen. v. Fullerton*, 2 V. & B. 263; *Att.-Gen. v. Stephens*, 6 D., M. & G. 111.

Term.] A lease for years being a mere chattel interest, may, unlike an estate of freehold, be made to commence at a future time as well as at a present or past time. Touchst. 272; see *Ackland v. Lutley*, 9 A. & E. 879. And a lease to commence upon the expiration of an existing lease does not convey the *reversion* expectant on such lease, but an *interesse termini* only until the expiration of such existing lease. *Smith v. Day*, 2 M. & W. 684; see *Lock v. Furze*, 19 C. B., N. S. 96. An *interesse termini* is the interest which a lessee has before he enters under his lease. Until entry he has only a qualified right. Co.

Lit. 46 b. At law he cannot, until entry, exercise his full rights as tenant, even where the lease is a present one. He cannot, for example, maintain trespass (see *Harrison v. Blackburn*, 17 C. B., N. S. 678); but on entry his right is complete. A lease to commence at the expiration of an existing term commences whenever the term expires, whether by effluxion of time or by surrender or forfeiture, but a lease to commence at the expiration of the number of years for which the existing term is granted, will not commence until after the expiration of such number of years, though the term may have previously determined. Co. Lit. 45 b.

If the *habendum* is from the date or day of the date, and there is an impossible date, as the 31st of June, or no date, the *habendum* will be from the *delivery*. Co. Lit. 46 b. The duration of the term is from the day of the date where there is one, but the time of execution regulates the liability of the tenant as to breaches of covenant, and he will not be liable for such breaches committed between the date and execution of the lease. *Shaw v. Kay*, 1 Ex. 412, per Parke, B.; *Jervis v. Tomkinson*, 1 H. & N. 206. The duration of the term should be certain, or be capable of being rendered certain. Bac. Ab. Lease (L. 3). If a landlord agrees, in consideration of a premium, that his tenant shall not be turned out as long as he pays his rent, no *term* being mentioned, the tenant has a right to retain possession as long as the landlord's interest exists. *Browne v. Warner*, 14 Ves. 156. The rule is the same although no premium has been paid, the relation of landlord and tenant being a sufficient consideration. *King's Leasehold Estates*, L. R., 16 Eq. 521. Leases for different terms will be good if the terms are certain; for instance, for seven years and afterwards from year to year. *Brown v. Trumper*, 26 Bea. 11. Where a lease is to commence *from* a day, e.g., 25th of March, for a certain number of years, it does not expire until the last moment of the 25th of March in the last year of the term. *Ackland v. Lutley*, 9 A. & E. 879. Where the term is for months, without specifying whether lunar or calendar, the latter must now be understood. 13 & 14 Vict. c. 21, s. 4. A lease for years, if one or more shall so long live, is a lease for the years named, determinable sooner on the death of the person or persons named. See Bac. Ab. Lease (L. 4). A lease for years in the alternative, as seven, fourteen or twenty-one years, gives the lessee only the option of determining it. *Price v. Dyer*, 17 Ves. 363.

Rent.] A formal reservation of rent in a lease, though usual, is not necessary, if it be clear that a rent is to be reserved. Woodfall, Land. & Ten. 12th ed. p. 145. The amount must be certain, or capable of being reduced to a certainty. Co. Lit. 96 a; *Daniel v. Gracie*, 6 Q. B. 145. The mere fact of rent being fluctuating does not make it uncertain. *Ex parte Voisey*, 21 Ch. D. 442. Rent may be reserved so as to be payable in advance. *Lee v. Smith*, 9 Ex. 662. As to reservations of corn rents in college leases under the 18 Eliz. c. 6, see Woodfall, L. & T., 12th ed., 351; and as to rents other than pecuniary

rents, *ante*, p. 196. The rent should be reserved to the lessor himself, his heirs and assigns, or his executors, administrators and assigns, according to the nature of the lessor's interest in the property demised. But a reservation of rent *generally during the term* is good, for though no person be named to whom it is to be paid, the law will distribute it to the persons legally entitled. See *Whitlock's Case*, 8 Rep. 69 b; *Dollen v. Batt*, 4 C. B., N. S. 768. Under a reservation to the lessor *alone*, the rent, it is said, is payable only during his lifetime. 2 Wms. Saun. 753, ed. 1871, n. 2 to *Sacheverell v. Froggatt*. Under a simple reservation of rent to a lessor who is seised in fee, or to him and his assigns or executors (not stating *during the term*), the rent, it seems, is only payable during the life of the lessor (Co. Lit. 47 a, n. 8); *aliter*, where it is so payable during the term. *Sacheverell v. Froggatt*, 2 Wms. Saun., *sup.* A mistake in the reservation, as, to heirs and assigns, when it should be to executors, administrators or assigns, or *vice versâ*, is immaterial, as the rent follows the reversion. Woodf. L. & T., 12th ed., 355. If rent be not reserved quarterly or half-yearly, it will not be due until the end of the year. *Turner v. Allday*, Tyr. & Gr. 819; *Coomber v. Howard*, 1 C. B. 440. Rent may be reserved so as to be increased from time to time by the amount of income tax. *Beadel v. Pitt*, 11 Jur., N. S. 152.

CHAPTER V.

OF COVENANTS IN LEASES.

SEC. 1.—*To pay Rent, Rates and Taxes.*

<i>Forfeiture for Nonpayment</i>	545	<i>Liability to pay Rent, though Fire</i>	546
<i>Relief in Equity and at Law</i>	545	<i>Disputed Right to Rent</i>	546
<i>Payment within Six Months</i>	546	<i>Rates and Taxes</i>	546

THE ordinary covenants in leases are considered in the several sections of this chapter. As to covenants with two or more, see *post*, tit. "MORTGAGE," Ch. V. Covenants in leases may be divided into affirmative and negative covenants. In *Evans v. Davis*, 10 Ch. D. 747, Fry, J., observed, p. 757, "I have always understood that 'non-observance' refers to the negative covenants, and 'non-performance' to the affirmative covenants." The covenant to pay rent is almost invariably the first covenant in a lease. The remedy for breach of it is usually by distress or action for the rent, or by an action of ejectment, where, under the proviso for re-entry, such an action is maintainable. Courts both of law and equity have power to relieve in cases of forfeiture for non-payment of rent. Such a power exists

as well where there is a proviso that the lease shall be *void* for non-payment as where there is a mere power of re-entry. *Bowser v. Colby*, 1 Hare, 109. By the 15 & 16 Vict. c. 76, this relief may be had in equity within six months after execution on the judgment executed, on payment of the rent, arrears and costs (ss. 210—212). But by the 23 & 24 Vict. c. 126, the remedy at law is of a more summary kind, for the court or a judge has power, upon *rule* or *summons*, to give the same relief as may be had in equity and upon the same conditions (s. 1) (3—11). See 44 & 45 Vict. c. 41, s. 14 (8), *post*, p. 560.

A tenant continues liable under his covenant to pay rent, notwithstanding the premises are destroyed by fire, even where there is a covenant to repair, damage by fire only excepted (*Holtzapffell v. Baker*, 18 Ves. 115; see *Bennett v. Ireland*, E., B. & E. 326), and equity will not interfere with the legal right. *Leeds v. Cheetham*, 1 Sim. 146, overruling, on this point, *Brown v. Quilter*, Amb. 619. Where the rent is to cease or abate if the premises should be destroyed or damaged by fire, flood, storm, tempest, or other inevitable accident, there is no right to an abatement, on the ground that the tenant has not the beneficial occupation of the house by reason of the lessor doing repairs. *Saner v. Bilton*, 7 Ch. D. 815; *Manchester, &c., Co. v. Carr*, 5 C. P. D. 507.

The tenant is sometimes placed in a difficulty, when, on the death of his lessor, there are conflicting claims on the part of the heir and devisee where the lessor was seised in fee. In such cases, the lessee is not bound to decide the matter for himself, but may claim the aid of the court by interpleader proceedings. *Jew v. Wood*, Cr. & Ph. 185. See Judicature Act, 1875, s. 2. As to the right to rent on a severance of the reversion, see *post*, Ch. VI.

The lessee under a covenant or agreement to pay rent free of all outgoing, or a net rent, must pay land tax and tithe rent-charge (*Parish v. Sleeman*, 1 D., F. & J. 326), and sewers rate. *Bennett v. Womack*, 7 B. & C. 627. See as to metropolitan main drainage rates, *Sweet v. Seager*, 2 C. B., N. S. 119; *Thompson v. Lapworth*, L. R., 3 C. P. 149. But where the tenant covenanted to pay all taxes and assessments except level, property and land taxes, he was held not liable to pay tithe rent-charge. *Jeffrey v. Neale*, L. R., 6 C. P. 240. In a lease of a shop and basement and of three rooms on the third floor of the same house, the lessor covenanted to pay "all rates and taxes chargeable in respect of the demised premises, except gas." Water was separately supplied by a company to the shop and basement. It was held that the water charge was a "rate" within the meaning of the covenant. *Direct Spanish Telegraph Co. v. Shepherd*, 13 Q. B. D. 202. The cost of drainage works directed to be executed by the proper sanitary authority comes within the terms taxes, rates, duties, and assessments whatsoever, whether parliamentary, parochial, or otherwise. *Budd v. Marshall*, 5 C. P. D. 481. A sum assessed upon the owners as their proportion of the expense of paving the street upon which the premises abutted is not a rate, tax, or assess-

ment within the meaning of a covenant to pay "all rates, taxes, and assessments payable in respect of the premises during the term," but is a charge imposed upon the owner for the permanent improvement of his property. *Wilkinson v. Collyer*, 13 Q. B. D. 1; see *Tidswell v. Whitworth*, L. R., 2 C. P. 326; *Rawlins v. Briggs*, 3 C. P. D. 368; *Hill v. Edward*, W. N. 1885, p. 32.

SEC. 2.—*To insure.*

<i>In whose Names</i>	547	<i>Tenant's Equity as to Expenditure</i>	
<i>In accordance with Covenant</i>	547	<i>of Insurance Money</i>	547
<i>Application of Insurance Money</i> ...	547	<i>Relief for Breach of Covenant</i>	548

Where there is a covenant to insure, the insurance must be in the names of the persons mentioned in the covenant. *Doe v. Gladwin*, 6 Q. B. 953. Thus, a covenant to insure in the name of A. only is broken by insuring in the joint names of A. and the lessee. *Penniall v. Harborne*, 11 Q. B. 368. But a covenant to insure in the names of the lessor and lessee may be performed by insuring in the name of the former only, if he consents. *Havens v. Middleton*, 10 Ha. 641. The covenant is broken by the premises (*Wilson v. Wilson*, 14 C. B. 616), or any part of them (*Penniall v. Harborne, sup.*), being uninsured, for however short a period.

By the 14 Geo. 3, c. 78, s. 83, insurance companies may, at the request of any person interested in any building burnt down, or upon any grounds of suspicion of fraud or wilful fire, apply the insurance money in rebuilding, unless security is given by the insurer so to apply it, or the money shall have been disposed of amongst the contracting parties to the satisfaction of the company. This act applies to the entire kingdom. *Ex parte Gorely*, 10 Jur., N. S. 1085. Unless under some covenant or agreement, or by the effect and operation of this statute, a tenant has no equity to compel his landlord to expend money, received from an insurance office on the demised premises being burnt down, in rebuilding the premises, nor has the tenant any equity to restrain the landlord from suing for the rent until the premises are rebuilt. *Leeds v. Cheetham*, 1 Sim. 146. But when the lessee under his covenant duly insures, and the landlord, although not bound to do so, likewise insures, in consequence of which the insurance offices, on a fire taking place, apportion the payments on the two policies, the landlord has no equity to retain the sum apportioned to him. In such a case the lessor must account for what he has received, and if the tenant has an option of purchase, the landlord must take the policy-money in part payment of the purchase-money. *Reynolds v. Arnold*, L. R., 10 Ch. 386.

Formerly there was no relief in equity against a forfeiture by reason of a breach of covenant to insure. *Reynolds v. Pitt*, 19 Ves. 134. By the 22 & 23 Vict. c. 35, a court of equity had power to relieve

against forfeiture (which had not been waived (s. 6)) for breach of this covenant, ss. 4, 5, 6, 7, 8. But these sections were repealed by the 44 & 45 Vict. c. 41, s. 71, see *post*, s. 10.

SEC. 3.—*To repair.*

<i>At all Times</i>	548	<i>"Forthwith"</i>	548
<i>General and particular Covenants</i>	548	<i>Yearly Tenant</i>	549
<i>When Tenant must rebuild under</i> ...	548	<i>No Relief in Equity formerly against</i>	
<i>Extent of Covenant</i>	548	<i>Forfeiture for Breach</i>	549

A covenant to repair and keep in repair means at *all times* during the term. *Luxmore v. Robson*, 1 B. & Al. 584; *Smith v. Peat*, 9 Ex. 161. Where there is a general covenant to repair and a special covenant to repair within a certain time after notice (usually three months), they are construed as distinct and independent covenants. *Baylis v. Le Gros*, 4 C. B., N. S. 537; *Few v. Perkins*, L. R., 2 Ex. 92. A covenant to substantially repair and yield up at the end of the term compels the tenant to give up the premises in as good a state of repair as when possession was taken, and it must be inferred that they were then in a tenantable state. *Brown v. Trumper*, 26 Bea. 11. Under a covenant to *keep* and deliver up in repair, the tenant must *put* in repair, but the extent of it depends upon the age and class of the premises demised. *Payne v. Haine*, 16 M. & W. 541. Under a covenant to repair and keep in repair, the tenant must *rebuild* the premises if burnt down, unless there is a qualification of the covenant "damage by fire excepted." *Bullock v. Dommitt*, 6 T. R. 650; *Pym v. Blackburn*, 3 Ves. 34. It would seem to be immaterial in such cases, so far as regards the tenant's liability on his express covenants to repair, that the landlord has insured the premises and received the insurance money without expending it towards the rebuilding. *Leeds v. Cheetham*, 1 Sim. 146, 149. And although the tenant may be relieved from repairing by an exception in case of fire, the landlord is not bound to repair unless he has entered into a covenant to do so; and a covenant for quiet enjoyment is not equivalent to such a covenant. *Brown v. Quilter*, 2 Amb. 619. In a demise of houses and a field adjoining, a covenant to repair the houses, field and premises with needful and necessary reparations does not extend to houses afterwards erected in the field. *Cornish v. Cleife*, 3 H. & C. 446. "Forthwith," in a covenant to repair, means not immediately, but with all *reasonable celerity*. *Per Tindal, C.J.*; *Burgess v. Boetefeur*, 7 M. & G. 494. Covenants by the tenant to repair and by the landlord to find materials are independent, and if the landlord does not find materials the tenant should do so and claim the cost from the landlord. *Tucker v. Linger*, 21 Ch. D. 18. And where a notice to repair has been given, and the lessee makes an offer to sell his interest in the premises to the lessor, and a negotiation takes place on that

offer, the effect of that offer and the negotiation is to suspend the notice till the negotiation has been terminated, from which event alone the date of the notice can properly be calculated, and equity will relieve against an ejectment founded on the original notice. *Hughes v. Met. R. Co.*, 2 App. C. 439.

A yearly tenant is not bound to do substantial repairs in the absence of an express stipulation to that effect (*Gott v. Gandy*, 2 E. & B. 845); merely to keep them wind and water tight (*Auworth v. Johnson*, 5 C. & P. 239), and, as regards farms, to manage them in a husbandlike manner. *Powley v. Walker*, 5 T. R. 373.

In general there was no relief formerly against forfeiture for breach of covenants in the lease, except for nonpayment of rent and non-insurance, and consequently not for breach of covenant to repair. *Wadman v. Calcraft*, 10 Ves. 67; *Hill v. Barclay*, 18 Ves. 56; *Job v. Banister*, 2 K. & J. 374. In *Bargent v. Thomson* (4 Giff. 473), however, this equity was, under special circumstances, administered. See now, *post*, sec. 10.

SEC. 4.—Restrictive Covenants as to Trade, &c.

<i>Covenants construed strictly</i>	549	<i>Bind Assignees</i>	551
<i>Continuing Breach</i>	550	<i>To carry on particular Trade only</i> ..	551
<i>Waiver—Acquiescence</i>	550	<i>To deal with particular Persons only</i>	551

Covenants not to carry on any trade, or particular trades, without licence, though not in general coming under the description of usual covenants in an agreement, are, nevertheless, very commonly inserted in leases of houses in particular localities, and are in general construed strictly. Thus a covenant not to carry on any trade or business, or not to carry on any business, but use the house as a private house only, is broken by carrying on the business of a schoolmaster or teacher. *Kemp v. Sober*, 1 Sim., N. S. 517; *Johnstone v. Hall*, 2 K. & J. 414; *Wickenden v. Webster*, 6 E. & B. 387; see *Wilkinson v. Rogers*, 2 D., J. & S. 62; *Evans v. Davis*, 10 Ch. D. 747. The user of premises as a throat and chest hospital for poor persons, where small payments are made by the patients according to their means, is a breach of a covenant not to carry on upon the demised premises "any trade, business, or dealing whatsoever, or anything of the nature thereof, or suffer any act or thing which may be or grow to the annoyance, damage, injury, prejudice, or inconvenience of the neighbouring premises." *Bramwell v. Lacy*, 10 Ch. D. 691. Using premises as a charitable institution, a "home for working girls," where the inmates were provided with board and lodging, whether any payment was taken or not, is a business, and comes within the restriction of a covenant "not to use, exercise, or carry on upon the premises any trade or business of any description whatsoever." It is not essential that there

should be payment in order to constitute a business; nor does payment necessarily make that a business which without payment would not be a business. *Rolls v. Miller*, 27 Ch. D. 71.

Selling beer in pursuance of a licence to sell beer *not* to be drunk on the premises is a breach of a covenant not to use the premises as a public house, tavern, or beer shop (*Bp. of St. Albans v. Battersby*, 3 Q. B. D. 359; *London and Sub., &c. Co. v. Field*, 16 Ch. D. 645); but not a breach of covenant, not to use as a public house, tavern, or beer house. *Hall & Co. v. Collyer*, 16 Ch. D. 718. In these cases a distinction was drawn between *beerhouse* and *beershop*. In the first cited case, 3 Q. B. D., 359, it was said that the words were not synonymous, but that *beershop* was large enough to embrace an establishment where beer was sold to be drunk off the premises, *ib.* p. 362. In the second case, 16 Ch. D. 645, it was stated in the judgments that it meant any place where beer was *sold*, and expressly, *per* Cotton, L.J., p. 648, that it made no difference whether the beer was consumed on the premises or not. In the third case, however, 16 Ch. D. 718, Fry, J., considered, p. 721, that the judges in the Q. B. case were of opinion that *beerhouse* meant a place where beer was sold to be consumed on the premises, *beershop* where it was to be consumed off the premises. But *quære* if the language of Cockburn, C.J., 3 Q. B. D., p. 362, can be considered as intended to draw this distinction.

Under such restrictive covenants, there may be a continuing breach or successive breaches, so that a waiver of one will not necessarily be a waiver of others. *Doe v. Woodbridge*, 9 B. & C. 376. As to the waiver of a breach of such a covenant, see *Doe v. Allen*, 3 Taun. 78; *Bridges v. Longman*, 24 Bea. 27; *Gibson v. Doeg*, 2 H. & N. 615.

An injunction will be granted to restrain a lessee from breaking negative covenants of this description. *Evans v. Davis*, 10 Ch. D. 747. Where there is a restrictive covenant the right to enforce it may be lost either by the covenantee himself having done similar acts to those complained of, *D. of Bedford v. Br. Museum*, 2 M. & K. 552, or by reason of the property having become so altered from what it originally was when the covenant was entered into, that it would be inequitable to enforce it. *Sayers v. Collyer*, 24 Ch. D. 180. In the last case it must be observed that the facts stated went strongly to show acquiescence on the part of the plaintiff in what had been done, although this was not the ground on which the decision was based, see *ib.* p. 186. A covenant not to use premises as a shop or warehouse for any trade, nor to permit anything which may grow to the annoyance or damage of the lessors, or any of their other tenants, is broken, though the act done may not be a nuisance in law, public or private; if it be an annoyance, equity will not relieve the tenant in such cases, nor will the court enter into a comparison as to what particular breaches are more or less offensive. *Macher v. Foundling Hosp.*, 1 V. & B. 188.

Where a lessee has assigned his interest, and his assignee has cove-

nanted not to carry on a particular trade on the demised property, the lessee of the assignee will be restrained from carrying it on, although the covenant is not contained in the *original lease*, but only in the assignment of it. It would seem, also, that it makes no difference that the lessee of the assignee had no notice of the covenant. *Clements v. Welles*, L. R., 1 Eq. 200; *Wilson v. Hart*, L. R., 1 Ch. 463; *Feilden v. Slater*, L. R., 7 Eq. 523; see *Parker v. Whyte*, 1 H. & M. 167. But, as to the latter point, see and consider *Carter v. Williams*, L. R., 9 Eq. 678. Sometimes the covenant is not to carry on any *but a particular business*. A restriction of this kind is usual in the case of a house let for the express purpose of being used as a public-house. *Bennett v. Womack*, 7 B. & C. 627. But such a covenant does not compel the lessee to carry on the particular business; there should be positive and affirmative words for that purpose. *Doe v. Guest*, 15 M. & W. 160. A covenant that one kind of trade shall not be carried on is not restrictive in respect of other trades. *Tan v. Corpe*, 3 M. & K. 269. A covenant that the tenant shall only deal with a particular person, for instance, his landlord, is not inoperative though not favoured. Such a covenant is not unfrequently contained in brewers' leases. See *Holcombe v. Hewson*, 2 Camp. 391; *Jones v. Edney*, 3 Camp. 285; *Doe v. Reid*, 10 B. & C. 849. In *Catt v. Tourle*, L. R., 4 Ch. 654, a brewer sold a piece of land, and the purchaser covenanted with him that he should have the exclusive right of supplying beer to any public-house erected on the land; there was no covenant by the vendor to supply such beer; it was held, nevertheless, that the covenant was binding on an assignee of the land, who purchased with notice. A covenant by the lessee of a public-house for himself, his executors, administrators, and assigns, to purchase from the lessor all the beer consumed at that public-house, and also at another public-house of which the publican held a lease under a different landlord, is binding in equity upon an assignee of the second public-house who has notice of the covenant. Covenants of this description are subject to an implied obligation on the part of the lessor to supply good marketable beer. *Luker v. Dennis*, 7 Ch. D. 227. And such as the tenant requires. *Edwick v. Hawkes*, 18 Ch. D. 199.

SEC. 5.—*Not to assign without Licence.*

<i>Written Licence, where necessary...</i>	551	<i>Consent unreasonably withheld.....</i>	552
<i>Equity will not relieve if broken ...</i>	552	<i>Assignment by Operation of Law...</i>	552
<i>Underlease, where Breach of.....</i>	552	<i>Under Bankruptcy Act, to Trustee</i>	552
<i>Effect of Assignment</i>	552	<i>Bequest—Executors.....</i>	552
<i>Of Equitable Mortgage</i>	552	<i>Compulsory Power of Purchase ...</i>	552

Where there is a covenant not to assign without licence a written licence is not necessary unless required by the covenant. *Richardson v. Evans*, 3 Madd. 218. And if required to be in writing, and a parol

licence is given as a snare, and to entrap the tenant, equity will relieve him. *Ib.* But, in general, when a forfeiture has been incurred under the covenant, equity will not relieve. *Hill v. Barclay*, 18 Ves. 63; *Lovat v. Ld. Ranelagh*, 3 V. & B. 24. See *post*, p. 560. And if the lessee assigns without licence, the assignee will not be entitled to enforce against the lessor a covenant to pay a valuation to the tenant on the expiration of his term, if no rent has been accepted by the lessor from the assignee. *Elliott v. Johnson*, L. R., 2 Q. B. 120. A covenant not to assign, transfer or set over, or otherwise do or put away the lease or demised premises, is not broken by an underlease. *Crusoe v. Bugby*, 2 W. B. 767. But an underlease is a breach of a covenant not to set, let or assign. *Roe v. Harrison*, 2 T. R. 425. An assignment is a breach of covenant not to let, set or demise for the whole or any part of the term. *Greenaway v. Adams*, 12 Ves. 395. But an equitable mortgage by deposit is no breach of a covenant not to let, assign, transfer or otherwise part with the premises or lease, because it gives no legal title. *Doe v. Bevan*, 3 M. & S. 353; see *Gourlay v. D. of Somerset*, 1 V. & B. 68.

Sometimes the covenant not to assign is qualified by the proviso that the lessor shall not refuse his consent unreasonably or vexatiously, or to a respectable and responsible person. See *Lehmann v. McArthur*, L. R., 3 Ch. 496. These, or similar words, do not amount to a contract on the part of the lessor, but are a qualification of the covenant by the lessee. *Treloar v. Bigge*, 9 Ex. 151; *Sear v. House Prop. and Invest. Soc.*, 16 Ch. D. 387. Where there is this qualification it is unnecessary to the validity of an assignment or underlease to a person of that character that the consent of the lessor should be first obtained. *Hyde v. Warden*, 3 Ex. D. 72. Where there is this restrictive covenant under a licence to sub-let with a proviso "that this should not authorize any further letting or assigning without such consent as was required by the lease," the underlessee cannot be prevented from letting or assigning without the consent of the original lessor. *Williamson v. Williamson*, L. R., 9 Ch. 729. Comp. *Haywood v. Silber*, 30 Ch. D. 404. It is a breach of this covenant for one of two partners to assign to the other. *Varley v. Coppard*, L. R., 7 C. P. 505. But not if one partner merely leaves the other in possession. *Corp. Bristol v. Wescott*, 12 Ch. D. 461.

An assignment by operation of law is not a breach of a covenant restraining alienation without licence; as where the lessee becomes bankrupt. See *Watherall v. Geering*, 12 Ves. 512. See the Acts, 32 & 33 Vict. c. 71, ss. 125, 126; and 46 & 47 Vict. c. 52, s. 44. An assignment of all the assignor's property to trustees, under the 192nd section of the Bankruptcy Act of 1861, was held to be a voluntary act and a breach of the covenant not to assign. *Holland v. Cole*, 1 H. & C. 67. A bequest would seem to be no breach of such a covenant. *Doe d. Evans v. Evans*, 9 A. & E. 719. And if leaseholds, subject to such a covenant, come to the hands of executors, they may dispose of them notwithstanding the covenant. *Seers v. Hind*, 1 Ves. jun. 295. And a sale to any company or authority

having statutory compulsory powers of purchase is valid, notwithstanding the restrictive covenant. *Slipper v. Tottenham, &c. R. Co.*, L. R., 4 Eq. 112; see, as to a licence under the 22 & 23 Vict. c. 35, *post*, p. 558.

SEC. 6.—Of the Lessor's Covenants.

<i>For quiet Enjoyment</i>	553	<i>To Repair</i>	553
<i>As to fitness for Occupation</i>	553	<i>To Renew</i>	553, 554

In general, the covenant for quiet enjoyment is the only covenant which a lessor enters into. Occasionally, however, the lessor covenants to insure and to pay certain rates and taxes, as land tax, and sometimes he enters into a covenant for renewal or sale to the lessee. A covenant for quiet enjoyment is implied from the words "demise," "lease," or any equivalent words, against interruption or disturbance by any person. *Iggulden v. May*, 9 Ves. 330; *Williams v. Burrell*, 1 C. B. 429; *Hall v. City, &c. Brewery Co.*, 2 B. & S. 737. But no covenant is to be implied from the words "give" or "grant," except by force of some statute. 8 & 9 Vict. c. 106, s. 4. And any express covenant in the lease for quiet enjoyment will supersede the implied one. *Line v. Stephenson*, 4 B. N. C. 678. When there is the usual covenant for quiet enjoyment, a landlord is liable to a tenant for damage done to his land through the acts of another tenant of the same landlord, if such acts are lawful and properly done under his lease, but otherwise if they are not lawful and not so done. *Sanderson v. Mayor, &c. of Berwick-on-Tweed*, 13 Q. B. D. 547. If water is stored in a cistern for the common benefit of tenants of the lessor, and a service-pipe of the cistern bursts accidentally and through no negligence of the lessor, he is not liable under this covenant to a tenant for damage sustained in consequence of the bursting of the pipe. *Anderson v. Oppenheimer*, L. R., 5 Q. B. D. 602. See *Rylands v. Fletcher*, L. R., 3 H. L. 330.

There are no implied covenants by the lessor that a house is reasonably fit for habitation, or that land is fit for cultivation. *Sutton v. Temple*, 12 M. & W. 52; *Hart v. Windsor*, *ib.* 68. See *Manchester, &c. Co. v. Carr*, 5 C. P. D. 507; *Chester v. Powell*, W. N. 1885, p. 67. Nor is there an implied covenant that the lessor will do any repairs. *Arden v. Pullen*, 10 M. & W. 321; *Gott v. Gandy*, 2 E. & B. 845. And when he does covenant, notice of the want of repair must be given to him. *Makin v. Watkinson*, L. R., 6 Ex. 25, Martin, B., *diss.*; *L. S. W. R. Co. v. Flower*, 1 C. P. D. 77; *Hugall v. M'Lean*, W. N. 1885, p. 96.

Under a covenant in a lease to two (in which their covenants were joint and several) to renew to both, subject to the same covenants; if both are living, one, to whom the other has assigned his interest, has no right to a renewal. *Finch v. Underwood*, 2 Ch. D. 310. *Qu.*, if the other is dead, *ib.* If it is a condition precedent to the right of

renewal that the *covenants in the lease shall have been observed and performed*, and if there is a breach of the covenant to repair, although not serious, at the time the renewal is applied for, the lessor is not bound to renew, *ib.* The words in italics are satisfied if there is no existing right of action under them at the time the lease is applied for. *Per Mellish, L.J., ib., p. 316.*

A covenant to renew, provided the rents should have been paid and the covenants kept, creates a condition precedent. *Job v. Banester*, 3 K. & G. 374; *Finch v. Underwood*, 2 Ch. D. 310; *Baston v. Bidwell*, 18 Ch. D. 238. Where there was a covenant to renew, if required by the lessee, on payment of a fine, and the agent of the lessee stated to one of the lessors that the lessee would renew, this was held sufficient, and that payment of the fine before the expiration of the first lease was not obligatory. *Nicholson v. Smith*, 22 Ch. D. 640.

As to covenants for renewal of leaseholds for lives, see *ante*, p. 235, and as to an option of purchase, tit. "VENDOR AND PURCHASER," Ch. II.

SEC. 7.—Covenants running or not with the Land.

<i>Covenants running with the Land</i>	554	<i>Covenants running with the Land—</i>	
<i>To pay Rent</i>	555	continued.	
<i>To build—To repair</i>	555	<i>To renew</i>	555
<i>As to User of Land</i>	555	<i>Joint Demise</i>	555
<i>To reside—Not to assign</i>	555	<i>Covenants not Divisible</i>	555
<i>Not to carry on Trade</i>	555	<i>Covenants not running</i>	555
<i>To insure</i>	555	<i>To pay additional Rent</i>	555
<i>Quiet Enjoyment</i>	555	<i>Not to build</i>	555
<i>Further Assurance</i>	555	<i>To indemnify</i>	555

Covenants running with the Land.] A covenant in a lease runs with the land or the reversion where it touches or concerns the thing demised. *Spencer's Case*, 5 Rep. 16; *Ackroyd v. Smith*, 10 C. B. 164; *Thomas v. Hayward*, L. R., 4 Ex. 311; see *Easterby v. Sampson*, 6 Bing. 644. There are two sorts of covenants which run with the land; one binds the assignees when named, the other binds them though not named. Covenants of the former class, as a rule, concern things to be *newly done* upon the demised premises; covenants of the latter class concern things *in esse*, parcel of the demise. *Spencer's Case*, 5 Rep. 16; and see *Doughty v. Bowman*, 12 Jur. 183; on appeal, 11 Q. B. 444. In *Minshull v. Oakes*, 2 H. & N. 793, that part of the resolution in *Spencer's Case* which relates to things to be newly done was doubted. See, however, 1 Sm. L. C. 8th ed. 82. Subject to the qualification contained in this resolution, the assignee of the term or reversion is bound to perform a covenant which runs or is entitled to the benefit of it, as the case may be. See 32 Hen. 8, c. 34, *post*, Chap. VII. Other covenants, which are simply collateral, not in any way concerning the subject of the demise, do not bind

assignees though named; for instance, to build elsewhere than on the demised premises, to pay money (not being rent), or the like. 4 Byth. Conv. by Sweet, 425. The principal covenants by a *lessee* which run with the land are covenants to pay rent (*Parker v. Webb*, 3 Salk. 5); to build, but in this case assigns must be named to bind them (*Sampson v. Easterby*, 9 B. & C. 505; 6 Bing. 644; *Doughty v. Bowman*, 11 Q. B. 444); cons. *Milnes v. Branch*, 5 M. & S. 411; *Haywood v. Brunswick B. Soc.*, 8 Q. B. D. 403; to repair (*Dean, &c. Windsor's Case*, 5 Rep. 24a; *Martyn v. Clue*, 18 Q. B. 661; *Williams v. Earle*, L. R., 3 Q. B. 739), even new buildings, if erected on the demised premises (*Minshull v. Oakes*, 2 H. & N. 793), and binds the assigns, although not named (*Ib.*; but see, as to this case, 1 Sm. L. C., 8th ed. 82); to use as a private house only, which also binds assigns though not named (*Wilkinson v. Rogers*, 10 Jur., N. S. 5); to reside on the demised premises, though assigns are not named (*Tatem v. Chaplin*, 2 H. B. 133); not to assign, underlet or part with the premises, without licence (*Williams v. Earle*, L. R., 3 Q. B. 739; see *West v. Dobb*, L. R., 5 Q. B. 460), if the assigns are named, not otherwise it would seem (*Doe v. Smith*, 5 Taun. 795); to insure where the property is within the bills of mortality, 14 Geo. 3, c. 78, s. 83 (old Building Act), (*Vernon v. Smith*, 5 B. & Al. 1), and as it would seem to insure out of the limits of this act—*per Best, J.*, *ib.* 9; see *Penniall v. Harborne*, 11 Q. B. 368. As to restrictive covenants, see *Wilkinson v. Rogers*, 2 D., J. & S. 62; *Jay v. Richardson*, 30 Bea. 563; *Wilson v. Hart*, L. R., 1 Ch. 463. The following covenants by a lessor (or vendor) run with the land: to produce deeds (*Barclay v. Raine*, 1 S. & S. 449); for quiet enjoyment (*Campbell v. Lewis*, 3 B. & Al. 392); for seisin and right to convey (*Kingdon v. Nottle*, 4 M. & S. 53); for further assurance (*Middlemore v. Goodale*, Cro. Car. 503); to renew a lease (*Furnival v. Crew*, 3 Atk. 87). The benefit of a covenant in respect of something which is not divisible, *e.g.*, to repair, in a demise by tenants in common runs with the *entire* reversion, and all the lessors, therefore, or their representatives, must sue for a breach. *Thompson v. Hakewill*, 19 C. B., N. S. 713.

Covenants not running.] When a covenant does not touch or concern the *thing demised*, it will not run with the land, and the assignee of the land or reversion, as the case may be, is not bound by it and cannot take advantage of it. *Spencer's Case*, 5 Rep. 16 a. See *Austerberry v. Corp. Oldham*, 29 Ch. D. 750. It is not sufficient that it should affect or concern the beneficial occupation of the thing demised. *Thomas v. Hayward*, L. R., 4 Ex. 311. A covenant by a lessee to pay additional rent for the lessor's outlay in improving buildings does not run. *Lambert v. Norris*, 2 M. & W. 333. A covenant by a lessor not to build or keep a house for the carrying on of a business similar to that covenanted to be carried on by the lessee does not run (*Thomas v. Hayward*, *sup.*; see *Feilden v. Slater*, L. R., 7 Eq. 523); nor does a covenant by a lessor in an underlease to indemnify the lessee against the covenants in the original lease.

Doughty v. Bowman, 11 Q. B. 444. In this case the assigns of the covenantor were not named.

SEC. 8.—*Remedy in Equity for Breach of Covenant.*

<i>By Injunction</i>	556	<i>Landlord bound by Representa-</i>	
<i>Relief in Equity does not depend</i>		<i>tions</i>	556, 557
<i>upon Covenants running</i>	556	<i>Landlord restrained from Breach</i>	
<i>Underlessee bound by Covenants of</i>		<i>of Covenant or Agreement</i>	557
<i>his lessor</i>	556	<i>Building Plots</i>	557

The remedies for breach of covenant or agreement are:—1, by action; 2, also for rent in arrear, by distress; 3, by ejectment formerly, now for the recovery of land, where there is a proviso for re-entry for the breach of covenant; 4, by injunction. The first and second remedies do not fall within the scope of this work; the third has already been noticed in several places, particularly where the remedy is subject to the control of a court of equity. The fourth remedy being that especially within the jurisdiction of a court of equity, remains to be considered. It may be observed that, with regard to the remedy by injunction as between persons who are not actual parties to a covenant, it is not necessary that it should in every case run with the land, so as to bind an assignee *at law*. An injunction will be granted in many cases where the covenant does not at law bind the person against whom it is sought to enforce it. See *Wilson v. Hart*, 2 H. & M. 551; *S.C.*, L. R., 1 Ch. 463 (between vendor and purchaser). In most cases where a breach of covenant is threatened or committed, and a court of equity can prevent it, or prevent the continuance of it, it will interfere by injunction. *Tipping v. Eckersley*, 2 K. & J. 264; *Hindley v. Emery*, L. R., 1 Eq. 52. Thus the court will restrain the tenant from breaking up meadow land contrary to his covenant. *Ld. de Wilton v. Saxon*, 6 Ves. 106; *Drury v. Molins*, *ib.* 328. And a court of equity can give damages in respect of a breach of covenant already committed. *Middleton v. Magnay*, 2 H. & M. 233; *Hindley v. Emery*, *sup.* An injunction may be had against a yearly tenant. *Onslow v. —*, 16 Ves. 173; *Wilson v. Hart*, L. R., 1 Ch. 463. The Judicature Act, 1873, s. 26, sub-s. 8, has not altered the principles on which the court acts in granting injunctions. *Gaskin v. Balls*, 13 Ch. D. 324.

It is the duty of an underlessee to inquire into the provisions of the original lease, as he will be restrained from committing breaches of them. *Parker v. Whyte*, 1 H. & M. 167. So he will be restrained from committing a breach of covenant in an assignment of the original lease, although not contained in the original lease, though he has no actual notice, and, *semble*, even no constructive notice. *Clements v. Welles*, L. R., 1 Eq. 200; see *Mitchell v. Seward*, *ib.* 541; cons. *Carter v. Williams*, L. R., 9 Eq. 678.

A landlord will also be bound in equity by his conduct or representa-

tions, by which he induces his tenant to believe that a certain state of things or a certain condition of property, though *not* demised, shall continue unaltered, particularly if there has been expenditure by the tenant on the faith of such conduct or representations. *Jackson v. Cator*, 5 Ves. 688; *Nicholson v. Rose*, 4 D. & J. 10; see *Piggott v. Stratton*, 1 D., F. & J. 33; and the cases *ante*, p. 95; comp. *Armstrong v. Courtenay*, 15 Ir. Ch. R. 138. There would seem no reason for doubting that this is the true rule as between landlord and tenant. As between strangers this is not so clear. In *Jackson v. Cator*, 5 Ves. 690, a case was referred to in which the owner of land was obliged to sell a road over it, he having stood by and allowed a person not a tenant to incur expenditure which would have been useless without the road. This was cited in *Willmott v. Barber*, 15 Ch. D. 96, to Fry, J., who observed, 104: "I do not think the court would follow that case now, if it is correctly stated." It was suggested in reply that this case, cited by Ld. Loughborough, was approved of by James, V. C., in *Bankart v. Tennant*, L. R., 10 Eq. 141, 147, in which he was of opinion that if B., being a customer of A., the owner of a canal, and in consequence of an understanding with him, had incurred expense in establishing a manufacture for which the use of the water was absolutely necessary, A. must supply it.

With reference to cases of this description, certain general principles stated in *Ramsden v. Dyson*, L. R., 1 H. L. 129, are important. It was there laid down by Ld. Cranworth, C., in a judgment in which Ld. Westbury concurred, *ib.* 174, that if a stranger begins to build on land supposing it to be his own, and the real owner, perceiving his mistake, abstains from setting him right, and leaves him to persevere in his error, a court of equity will not afterwards allow the real owner to assert his title to the land. But if a stranger builds on land, knowing it to be the property of another, equity will not prevent the real owner from afterwards claiming the land, with the benefit of all expenditure upon it.

So, if a tenant builds on his landlord's land, he does not, in the absence of special circumstances, acquire any right to prevent the landlord from taking possession of the land and buildings when the tenancy has determined.

If the tenant, being a mere tenant at will, builds on the land in the belief that he thereby acquires a title afterwards to claim a lease of the land, and the landlord allows him so to build, knowing that he is acting in that belief, and does not interfere to correct the error, *semble*, that equity will interfere to compel the grant of a lease. *ib.*, 141, 142.

A landlord, and those claiming under him, will be restrained from a breach of his covenant. Thus, if he covenant in a lease of an hotel that he will not let any other house within a certain distance be used as an hotel, he, and those claiming under him, will be restrained from committing a breach of the covenant. *Jay v. Richardson*, 30 Bea. 563. But there is no breach of covenant where he does not let for the purpose of the prohibited business being carried on. *Kemp v. Bird*,

5 Ch. D. 974. As to the effect of restrictive covenants where plots of land are sold for building, and the right of one *purchaser* against another, see tit. "VENDORS AND PURCHASERS."

SEC. 9.—*Waiver of Breach of Covenant—Licence.*

<i>Waiver</i>	558	<i>Waiver—continued.</i>	
<i>By Acceptance of Rent</i>	558	<i>Acquiescence in</i>	558
<i>Continuing Breach</i>	558	<i>Licence</i>	558
22 & 24 Vict. c. 38	558	22 & 23 Vict. c. 35	558

Waiver.] Acceptance of rent after a forfeiture, with knowledge of it, is a waiver (*Roe v. Harrison*, 2 T. R. 425; *Arnsby v. Woodward*, 6 B. & C. 519; *Price v. Worwood*, 4 H. & N. 512; *Bridges v. Longman*, 24 Beav. 27; see *West v. Dobb*, L. R., 5 Q. B. 460), if the forfeiture does not make the lease absolutely void, but voidable only. *Doe v. Bancks*, 4 B. & A. 401. So bringing an action for rent accruing after the forfeiture, and with knowledge of it. *Dendy v. Nicholl*, 4 C. B., N. S. 376. But after ejection brought, the receipt of rent is no waiver of the forfeiture (*Doe d. Morecraft v. Meux*, 4 B. & C. 606; see *Tolman v. Portbury*, L. R., 6 Q. B. 245); nor is it of a continuing breach of covenant. *Doe v. Jones*, 5 Ex. 498; *Doe v. Gladwin*, 6 Q. B. 953; see *Hills v. Rowland*, 4 D., M. & G. 430. Now, by the 23 & 24 Vict. c. 38, s. 6, an actual waiver shall not extend to any breach of covenant or condition other than that to which the waiver relates, unless an intention to that effect shall appear. Where a lessor merely stands by and sees the lessee making alterations which are in violation of his covenant, this will not amount to a waiver. *Perry v. Davis*, 3 C. B., N. S. 769; see *Doe v. Allen*, 3 Taunt. 78.

Licence.] Formerly a licence to commit a breach of covenant operated as a *total* waiver of the condition. *Dumpor's Case*, 4 Rep. 119 b. By the 22 & 23 Vict. c. 35, a licence to do any act which if done without a licence would create a forfeiture extends now, unless otherwise expressed, only to the permission actually given, or to any specific breach, or to the actual matter authorized to be done (s. 1); and a licence to one of several lessees, or as to part of property, does not affect the right of re-entry as to the other lessees or the remainder of the property (s. 2).

SEC. 10.—*Proviso for Re-entry.*

<i>At Option of Lessor only</i>	558, 559	<i>On Bankruptcy</i>	559
<i>Proviso that Lease to be void</i>	559	<i>Conveyancing Act, 1881</i>	560
<i>Re-entry without Ejection</i>	559	<i>Protection of Lessee under Act</i>	560

A proviso that the lease shall be void, and for re-entry, on non-payment of rent or non-performance of covenants, is exercisable at the

option of the lessor only, who, if he intends to avoid the lease, brings an action of ejectment. *Arnsby v. Woodward*, 6 B. & C. 519. So, if the proviso be that on breach of covenant the lessee may re-enter as if the lease had never been made (*Hartshorne v. Watson*, 4 B. N. C. 178), or that the term shall cease. *Doe v. Baker*, 8 Taunt. 241; see *Pennington v. Cardale*, 3 H. & N. 656. As to a right to re-enter without bringing ejectment, see *Hartshorne v. Watson*, *supra*; *Acocks v. Phillips*, 5 H. & N. 183. A recovery in ejectment puts an end to the rights of under-lessees. *G. W. R. Co. v. Smith*, 2 Ch. D. 235.

A proviso for re-entry on the bankruptcy of the lessee is valid. *Church v. Brown*, 15 Ves. 268; *Doe v. David*, 1 C., M. & R. 405; *Doe v. Ingleby*, 15 M. & W. 465. Where there was a proviso that in case the lessees should during the term be bankrupts, or file a petition in liquidation, and after the Bankruptcy Act, 1883, came into operation, the lessees presented a bankruptcy petition, and a receiving order was made: it was held, that the presentation of the petition caused a forfeiture of the term, and that s. 14 of the Conveyancing Act, 1881, had no application. *Ex parte Gould. In re Walker*, 13 Q. B. D. 454. A power of re-entry, upon the lessee wilfully failing or neglecting to perform any covenant, does not apply to a breach of a negative covenant. *Hyde v. Warden*, 3 Ex. D. 72. As to negative covenants, see *ante*, p. 545. Where two pieces of land are demised by one lease containing a power of re-entry over both, and afterwards the reversion in one of them is assigned to the lessee, the right of re-entry remains intact over the piece of land of which the reversion remains vested in the lessor. *Semble, ib.*, 3 Ex. D. 72. If there is a stipulation for increased rent upon particular things being done by the lessee, and the usual power of entry if (*inter alia*) such things are done, the lessor has the option of claiming the increased rent or proceeding under the proviso for re-entry. *Weston v. Met. Asyl. District*, L. R., 9 Q. B. D. 404. See further, as to the construction of this proviso at law, Woodf. L. & T., 12th ed. 289, *et seq.*

By the Conveyancing Act, 1881, 44 & 45 Vict. c. 41, s. 14—(1.) “A right of re-entry or forfeiture under any proviso or stipulation in a lease, for a breach of any covenant or condition in the lease, shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice specifying the particular breach complained of and, if the breach is capable of remedy, requiring the lessee to remedy the breach, and, in any case, requiring the lessee to make compensation in money for the breach, and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach.

(2.) “Where a lessor is proceeding, by action or otherwise, to enforce such a right of re-entry or forfeiture, the lessee may, in the lessor’s action, if any, or in any action brought by himself, apply to the court for relief; and the court may grant or refuse relief, as the court, having regard to the proceedings and conduct of the parties under the foregoing provisions of this section, and to all the other circum-

stances, thinks fit; and in case of relief may grant it on such terms, if any, as to costs, expenses, damages, compensation, penalty, or otherwise, including the granting of an injunction to restrain any like breach in the future, as the court, in the circumstances of each case, thinks fit.

(3.) "For the purposes of this section a lease includes an original or derivative under-lease, also a grant at a fee farm rent, or securing a rent by condition; and a lessee includes an original or derivative under-lessee, and the heirs, executors, administrators, and assigns of a lessee, also a grantee under such a grant as aforesaid, his heirs and assigns; and a lessor includes an original or derivative under-lessor, and the heirs, executors, administrators, and assigns of a lessor, also a grantor as aforesaid, and his heirs and assigns.

(4.) "This section applies although the proviso or stipulation under which the right of re-entry or forfeiture accrues is inserted in the lease in pursuance of the directions of any Act of Parliament.

(5.) "For the purposes of this section a lease limited to continue as long only as the lessee abstains from committing a breach of covenant shall be and take effect as a lease to continue for any longer term for which it could subsist, but determinable by a proviso for re-entry on such a breach.

(6.) "This section does not extend—

(i.) To a covenant or condition against the assigning, under-letting, parting with the possession, or disposing of the land leased; or to a condition for forfeiture on the bankruptcy of the lessee, or on the taking in execution of the lessee's interest; or

(ii.) In case of a mining lease, to a covenant or condition for allowing the lessor to have access to or inspect books, accounts, records, weighing machines or other things, or to enter or inspect the mine or the workings thereof."

(7.) This refers to repeals.

(8.) "This section shall not affect the law relating to re-entry or forfeiture or relief in case of non-payment of rent.

(9.) "This section applies to leases made either before or after the commencement of this Act (1 January, 1882), and shall have effect notwithstanding any stipulation to the contrary."

And see s. 12, *post*, p. 563, as to the apportionment of a right of re-entry on a severance of the reversion.

CHAPTER VI.

ASSIGNMENT AND DEVOLUTION OF THE INTEREST OF LESSOR AND LESSEE.

<i>Assignment by Deed</i>	561	<i>Lessee and Assignee, how bound by</i>	
<i>Of the Reversion</i>	561	<i>Covenants</i>	563
<i>Rights at Common Law</i>	561	<i>Assignee not executing, bound</i>	563
<i>By 32 Hen. 8, c. 34</i>	561	<i>Covenants to indemnify Lessee</i>	563
<i>Act applies only to Covenants which</i>		<i>Equitable Assignee</i>	563
<i>run</i>	561	<i>Successive Assignees</i>	563
<i>And Leases by Deed</i>	562	<i>Covenant of Indemnity on Sale</i> ...	563
<i>Severance of Reversion</i>	562	<i>Underlease of whole Term</i>	564
<i>22 & 23 Vict. c. 35</i>	562	<i>Bankruptcy</i>	564
<i>Conveyancing Act, 1881</i>	563	<i>Death</i>	564

As previously stated (*ante*, p. 534), an assignment of chattel interest (not being copyhold) in tenements or hereditaments is void at law unless made by deed, except perhaps where the interest might have been created by parol. The assignment of the reversion gave, at common law, the assignee of the reversion limited rights only; for instance, to rent and to the benefit of certain covenants. By the operation of the 32 Hen. 8, c. 34, grantees of reversions have the like advantages against the lessees, their executors, administrators and assigns, by *entry* for non-payment of rent, waste or other forfeiture, and by action only for non-performance of other conditions, covenants or agreements contained in leases, as the lessors, their heirs or successors might have had against the lessees (s. 1). The other conditions mentioned in this section are such as are incident to the reversion, as rent, or for the benefit of the reversion. See Co. Litt. 215 b. And, by section 2, lessees, their executors, administrators and assigns, shall have the same remedy against grantees of reversions on the covenants of the grantors as the lessees might have had against the lessors, their heirs and successors. This statute, however, applies only to covenants running with the land (*ante*, p. 554; see 1 Sm. L. C., 8th Ed., p. 77; *Spencer's Case*, 5 Rep. 16); when they do, an assignee, whether of the term or reversion, may sue for breaches of them, subject to the resolution in *Spencer's Case*, *ante*, p. 554. They must, however, be breaches committed in *his own time*, not previous breaches. *Martyn v. Williams*, 1 H. & N. 817. And an assignee of the reversion is not entitled to arrears of rent which became due prior to the assignment. *Flight v. Bentley*, 7 Sim. 149. Although a lessor has demised at a rent without leaving a reversion in himself, the rent may be assigned so as to give the assignee a right of action in his own name. *Williams v. Hayward*, 1 E. & E. 1040.

By the 4 Anne, c. 16 (Ruff.), s. 9, conveyances of reversions or rents of the reversion or remainders are as effectual without any attornment of the tenants as if their attornment had been had and made. See *Allcock v. Moorhouse*, 9 Q. B. D. 366.

The Act of Henry 8th applies only to leases by deed, and if the lease be not by deed the reversioner cannot sue upon the parol lease. *Standen v. Chrismas*, 10 Q. B. 135; see *Bickford v. Parson*, 5 C. B. 921. An assignee of part of the grantor's reversion in the whole of the property in which a particular estate, for instance a term of years, has been created is an assignee of the reversion within the 32 Hen. 8, c. 34. Thus if a person seised in fee makes a lease, and then grants to A. for life, or years, A. becomes entitled, during his term, to the benefit of the covenants contained in the lease. Co. Litt. 215 b (n. 1); *Wright v. Burroughes*, 3 C. B. 685; see, in particular, the judgment of Maule, J. But a grantee of the whole reversion in part of the property was not such an assignee in respect of conditions. *Wright v. Burroughes*, *sup.* Though otherwise in respect of covenants. *Twynnam v. Pickard*, 2 B. & Al. 105; *Simpson v. Clayton*, 4 B. N. C. 758, 780. A landlord who assigns his reversion in part of the demised property may maintain an action against his tenant for a fair apportionment of the rent in respect of the part he retains. *Mayor of Swansea v. Thomas*, 10 Q. B. D. 48.

By the 22 & 23 Vict. c. 35, when the reversion upon a lease is severed and the rent legally apportioned, the assignee of *each part* of the reversion has, in respect of his apportioned rent or other reservation, the benefit of all conditions or powers of re-entry for non-payment of the original rent or other reservation as if originally incident to his part of the reversion (s. 3).

By the Conveyancing Act, 1881, 44 & 45 Vict. c. 41, s. 10 (1), rent reserved by a lease, and the benefit of every lessee's covenant, having reference to the subject-matter thereof, and every condition of re-entry and other condition therein contained, shall be annexed and incident to and shall go with the reversion in the land, or in any part thereof, immediately expectant on the term granted by the lease, notwithstanding severance of that reversion, and shall be capable of being recovered, received, enforced, and taken advantage of by the person from time to time entitled, subject to the term, to the income of the whole or any part, as the case may require, of the land leased.

11.—(1.) The obligation of a lessor's covenant with reference to the subject-matter of the lease shall, if and as far as the lessor has power to bind the reversion immediately expectant on the term granted by the lease, be annexed and incident to and shall go with that reversion, or the several parts thereof, notwithstanding severance of that reversion, and may be taken advantage of and enforced by the person in whom the term is from time to time vested by conveyance, devolution in law or otherwise; and, if and as far as the lessor has power to bind the person from time to time entitled to that reversion, the obligation aforesaid may be taken advantage of and enforced against any person so entitled.

12.—(1.) Notwithstanding the severance by conveyance, surrender, or otherwise, of the reversion in any land comprised in a lease, and notwithstanding the avoidance or cesser in any other manner of the term granted by a lease as to part only of the land comprised therein, every condition or right of re-entry, and every other condition, contained in the lease, shall be apportioned, and shall remain annexed to the severed parts of the reversionary estate as severed, and shall be in force with respect to the term whereon each severed part is reversionary, or the term in any land which has not been surrendered, or as to which the term has not been avoided or has not otherwise ceased, in like manner as if the land comprised in each severed part, or the land as to which the term remains subsisting, as the case may be, had alone originally been comprised in the lease.

(2.) The three preceding sections apply only to leases made after the commencement of this Act, 1 Jan., 1882.

The lessee is bound by the covenants in the lease during the whole term, but an assignee only during the period of his holding as assignee. *Taylor v. Shum*, 1 B. & P. 21; *Staines v. Morris*, 1 V. & B. 9, 11. Where a lessee covenants in an underlease to observe the covenants of the original lease, it is the same as if these covenants had been inserted at length in the underlease. *Piggott v. Stratton*, 1 D., F. & J. 33; see *Doughty v. Bowman*, 11 Q. B. 444; *Williamson v. Williamson*, L. R., 9 Ch. 729.

An assignee of leaseholds, who accepts the benefit of an assignment, is, in equity, liable to the covenants on his part contained in the assignment, although he does not execute it (*Willson v. Leonard*, 3 Bea. 373); and the equitable assignee of a lease is liable in equity to indemnify his assignor in respect of breaches of covenant in the lease occurring after the equitable assignment and during the time the assignee is in possession. *Close v. Wilberforce*, 1 Bea. 112.

There is an implied promise on the part of each successive assignee of a lease to indemnify the original lessee against breaches of covenants in the lease committed by each assignee during the continuance of his own term; and such promise will be implied, although each assignee expressly covenants to indemnify his immediate assignor against all subsequent breaches. *Moule v. Garrett*, L. R., 5 Exch. 132, *Cleasby, B., diss.* If there are mutual covenants by owners of land, their heirs and assigns, with the owners of adjoining land, their heirs and assigns, to comply with certain stipulations, the subsequent lessee of one of the owners is entitled to the benefit of the covenants as an assign, and can sue to restrain a breach. *Taite v. Gosling*, 11 Ch. D. 273.

The assignor of a lease is entitled to a covenant of indemnity from the assignee against non-payment of rent and non-performance of the covenants and conditions in the lease by the latter in all cases in which the assignor, notwithstanding the assignment, will still continue liable either where he is lessee, or assignee, if he has covenanted to indemnify his assignor. *Pember v. Mathers*, 1 B. C. C. 52; *Staines v. Morris*, 1 V. & B. 8. But this rule did not apply on the sale of

a bankrupt's leasehold estates. *Wilkins v. Fry*, 1 Mer. 244; and consider 32 & 33 Vict. c. 71, ss. 23, 24; Dart, Ven. & Pur., 5th Ed., 558; *Ex parte Buxton*, 15 Ch. D. 289. An assignor who knows that the premises assigned are to be used for immoral or illegal purposes cannot enforce this covenant. *Smith v. White*, L. R., 1 Eq. 626. An underlease of the whole term operates as an assignment. *Beardman v. Wilson*, L. R., 4 C. P. 57.

On the bankruptcy of a lessee or assignee, his interest vests in the trustee in bankruptcy (see *Titterton v. Cooper*, 9 Q. B. D. 473), who however may disclaim (see *post*, Ch. VII.). On the death of a lessor, his interest vests in his devisees, or real or personal representatives, as the case may be, and according as the reversion is of a freehold or leasehold nature. The interest of a lessee or assignee, unless for his own life only, vests in his executors or administrators; as to whose rights and liabilities in such cases, see tit. "EXECUTORS AND ADMINISTRATORS."

CHAPTER VII.

DETERMINATION OF LEASE—HOLDING OVER.

<i>By Forfeiture—Surrender</i>	564	<i>By Disclaimer—Bankruptcy</i>	567
<i>Surrender, what is</i>	564	<i>Acts of 1869 and 1883</i>	567
<i>Statute of Frauds</i>	564	<i>Extension of Time to disclaim</i> 567, 568	
<i>8 & 9 Vict. c. 106, s. 3</i>	564	<i>Leave to disclaim</i>	568
<i>Interesse termini</i>	565	<i>Conditions</i>	568
<i>Surrender in Futuro</i>	565	<i>Disclaimer releases Trustee</i> ...	569
<i>By Operation of Law</i>	565	<i>As to Relation back</i>	569
<i>New Lease to Tenant or Third</i>		<i>Landlord—Rights—Remedies</i> ..	569
<i>Person taking Key</i>	565	<i>Rights of Third Persons</i>	569
<i>Cancellation of Lease</i>	565	<i>Surety to Lessor</i>	569
<i>By Effluxion of Time</i>	565	<i>Partnerships</i>	569
<i>Notice</i>	566	<i>Sub-tenant</i>	570
<i>Option—Consent of both</i>	566	<i>Mortgagee</i>	570
<i>Condition precedent</i>	566	<i>Notice of Appeal</i>	570
<i>Delivering up Possession</i>	566	<i>Fixtures</i>	570
<i>Inclusures and Encroachments</i>	566	<i>Chattels and Land</i>	570
<i>Holding over</i>	567	<i>Assignment by Trustee</i>	570

Forfeiture—Surrender.] As to determination by forfeiture, see *ante*, Ch. V., s. 10. A surrender is the yielding up an estate for life or years to him who has the immediate estate in reversion or remainder, wherein the surrendered estate may drown by mutual agreement. Co. Lit. 337 b. By the Statute of Frauds, 29 Car. 2, c. 3, s. 3, no leases or *terms of years*, or any uncertain interest not being copyhold or customary interests in any hereditaments, shall be assigned or surrendered unless by deed or note in writing, or by act and operation of law. By the 8 & 9 Vict. c. 106, s. 3, surrenders in

writing of interests in hereditaments not being copyholds, and not being interests which may be created *without writing*, are void unless by deed. Terms not exceeding three years may be surrendered, by the Statute of Frauds, by deed or *note in writing* or by act and operation of law. The 8 & 9 Vict. c. 106 does not apply to such terms, as they may be created by parol. The surrender of a lease will not affect a subsisting sub-lease (see *post*, tit. "MERGER"), nor agreements for underleases. *Cousins v. Phillips*, 3 H. & C. 892. An *interesse termini* (*ante*, p. 543) cannot be expressly surrendered (Bac. Ab. Lease, 7th Ed., vol. 4, p. 880); but it will be extinguished by the acceptance of a new lease. *Ib.* A surrender cannot be made to take effect *in futuro*, as it must be accepted by the reversioner, and it cannot be said who will be the reversioner at a future day. *Weddall v. Capes*, 1 M. & W. 50; *Doe v. Milward*, 3 M. & W. 328.

Surrenders by operation of law usually take place where a tenant accepts a new lease before the expiration of the old one (see *Donellan v. Read*, 3 B. & Ad. 905; *Davison v. Stanley*, 4 Burr. 2210; *McDonnell v. Pope*, 9 Ha. 705), although the new lease may be voidable; but otherwise where it is *void*, in which case the surrender will be void. *Roe v. Archbp. of York*, 6 Ea. 86; see *Doe v. Forwood*, 3 Q. B. 627; *Same v. Courtenay*, 11 Q. B. 702; *Doe v. Poole*, 11 Q. B. 713. The old lease will be surrendered immediately, although the new one does not commence immediately, but at a future time if limited, so that it necessarily must commence *before* the expiration of the first. See *Ive's Case*, 5 Rep. 11 b; *Ive v. Sams*, Cr. El. 521; Perk. 118, n., by Greening. The granting of a fresh lease to a third person, with the consent of the old tenant, who gives up possession, operates as a surrender of the lease of the latter. *Davison v. Gent*, 1 H. & N. 744. The acceptance of the key of the premises and using it to show them, and effacing the name of the old tenant, has been held evidence of a surrender by operation of law. *Phenè v. Popplewell*, 12 C. B., N. S. 334. And where a lessee, having agreed to surrender his lease to the lessor, delivered up the key, which the lessor took, but afterwards refused to accept the surrender, the lessee was held to be discharged from the rent. *Natchbolt v. Porter*, 2 Vern. 112; comp. *Morrison v. Chadwick*, 7 C. B. 266; *Cannan v. Hartley*, 9 C. B. 634. The mere cancellation of a lease by mutual consent does not put an end to it. *Roe v. Archbp. of York*, 6 Ea. 86; *Ld. Ward v. Lumley*, 5 H. & N. 87, 656. Where a lease is surrendered, the rights of under-lessees are not affected, but otherwise where the lease is put an end to by forfeiture and ejectment. *G. W. R. Co. v. Smith*, 2 Ch. D. 235.

By Effluxion of Time.] A lease naturally expires at the end of the term for which it has been granted, unless the tenancy is one in which a condition is either expressed or implied that notice of determination should be given; for instance, tenancies from year to year, in which the law implies continuance unless notice be given. But in general a lease for a specified term, or number of years, expires by

effluxion of time when the term is at an end. The tenant has then a right to quit and the landlord to resume possession. But if a notice be stipulated for in such cases, it must be given. See *Brown v. Trumper*, 26 Bea. 11. Where notice is to be given to a tenant it must be served on him personally. *Hogg v. Brooks*, 15 Q. B. D. 256. In cases of tenancies from year to year, the proper notice to determine them must be given (*ante*, p. 534); and as regards tenancies at will, some act must be done showing an intention to determine them. *Ante*, p. 535. As to a proviso giving the lessor power to resume possession of the whole or part of the premises on giving notice, see *Doe v. Kennard*, 12 Q. B. 244; *Liddy v. Kennedy*, L. R., 5 H. L. C. 134.

An option to determine the lease is the option of the lessee only, unless given to both parties (*Price v. Dyer*, 17 Ves. 363); but if made determinable "if the parties so think fit," both must consent. *Fowell v. Tranter*, 3 H. & C. 458.

A condition on the part of the lessee, precedent to his right to determine his lease, must be performed before the right can be exercised, and the rent reserved continues payable until due determination of the lease. *Phillips v. Jones*, 9 Sim. 519; see *Friar v. Grey*, 4 H. L. C. 565.

On the determination of the tenancy the lessee must deliver up the premises in the condition in which by the terms of his lease he is bound to leave them. If a tenant has built on his landlord's land, he does not, in the absence of special circumstances, acquire any right to prevent the landlord from taking possession of the land and buildings when the tenancy has determined. *Ramsden v. Dyson*, L. R., 1 H. L. 129; see *White v. Wakley*, 26 Bea. 17. A tenant whose term has expired cannot in general refuse to deliver up possession to the lessor of his lessor. *Lon. & N. W. R. Co. v. West*, L. R., 2 C. P. 553. For an undertenant cannot be permitted to dispute a title which is valid against his lessor. *Doe v. Beckett*, 4 Q. B. 601. If a tenant of the lessee holds over, the latter is liable for the costs of recovering possession from him and for the value of the premises until recovered. *Henderson v. Squire*, L. R., 4 Q. B. 170.

A tenant who takes in land adjacent to his own by encroachment must, as between himself and his landlord, be deemed *prima facie* to take it as part of the demised land; but this will not avail the landlord as against third persons. *Doe v. Massey*, 17 Q. B. 373; *Andrews v. Hailes*, 2 E. & B. 349; cons. *Kingsmill v. Millard*, 11 Ex. 313; *Doe v. Tidbury*, 14 C. B. 304; *E. Lisburne v. Davies*, L. R., 1 C. P. 259; *White v. Wakley*, 26 Bea. 17; *Whitmore v. Humphreys*, L. R., 7 C. P. 4. The lessee of land who erects a building thereon without the lessor's consent does not commit waste, unless it can be shown that such building is an injury to the inheritance. *Jones v. Chappell*, L. R., 20 Eq. 539.

Frequently the tenant holds over by consent after the determination of his interest. Where this is the case, the presumption is that he does so upon the terms of the original lease or tenancy, so far as they

can be considered applicable to a yearly tenancy. Whether he does hold on such terms is a question of fact. *Hyatt v. Griffiths*, 17 Q. B. 505; and see *ante*, p. 534. Where the tenancy is ended by the determination of the estate of the lessor and the tenant holds over, paying rent to the remainderman, the latter is not bound by stipulations affecting the former tenancy which are not communicated to him and which are not according to the custom of the country. *Oakley v. Monck*, L. R., 1 Ex. 159. The liability to pay an outgoing tenant is a liability attaching to the land, and the landlord for the time being in receipt of the rents and profits is the person primarily liable. *Mansel v. Norton*, 22 Ch. D. 769.

Disclaimer—Bankruptcy.] It has already been mentioned that on bankruptcy certain interests of the bankrupt vest in the trustee in bankruptcy, *ante*, p. 529; and that if the bankrupt is a lessee or assignee of a lease, it vests in the trustee subject to his right of disclaimer, *ante*, p. 84. The act of 1869, 32 & 33 Vict. c. 71, and the repealing act of 1883, 46 & 47 Vict. c. 52 (1 Jan. 1884), with regard to disclaimers are in many respects similar. By the former when the trustee disclaimed, the lease was to be deemed to be surrendered from the order of adjudication: act of 1869, s. 23. See act of 1883, s. 55 (2), *ante*, p. 84. On a written application to him by any person interested in the property the time limited for disclaimer was and is *twenty-eight days* after the application, or such further time as the court might allow (act of 1869, s. 24), act of 1883, s. 55 (4). Some of the provisions of the latter have been already stated, *ante*, p. 84, and these are applicable to disclaimers of leases. It is also enacted that "A trustee shall not be entitled to disclaim a lease without the leave of the court, except in any cases which may be prescribed by general rules, and the court may, before or on granting such leave, require such notices to be given to persons interested, and impose such terms as a condition of granting leave, and make such orders with respect to fixtures, tenant's improvements, and other matters arising out of the tenancy as the court thinks just," s. 55 (3). "Where the property disclaimed is of a leasehold nature, the court shall not make a vesting order in favour of any person claiming under the bankrupt, whether as under-lessee or as mortgagee by demise, except upon the terms of making such person subject to the same liabilities and obligations as the bankrupt was subject to under the lease in respect of the property at the date when the bankruptcy petition was filed, and any mortgagee or under-lessee declining to accept a vesting order upon such terms shall be excluded from all interest in and security upon the property, and if there shall be no person claiming under the bankrupt who is willing to accept an order upon such terms, the court shall have power to vest the bankrupt's estate and interest in the property in any person liable either personally or in a representative character, and either alone or jointly with the bankrupt to perform the lessee's covenants in such lease, freed and discharged from all estates, incumbrances, and interests created therein by the bankrupt," s. 55 (6). Any person injured by

a disclaimer shall be deemed to be a creditor of the bankrupt, and may prove accordingly (7).

If a trustee required an extension of time beyond the twenty-eight days, it was necessary to apply to the court before they expired, unless he could show special circumstances. *Ex parte Lovering*, L. R., 9 Ch. D. 586; see *Ex parte Moore*, 2 Ch. D. 802; *Ex parte Harris*, 16 Ch. D. 613.

The following cases, unless otherwise mentioned, were decided on the act of 1869, but many have, *mutatis mutandis*, an important bearing on the later act. When a landlord gives a trustee notice under sub-s. 4 of the 55th section of the act of 1883, and the trustee declines or neglects within the twenty-eight days to give notice whether he disclaims or not, and subsequently applies to the court for leave to disclaim, he may render himself personally liable to the payment of rent and costs. *In re Page*, *Ex parte Mackay*, 14 Q. B. D. 401. Although the three months given to a trustee by s. 55, sub-s. 1, of the act of 1883, *ante*, p. 84, within which to disclaim onerous property, may have expired, the court has power under s. 105, sub-s. 4, by which the court has a general power to extend time limited for doing any act or thing, to grant the trustee an extension of time.—When a trustee applies for an extension of time, he should give some good reason for the indulgence he asks, and if the rights of other parties will be prejudiced by the time being extended, the court will, as a general rule, put the trustee upon terms. *In re Price*, *Ex parte Foreman*, 13 Q. B. D. 466.

With respect to giving leave to disclaim it, leave will be given where it cannot prejudice the rights of any person not before the court. *Ex parte Paterson*, 11 Ch. D. 908. In giving leave to disclaim, the court has power to impose a condition (such as the payment to the lessor of the rent in full up to the date of the disclaimer), even though no third party has acquired from the bankrupt an interest in the lease. *Ex parte Ladbury*, 17 Ch. D. 532; see *Ex parte Isherwood*, 22 Ch. D. 384; *Ex parte Izard*, 23 Ch. D. 115. The imposing of conditions is a matter of judicial discretion. *Ex parte Arnal*, 24 Ch. D. 26. These cases (*Ex parte Isherwood*, *loc. cit.*, *supra*) “have established that in determining whether, on giving leave to a trustee to disclaim a lease belonging to a bankrupt, he shall be required to pay compensation to the landlord, the court will have regard, not merely to the actual benefit which has resulted to the estate from the trustee’s occupation, but to the question whether the possession was retained by him with the view of obtaining a profit for the estate,” *per* Baggallay, L.J., *Ex parte Goode*, 13 Q. B. D. 731, 735. It is a duty of the trustee as between himself and the Court of Bankruptcy to obtain the leave of the court before disclaiming a tenancy, but it does not render the disclaimer inoperative as between the landlord and the trustee where no such leave had been obtained. *Reed v. Harvey*, 5 Q. B. D. 184. After unconditional leave has been given by the court to a trustee in bankruptcy to disclaim a lease of the bankrupt, and the trustee has executed a disclaimer, it is too late to appeal from the order even for the purpose of getting conditions imposed on the

trustee. *Ex parte Ditton*, 3 Ch. D. 459; *Ex parte Sadler*, 19 Ch. D. 122. The right of disclaimer under the act of 1883 is not limited to property of the bankrupt divisible amongst his creditors as defined by s. 44, but extends to any property as defined by s. 168 from which no benefit can accrue to the bankrupt's estate. *In re Maughan, Ex parte Monkhouse*, 14 Q. B. D. 956.

A disclaimer relieves the trustee from all liability under the lease, not merely from liability as from the date of the adjudication. *Ex parte Allen*, 20 Ch. D. 341. Where the trustee with the leave of the court, and after notice to the landlord, disclaims, the disclaimer relates back, by force of s. 23 of the Bankruptcy Act, 1869, to the date of the adjudication, and the trustee is not liable to an action in respect of his subsequent occupation of the premises (either as assignee or as a trespasser): the landlord's only remedy being by application to the Court of Bankruptcy under rule 8 of the Bankruptcy Rules, 1871. *Gabriel v. Blankenstein*, 13 Q. B. D. 684. On a disclaimer of leaseholds by a trustee in bankruptcy under sub-s. 6, s. 55, of the act of 1883, the landlord has not such an interest in the "disclaimed property" as to be entitled to a vesting order under the sub-section. The right to a vesting order is only conferred on a person claiming an interest in the property through or under the bankrupt. *In re Parker and Parker, Ex parte Turquand*, 14 Q. B. D. 405. Where under s. 121, and rule 232 (1883), the trustee disclaims, without any application to the court, it has no jurisdiction to give any compensation to the landlord for the use and occupation by the trustee of the premises, although beneficial to the estate. *In re Sandwell, Ex parte Zerfass*, 14 Q. B. D. 960. As to company lessee, see *ante*, p. 491.

It would now seem that a disclaimer by the trustee of an assignee of a lease operates as a surrender only so far as is necessary to relieve the bankrupt and his estate and the trustee from liability, and not so as otherwise to affect the rights or liabilities of third parties. See per Manisty, J., *Harding v. Preece*, L. R., 9 Q. B. D. 281, 285, citing *Smyth v. North*, L. R., 7 Ex. 242; *O'Farrell v. Stephenson*, 4 Ir. L. R. 715; *Smalley v. Hardinge*, 7 Q. B. D. 524; *Ex parte Walton*, 17 Ch. D. 746; *In re Clarke*, *ib.* 759; *East & West India Dock Co. v. Hill*, 22 Ch. D. 14; aff. 9 App. C. 448. Thus the surety to a lessee for due performance of covenants by his assignee who afterwards becomes bankrupt is not, nor is the lessee, discharged by the disclaimer of the lease by the trustee in bankruptcy. *Harding v. Preece*, L. R., 9 Q. B. D. 281. And a disclaimer by the trustee of the interest of an assignee of a lease does not put an end to a covenant for payment of rent in the lease on which the lessee is still liable to the lessor. *Hill v. East & West India Dock Co.*, 9 App. C. 448, *Ld. Bramwell, diss.* When the trustee in bankruptcy of partners disclaims a lease of premises used by the partners for partnership purposes, but which was granted to the partners as joint tenants, they entering into a joint and several covenant to pay the rent, the lessor has a right to prove against the separate estate of each partner for the injury caused to him by the disclaimer. *Ex parte Corbett*, 14 Ch. D. 122. Whether a right is given to prove also against the joint estate of the partners, *quære. Ib.*

If a lessee sublets, and afterwards becomes bankrupt, and his trustee disclaims the lessee's interest in the premises, the lessor is not entitled to eject the sub-tenant. *Smalley v. Hardinge*, 7 Q. B. D. 524; comp. *Taylor v. Gillott*, L. R., 20 Eq. 682. Where a mortgagee does not appear on the trustee's application to disclaim, the proper course is to order that the mortgagee be excluded from all interest in and security upon the property, unless he shall by a short date declare his option to take a vesting order in the terms of the subsection. *In re Parker, Ex parte Turquand*, 14 Q. B. D. 405. Where leave was given to the trustee to disclaim a lease, and the trustee disclaimed, and after this had been done, but within the time allowed for bringing an appeal, a person with whom the bankrupt had deposited the lease by way of equitable mortgage, and who was present when the order giving the leave to disclaim was made, gave notice of appeal from the order, it was held that, the disclaimer having been executed, the lessor's title was complete, and the appeal was dismissed. *In re Woods, Ex parte Ditton*, 3 Ch. D. 459. By the act of 1869 a disclaimer placed the trustee in the position of never having had any estate in the leasehold property; it was held consequently, that any severance by the trustee of the fixtures attached to the property after the date at which the term is put an end to by the disclaimer, *i.e.*, the date of the trustee's appointment, is necessarily a wrongful act, and gave the landlord a right to recover the value of the fixtures from the trustee. *Ex parte Stephens*, 7 Ch. D. 127; *Ex parte Brook*, 10 Ch. D. 100; see *Ex parte Glegg*, 19 Ch. D. 7, which was to the same effect. The appointment of a trustee in a liquidation corresponded to the adjudication in bankruptcy. See *ib.* p. 16. But under the act of 1883, it has been held that where there are trade fixtures on the leasehold premises of a bankrupt, removable by the tenant, and the trustee applies for leave to disclaim the lease, the same rule will be applied as between the landlord and trustee as would obtain if the lease had been determined in an ordinary way. Therefore the landlord must either take over the fixtures at a valuation or the trustee must have a reasonable time, before disclaiming, in which to sever and remove them. *In re Moser*, 13 Q. B. D. 738. A disclaimer gives up to the lessor the entirety of that which is comprised in the demise. Therefore, if a bankrupt be the lessee of land and personal chattels, demised to him as one subject-matter at one entire rent, a disclaimer operates as a surrender to the lessor of the chattels, as well as the land, and the trustee cannot claim the chattels, as having been at the commencement of the bankruptcy in the order or disposition of the bankrupt as reputed owner with the consent of the true owner. *Ex parte Allen*, 20 Ch. D. 341. Although a trustee in bankruptcy, who has taken actual possession of leasehold property of the bankrupt, receives notice from the landlord to disclaim the lease, but does not disclaim, he may nevertheless relieve himself of liability to the landlord by assigning the lease, even without having previously offered to surrender it, and the mere fact that the trustee knows the assignee to be a pauper will not invalidate such assignment. *Hopkinson v. Lovering*, L. R., 11 Q. B. D. 92.

LIMITATIONS TO SUITS.

CH. 1.—LAND AND RENT, p. 572.

SEC. 1.—THE GENERAL STATUTORY BAR, p. 572.

SEC. 2.—WHEN RIGHT SHALL BE DEEMED TO HAVE FIRST
ACCRUED—GENERALLY, p. 574.

SEC. 3.—ADVERSE AND NON-ADVERSE POSSESSION, p. 576.

SEC. 4.—FORFEITURE — REMAINDERMAN — REVERSIONER —
ADMINISTRATOR, p. 578.

SEC. 5.—CASES OF TENANCY, p. 580.

SEC. 6.—MERE ENTRY—CONTINUAL CLAIM, p. 582.

SEC. 7.—POSSESSION BY COPARCENER—BY YOUNGER BRO-
THER, p. 582.

SEC. 8.—ACKNOWLEDGMENTS, p. 583.

SEC. 9.—DISABILITIES, p. 584.

SEC. 10.—TENANT IN TAIL, p. 585.

SEC. 11.—LIMITATION SAME IN EQUITY AS AT LAW, p. 586.

SEC. 12.—EXPRESS TRUSTS, p. 586.

SEC. 13.—CONCEALED FRAUD, p. 590.

SEC. 14.—ACQUIESCENCE, p. 591.

SEC. 15.—CHURCH PROPERTY, p. 591.

CH. 2.—EQUITIES OF REDEMPTION, p. 593.

CH. 3.—MORTGAGE AND JUDGMENT DEBTS, LIENS, CHARGES, LEGACIES,
p. 595.

CH. 4.—ARREARS OF RENT AND INTEREST, p. 600.

CH. 5.—SPECIALTIES—RECOGNIZANCES, p. 602.

CH. 6.—ACTIONS OF ACCOUNT — ON THE CASE — NON-SPECIALTY
DEBTS, p. 604.

CHAPTER I.

LAND AND RENT.

SEC. 1.—*The general Statutory Bar.*

<i>Definition of particular Words</i>	572	<i>Formerly twenty now twelve Years</i>	
<i>Land—Rent—Tithes</i>	572, 573	<i>the statutory Bar</i>	573
<i>Heriots, &c.—Annuities</i>	572	<i>Right and Remedy barred</i>	573
<i>Person through whom another</i>		<i>Crown and Duchy of Cornwall</i>	
<i>claims</i>	572	<i>Lands</i>	574
<i>Double meaning of word</i>		<i>Sixty Years' adverse Posses-</i>	
<i>"Rent"</i>	573	<i>sion</i>	574

THE principal acts now in force providing for the limitation of actions and suits in respect of property, contracts and debts are the 2 & 3 Will. 4, c. 71, *ante*, tit. "EASEMENTS;" the 3 & 4 Will. 4, c. 27; 7 Will. 4 & 1 Vict. c. 28, and the 37 & 38 Vict. c. 57, the Real Property Limitation Act, 1874, which is to be read with the prior acts. The act of 1874 came into operation on the 1st January, 1879. These acts relate to real property and interests therein or connected therewith and legacies. The 3 & 4 Will. 4, c. 42, relates to specialty debts; and the 21 Jac. 1, c. 16, relates to actions of assumpsit and simple contract debts. The substance of the material sections of these acts is in general stated, but fully, and the principal sections are cited (excluding formal words) *verbatim*, or nearly so. The alterations made by the act of 1874 will be mentioned under each section of the act of Will. 4 which is affected by them.

Definition of particular Words.] By the interpretation clause of the 3 & 4 Will. 4, c. 27, "land" extends to manors, messuages, and all other *corporeal hereditaments* whatsoever, to *tithes* (other than tithes belonging to a spiritual or eleemosynary corporation sole), and to any *estate or interest* in them or any of them, *freehold, chattel, copyhold*, or of any other tenure; "rent" extends to all *heriots, services* and *suits* for which a *distress* may be made, and to all *annuities* and periodical sums of money charged upon or payable out of any land (except moduses or compositions belonging to a spiritual or eleemosynary corporation sole); and the "person through whom another person is said to claim" shall mean any person *by, through or under, or by the act of whom*, the person so claiming became entitled to the estate or interest claimed, as heir, issue in tail, tenant by the curtesy of England, tenant in dower, successor, special or general occupant, executor, administrator, legatee, husband, assignee, appointee, devisee,

or otherwise, and also any person who was entitled to an estate or interest to which the person so claiming, or some person through whom he claims, became entitled as lord by escheat; "person" extends to a body politic, corporate or collegiate, and to a class of creditors or other persons, as well as to individuals (s. 1). In *Ld. Zouche v. Dalbiac*, 10 Ex. 172, the Court of Exchequer doubted whether, notwithstanding the interpretation of "rent" in this section, heriot service and heriot custom, or either of them, are within the enactments of ss. 2, 3, 34, and 42.

The word "rent" in this section means rent as an estate or inheritance distinct from the land, as fee-farm rents, rent-charges, or the like. *Grant v. Ellis*, 9 M. & W. 113; see *Dean of Ely v. Bliss*, 2 D., M. & G. 459, 472. It does, however, sometimes mean rent-service, or ordinary rent reserved in a lease. In the 2nd, 3rd, 4th, 5th and 7th sections, and in parts of section 9, it means *rent-charge*; in other parts of the last-mentioned section it means ordinary rent. *Doe v. Angell*, 9 Q. B. 328, 355. In this case Lord Denman observed that considerable difficulty arose in the construction of the act by reason of this word being used throughout in these two different senses. The word "tithes" does not mean tithes as between tithe-owners and occupiers, but as between parties claiming adverse estates in them. *Dean of Ely v. Cash*, 15 M. & W. 617; *Same v. Bliss*, 2 D., M. & G. 459; see *Bunbury v. Fuller*, 9 Ex. 128.

As to "heriots," see Sug. R. P. St. 17, 18; *Owen v. De Beauvoir*, 16 M. & W. 547, 566.

Formerly twenty now twelve Years the statutory Bar.] "After the 31st December, 1833, no person shall make an entry or distress, or bring an action to recover any land or rent (*charge*, 9 Q. B. 355), but within *twenty (now twelve) years* next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to some person through whom he claims, or if such right shall not have accrued to any person through whom he claims, then within *twenty (now twelve) years* next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to the person making or bringing the same" (s. 2). This is repealed by the Act of 1874 (*ante*, s. 9), but re-enacted except that on and after 1st January, 1879, *twelve years* are substituted for twenty years (s. 1). When the statutory bar is complete, the act gives the right and transfers the estate to the party in possession. *Burroughs v. M'Creight*, 1 Jo. & L. 290; *Scott v. Nixon*, 3 Dr. & War. 388. And this is expressly declared by a later section, enacting that—"At the determination of the period limited by this act to any person for making an entry or distress, or bringing any writ of *quare impedit* or other action or suit, the right and title of such person to the land, rent or advowson, for the recovery whereof such entry, distress, action or suit respectively might have been made or brought within such period, shall be *extinguished*," 3 & 4 Will. 4, c. 27 (s. 34). The old statutes barred the remedy only, the modern ones put an end to the *right* as

well as the remedy. *Dundee Harbour (Trustees) v. Dougall*, 1 Macq. H. L. 317, 321; *Dawkins v. Lord Penrhyn*, 6 Ch. D. 318. As to the right under a contract of re-purchase, see *Alderson v. White*, 2 D. & J. 97; and as to mortgagees, see *post*, s. 40.

Lands of the Crown and Duchy of Cornwall.] It may be useful to mention that adverse possession for sixty years of any messuages, lands, tenements, rents, tithes, or hereditaments whatsoever (other than liberties or franchises) of the crown or duchy of Cornwall confers now a good title against the crown or duchy. 24 & 25 Vict. c. 62.

SEC. 2.—*When Right shall be deemed to have first accrued—*
Generally.

<i>As to Estates in Possession</i>	574	<i>Cases of Forfeiture</i>	575
<i>Estates of Deceased Persons</i>	574	<i>Discontinuance—Dispossession</i>	575
<i>Estates conveyed</i>	574	<i>Reversionary, &c., Interests</i>	576
<i>Future Estates</i>	575	<i>Executory Devises</i>	576

The right to make an entry or distress, or bring an action to recover any land or rent (*charge*, 9 Q. B. 355), shall be deemed to have first accrued—

- (1.) *When the claimant, or some person through whom he claims, shall, in respect of the estate or interest claimed, have been in possession or in receipt of the profits of such land or of such rent, and shall, while entitled thereto, have been dispossessed or have discontinued such possession or receipt, then such right shall be deemed to have first accrued at the time of such dispossession or discontinuance of possession, or at the last time at which any such profits or rent were or was so received;*
- (2.) *When the claimant shall claim the estate or interest of some deceased person who shall have continued in such possession or receipt in respect of the same estate or interest until the time of his death, and shall have been the last person entitled to such estate or interest who shall have been in such possession or receipt, then such right shall be deemed to have first accrued at the time of such death;*
- (3.) *When the claimant shall claim in respect of an estate or interest in possession, granted, appointed or otherwise assured by any instrument (other than a will) to him, or some person through whom he claims, by a person being, in respect of the same estate or interest, in the possession or receipt of the profits of the land, or in the receipt of the rent, and no person entitled under such instrument shall have been in such possession or receipt, then such right shall be deemed to have first accrued when the claimant, or*

the person through whom he claims, *became entitled to such possession or receipt by virtue of such instrument* ;

- (4.) When the estate or interest claimed shall have been *in reversion or remainder, or other future estate or interest*, and no person shall have obtained the possession or receipt of the profits of such land, or the receipt of such rent in respect of such estate or interest, then such right shall be deemed to have first accrued when such estate or interest *became an estate or interest in possession* ;
- (5.) When the claimant, or the person through whom he claims, shall have become entitled by reason of any *forfeiture or breach of condition*, then such right shall be deemed to have first accrued *when such forfeiture was incurred or such condition was broken*. (3 & 4 Will. 4. c. 27, s. 3.)

See the very learned and acute criticisms on the second and third sections, with reference in particular to the case of *James v. Salter*, 2 Bing. N. C. 505, and 3 Bing. N. C. 544 (a decision as to annuities under wills), and generally as to the true construction of these sections, Sug. R. P. St. 2nd Ed. 19, *et seq.* "The expression 'in receipt of the profits of any land' is used in the act in conjunction with the words *in possession of the land*, to denote, not the receipt of rent from a tenant, but the receipt of the actual proceeds of the land." *Ib.* p. 47 ; see *Grant v. Ellis*, 9 M. & W. 128.

Discontinuance of possession means the abandonment of possession by one entitled to it (*Rimington v. Cannon*, 12 C. B. 18), followed by actual possession by another. *Smith v. Lloyd*, 9 Ex. 562 ; see *M'Donnell v. M'Kinty*, 10 Ir. L. R. 514. The time of discontinuance or dispossession of the receipt of rent has reference to the last actual payment of it, from which time the statute begins to run. *Owen v. De Beauvoir*, 16 M. & W. 547, 565 ; and see *post*, s. 7. Where a question arises as to mines, *prima facie* the possession of the surface is that of the mines beneath, unless they are severed in title. *Keyse v. Powell*, 2 E. & B. 132 ; *Smith v. Lloyd*, *sup.* There is no discontinuance of receipt of rent where there has been no omission by the party entitled to the rent to enforce his remedies for the payment with knowledge that the rent has not been paid. *Adnam v. Earl of Sandwich*, 2 Q. B. D. 485. In this case the person originally liable to pay the rent continued to do so after he had sold and conveyed the property out of which the rent issued, but the person entitled to the rent was not aware of the conveyance. The court also considered that on the sale and conveyance it might be presumed that there had been some arrangement by the vendor to indemnify the purchaser against the rent. Acts of user committed upon land which do not interfere, and are consistent, with the purpose to which the owner intends to devote it do not amount to a "dispossession" of him, and are not evidence of "discontinuance of possession" by him. *Leigh v. Jack*, 5 Ex. D. 264. Very little (*e.g.*, repairing a gate on the property) is sufficient to show that there is no abandonment of possession, *ib.* If A. has occupied a cellar under the ground of B. for the statutory

period, this is, in the absence of fraud, a discontinuance of possession on the part of B. within the meaning of the statute, though B. was ignorant of such occupation. *Rains v. Buxton*, 14 Ch. D. 537.

The words "or other future estates or interests," in the fourth branch of the second section, comprehend all executory devises. *Per Tindal, C. J.*, 3 Bing. N. C. 554. Where A., tenant for life, with remainder to B., wrongfully suffered a recovery and re-settled the estate, taking also a life interest under the new settlement, it was held that time did not begin to run against B. until the death of A., until which time B.'s estate was reversionary. *Lewis v. Rees*, 3 K. & J. 132; *Astley v. E. of Essex*, L. R., 18 Eq. 290. Where, prior to the Abolition of the Fines and Recoveries Act (3 & 4 Will. 4, c. 74) (*ante*, tit. "ESTATES"), husband and wife seised in fee in right of the wife conveyed to a purchaser by deed without fine, it was held that the wife's estate was a future estate (3 & 4 Will. 4, c. 27, s. 3), subject to and arising after the determination of the husband's estate. *Jumpson v. Pitchers*, 13 Sim. 327; see *Doe v. Bramston*, 3 A. & E. 63.

SEC. 3.—*Adverse and Non-adverse Possession.*

<i>Doctrine of adverse Possession</i>	576	<i>Nature of Possession material</i>	577
<i>Mere Possession in general sufficient</i>	576, 577	<i>Non-adverse Possession at Time of Act</i>	577

The act has done away with the doctrine of *adverse possession*. The question now is (except in cases of disability), whether twelve formerly twenty years have elapsed since the right accrued to the claimant or person through whom he claims, whatever may be the nature of the possession. See *Doe v. Nepean*, 2 M. & W. 911. Though "when the possession is a bar under the statute, it may still properly be called adverse possession, although not in the old sense." Sug. R. P. St. 2nd Ed. 23. But there must have been possession for the prescribed time on the part of one person, and absence or want of possession by the other, otherwise the statute does not apply. *Smith v. Lloyd*, 9 Ex. 562; see *Dixon v. Gayfere*, 17 Beav. 421; *Worssam v. Vandenbrande*, 17 W. R. 53. And *mere possession* for the statutory period without acknowledgment of an adverse right is, in general, a sufficient bar to a claimant. See *Doe v. Taylerson*, 11 A. & E. 1015; *Dixon v. Baty*, L. R., 1 Ex. 259. Where the owner of a field occupies and cultivates for the statutory period a strip of land adjoining the field, which strip originally belonged to another, he gains a title under the act. *Norton v. L. & N. W. R. Co.*, 13 Ch. D. 268. In this case, *Scarby v. Tottenham R. Co.*, L. R., 5 Eq. 409, which was similar in its circumstances, was questioned; comp. *Dixon v. Gayfere*, 17 Bea. 421. And prior possession for such period is sufficient as against the subsequent possession of another for less than the statutory period.

Doe v. Cooke, 7 Bing. 346. A person acquires by possession a devisable interest, and his devisee has a good title as against all but the true owner, and against him if his right is barred by lapse of time. *Asher v. Whitlock*, L. R., 1 Q. B. 1. And where a tenant for life devises the property in fee, a devisee for life under the will who enters is afterwards estopped from denying the title of those claiming in remainder under the will. *Board v. Board*, L. R., 9 Q. B. 48; see *Anstee v. Nelms*, 1 H. & N. 225; *Newlands v. Holmes*, 3 Q. B. 679.

But in order to give a right to maintain an action of ejectment, the possession must be, on the part of one person, for the statutory period, or by another deriving title under him (*Doe v. Barnard*, 13 Q. B. 945); although, as a *defence*, possession for such period may not be necessary. *Ib.* And mere possession (in the case cited for one year) is sufficient to enable a person to maintain an action against a trespasser who shows no title whatever. *Doe v. Dyeball*, M. & M. 346; acc. per Cockburn, C.J., *Asher v. Whitlock*, L. R., 1 Q. B. 5. Where a person who has simply a title to property by possession devises it, those claiming and taking possession under the will cannot set up any title inconsistent with it. *Hawksbee v. Hawksbee*, 11 Ha. 230; see *Anstee v. Nelms*, 1 H. & N. 225; *Board v. Board*, L. R., 9 Q. B. 48. But this rule does not apply where possession is taken of property which does not pass by the will, although erroneously thought to do so. Thus, a tenant for life of devised property who takes possession of that and other property not devised will acquire a title to the latter if in possession for the statutory period. *Paine v. Jones*, L. R., 18 Eq. 320. But although the doctrine of adverse possession, strictly speaking, no longer exists, yet the *nature of the possession* is sometimes important. Thus it has been held that an entry by a father (*Thomas v. Thomas*, 2 K. & J. 79), or an uncle, who was also executor (*Pelley v. Bascombe*, 9 Jur., N. S. 1120; aff. 11 Jur., N. S. 52, Turner, L.J., giving no opinion), is to be considered as made *prima facie* on behalf of a child or nephew or niece, being under age at the time, and not adversely. See *Doe v. Groves*, 10 Q. B. 486; *Hicks v. Sallitt*, 3 D., M. & G. 782; *Mathew v. Brise*, 14 Bea. 341. But where a tenant in tail affected to devise his estate tail to his widow in fee, and she continued in possession upwards of twenty years after her husband's death, she was held to have acquired a good title under the statute, although her son, the *heir in tail*, received the rents, first as agent for his mother, then in his own name, but always accounting to her for them. *Williams v. Pott*, L. R., 12 Eq. 149. And if trustees under a will enter into possession of an estate, erroneously supposing that it passed by the will, and pay the income of the estate to the persons who would have been entitled had it so passed, the right of the testator's heir will be barred in due course under the statute, although he himself may be one of such persons sharing with the others. *Yardley v. Holland*, L. R., 20 Eq. 428. By section 15, a period of five years from the passing of the act was allowed to make claims, where the possession was not then adverse. This section has no longer any direct operation. Sug. R. P. St., 2nd ed., 69.

SEC. 4.—*Forfeiture—Remainderman—Reversioner—Administrator.*

<i>Forfeiture—Meaning of</i>	578	<i>Rights of Reversioner</i>	579
<i>Copyholds—Rights of Lord</i>	578	<i>Person entitled to Estate in Possession and future Estate</i>	579
<i>Reversioner having no particular Estate</i>	578	<i>Administrator</i>	579

Where advantage of a forfeiture is not taken by the remainderman to recover any land or rent (*charge*, 9 Q. B. 355), he shall have a new right when his estate comes into possession (s. 4). See *Lewis v. Rees*, 3 K. & J. 132, *ante*, p. 576. This section must be read in connection with the last branch of sec. 3. The rights of a remainderman or reversioner who does not at the time take advantage of a forfeiture are not affected in consequence. Thus, where there is a forfeiture of a lease, the lessor need not take advantage of it, and his right at the end of the term will not be affected by his not doing so. *Doe v. Oxenham*, 7 M. & W. 131; see *Doe v. Blakeway*, 5 C. & P. 563. But he cannot enter *during the term* if he has allowed twenty years to elapse without taking advantage of the forfeiture. *Doe v. Bingham*, 3 Ir. L. R. 456. The terms “forfeiture” and “breach of condition” used in ss. 3, 4, are to be read in the largest sense, and extend to forfeitures which operate to accelerate an estate under a conditional limitation, as well as to forfeitures of which the heir-at-law only can take advantage. *Astley v. E. of Essex*, L. R., 18 Eq. 290. Thus, a tenant in tail incurs a forfeiture by not complying with the condition in the same way as a tenant for life, and acquires no estate as against the remainderman by continuing in possession for twenty years after the forfeiture has been incurred. *Id.* As to non-payment of rent, see *post*, ss. 8, 9.

The right of the lord of a manor to enter for a forfeiture was barred at the end of twenty years under the old Statute of Limitations. *Whitton v. Peacock*, 3 M. & K. 325. In the converse case, as regards the right of the tenant and those claiming under him, it has been held under the statute of Will. 4, that on a seizure by the lord *quousque*, the statute begins to run from the time of the seizure, and that a claim by the heir against whom the seizure operated is too late if made more than twenty years after the seizure. *Walters v. Webb*, L. R., 5 Ch. 531.

The right to recover any land or rent (*charge*, 9 Q. B. 355) shall be deemed to have first accrued, in respect of an estate or interest in reversion, at the time at which the same shall have become an estate or interest in possession (s. 5). That part of the 5th section which relates to estates in reversion expectant on the determination of the particular estate was held to apply only to cases where another person than the reversioner is entitled to the particular estate (*Doe v. Moulds-dale*, 16 M. & W. 689), “or, in other words, to the simple case of a reversioner having no particular estate.” Sug. R. P. St., 2nd ed., 49.

Sect. 5 is repealed by the Act of 1874 (s. 9), and in its place it is

enacted "that a right to make an entry or distress, or to bring an action or suit, to recover any land or rent, shall be deemed to have first accrued, in respect of an estate or interest in reversion or remainder, or other future estate or interest, at the time at which the same shall have become an estate or interest in possession, by the determination of any estate or estates in respect of which such land shall have been held, or the profits thereof or such rent shall have been received, notwithstanding the person claiming such land or rent, or some person through whom he claims, shall, at any time previously to the creation of the estate or estates which shall have determined, have been in the possession or receipt of the profits of such land, or in receipt of such rent. But if the person last entitled to any particular estate on which any future estate or interest was expectant shall not have been in the possession or receipt of the profits of such land, or in receipt of such rent, at the time when his interest determined, no such entry or distress shall be made, and no such action or suit shall be brought, by any person becoming entitled in possession to a future estate or interest, but within twelve years next after the time when the right to make an entry or distress, or to bring an action or suit, for the recovery of such land or rent, shall have first accrued to the person whose interest shall have so determined, or within six years next after the time when the estate of the person becoming entitled in possession shall have become vested in possession, whichever of those two periods shall be the longer, and if the right of any such person to make such entry or distress, or to bring any such action or suit, shall have been barred under this act, no person afterwards claiming to be entitled to the same land or rent in respect of any subsequent estate or interest under any deed, will, or settlement, executed or taking effect after the time when a right to make an entry or distress or to bring an action or suit, for the recovery of such land or rent, shall have first accrued to the owner of the particular estate whose interest shall have so determined as aforesaid, shall make any such entry or distress, or bring any such action or suit, to recover such land or rent." 37 & 38 Vict. c. 57, s. 2.

The following section being connected with the previous sections is stated here for convenience instead of in the order of sections:—

When the right of any person to recover any land or rent in respect of an estate *in possession* shall have been barred by the determination of the period hereinbefore limited, and such person shall, at any time during the said period, have been entitled to *any other estate*, in reversion or otherwise, no action, &c. shall be brought by him, or any person claiming through him, to recover in respect of *such other estate*, unless in the meantime the land or rent shall have been recovered by some person entitled to an estate which shall have been limited or have taken effect after or in defeasance of such estate in possession (3 & 4 Will. 4, c. 27, s. 20). See as to the difference between this and the 3rd section (4th branch), *Doe v. Liversedge*, 11 M. & W. 517.

"For the purposes of the act an administrator shall be deemed to

claim as if there had been no interval of time between the death of such deceased person and the grant of the letters of administration." *Ib.* (s. 6).

SEC. 5.—*Cases of Tenancy.*

<i>Tenancy at Will</i>	580	<i>Lease in writing</i>	581
<i>Mortgagor and Mortgagee</i>	580	<i>Rent 20s. and upwards</i>	581
<i>Cestui que Trust</i>	580	<i>Rent under 20s.</i>	581
<i>Parol yearly Tenancy</i>	580	<i>Receipt of Rent</i>	581

When any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent (*charge*, 9 Q. B. 355) *as tenant at will*, the right of the person entitled subject thereto, or of the person through whom he claims, *shall be deemed to have first accrued* either at the *determination* of such tenancy, or at the *expiration of one year next after the commencement of such tenancy*, at which time such tenancy shall be deemed to have determined: "provided always, that no mortgagor or *cestui que trust* shall be deemed to be a tenant at will, *within the meaning of this clause*, to his mortgagee or trustee," 3 & 4 Will. 4, c. 27 (s. 7). As to what is a tenancy at will, see *ante*, p. 534. Where there is a tenancy at will, and then the owner enters for the purpose of determining the tenant's possession, and thereupon a fresh agreement is made between them, the tenancy at will is determined. *Randall v. Stevens*, 2 E. & B. 641; *Locke v. Matthews*, 13 C. B. N. S. 753.

The proviso in this section applies, it would seem, only to cases of express trust. *Doe v. Rock*, 4 M. & G. 30; see *Garrard v. Tuck*, 8 C. B. 253; Sug. R. P. St., 2nd ed., 39 *et seq.*, and *post*, sec. 25. But in *Drummond v. Lant*, 41 L. J., Q. B. 763, the proviso was held to apply to cases of actual direct trust. Notwithstanding the proviso, a *cestui que trust* may be a tenant at will within sections 2 and 3. *Garrard v. Tuck*, *supra*; Sug. R. P. St. 53; see *Melling v. Leak*, 16 C. B. 661, 667. See further as to this section, *Doe v. Thompson*, 6 A. & E. 721; *Doe v. Page*, 5 Q. B. 767; *Doe v. Moore*, 9 Q. B. 555; *Doe v. Carter*, *ib.* 863; *Randall v. Stevens*, 2 E. & B. 641; *Locke v. Matthews*, 13 C. B., N. S. 753; *Hodgson v. Hooper*, 3 E. & E. 149. When the money due upon a mortgage has been paid to the mortgagee, but no reconveyance has been executed, the mortgagor becomes from the date of such payment a tenant at will to the mortgagee, and the legal estate of the mortgagee is extinguished by thirteen years' adverse possession of the mortgagor. The 25th section of the Statute of Limitations (3 & 4 Will. 4, c. 27) relates to express trusts only, and does not apply to the relation between a mortgagee whose mortgage has been satisfied and the mortgagor. *Sands to Thompson*, 22 Ch. D. 614.

When any person shall be *in possession* or *in receipt of the profits* of any land, or *in receipt of any rent (charge)*, *as tenant from year to year or other period, without any lease in writing*, the right of the person

entitled subject thereto, or of the person through whom he claims to recover such land or rent (*charge*), shall be deemed to have first accrued at the determination of the first of such years or other periods, or at the last time when any *rent* payable in respect of such tenancy shall have been received (which shall last happen), *ib.* (s. 8). Where the lord of a manor granted to A. licence to enclose part of the waste and occupy it at a yearly rent for a term, and A. continued to occupy for upwards of forty years after the term without paying any rent during that period, he was held to have acquired a freehold by operation of the act. *Att.-Gen. v. Tomline*, 15 Ch. D. 150.

The word rent in this section means rent-charge, as in section 2, except at the end, where it means ordinary rent. *Doe v. Angell*, 9 Q. B. 355; *Baines v. Lumley*, 16 W. R. 674. A verbal admission by a tenant that he is paying rent is sufficient, and the case is not then within (s. 14) (*post*, p. 583). *Doe v. Beckett*, 4 Q. B. 601. Although the instrument purporting to be a lease may be signed by the tenant, it is not within this section, unless it duly passes the interest of the lessor or lessors. *Doe v. Gower*, 17 Q. B. 589. Where the payment is not on account of rent, it will not prevent the operation of the statute. *Att.-Gen. v. Stephens*, 6 D., M. & G. 111. Nonpayment of rent to a mortgagor creates no adverse right as against his mortgagee. *Ford v. Ager*, 2 H. & C. 279.

Where there is a person in possession or receipt of profits of any land, or receipt of any rent (*charge*) by virtue of a *lease in writing*, at a rent of 20s. and upwards, and the rent under it has been received by some wrongful claimant, and no rent has been afterwards paid to the rightful owner, his *right first accrues* when the rent was *first received by the wrongful claimant*, and not on the determination of the lease. *Ib.* (s. 9).

This section is an alteration of the old law. See *Doe v. Angell*, 9 Q. B. 328; Sug. R. P. St., 2nd ed., 62. In cases of mere *nonpayment* of rent to anyone, this section does not apply. *Archbold v. Scully*, 9 H. L. C. 360; see *Chadwick v. Broadwood*, 3 Bea. 307; *Doe v. Oxenham*, 7 M. & W. 131; consider section 35, *infra*, and the observations on it.

Where the lease is in writing, but no rent, or a less rent than 20s., is reserved, the case is then subject to the old law, and the time at which the right first accrues is the time of the determination of the lease. See *Doe v. Oxenham*, 7 M. & W. 131; *Chadwick v. Broadwood*, 3 Bea. 308; Sug. R. P. St., 2nd ed., 48. But where a lease is absolutely void, *e.g.*, within the provisions of a statute, and no rent is received under it, the right of the lessor to re-enter exists from the moment of the execution of the lease, from which period time begins to run under the Statutes of Limitations. *Magdalen Hospital v. Knotts*, L. R., 4 App. C. 324. If any rent, however small, had been reserved and received, it would have created the legal relation of a tenancy from year to year, and the Statute of Limitations would not have run. *Per* Ld. Selborne, *ib.*, p. 335.

“The receipt of the rent payable by any tenant from year to year, or

other lessee, shall, as against such lessee or any person claiming under him (but subject to the lease), be deemed to be the receipt of the profits of the land for the purposes of this act" (s. 35).

This section is somewhat ambiguous. Lord St. Leonards has thus explained it, "The framers of the act appear to have been apprehensive that the tenant, being in the actual receipt of the profits of the land, as that term was used in the act, might claim adversely to the lessor, who received the rent only. On the other hand, they guarded the tenant's lease against the landlord's claim, on the ground that the receipt of the rent was to be deemed a receipt of the profits of the land. It is, no doubt, a singular provision. The question could only arise between the tenant and the person receiving the rent; and the receipt of it is made binding only against such lessee, or any person claiming under him." Sug. R. P. St., 2nd ed., 47. As to the meaning of the expression "receipt of the profits of land," see *ib.*, and, *ante*, p. 575.

SEC. 6.—*Mere Entry—Continual Claim.*

Mere Entry not Possession..... 582 | *Continual Claim ineffectual* 582

No person shall be deemed to have been in possession of any land merely by reason of having made an entry thereon (s. 10).

A mere statement that possession is taken, accompanied by the removal of a stone from a wall and part of a fence, in the absence of the owner, is a mere entry under this section. *Doe v. Coombes*, 9 C. B. 714. As to what is a sufficient entry to establish the commencement of a title by possession, see *Randall v. Stevens*, 2 E. & B. 641; *Locke v. Matthews*, 13 C. B., N. S. 753.

"No continual or other claim upon or near any land shall preserve any right of making an entry or distress or of bringing an action," Act of W. 4 (s. 11).

As to continual claim and the cases in which it might formerly have been made, see Lit. s. 414 *et seq.*; Co. Lit. 250 b *et seq.*

SEC. 7.—*Possession by Coparcener—by Younger Brother.*

Possession by one Coparcener, &c., not that of others 582 | *Possession of younger Brother not that of Heir* 583

Possession of one or more coparceners, joint tenants, or tenants in common, shall not be deemed to have been the possession of the other or others, Act of W. 4 (s. 12).

For the law before the act, see *Doe v. Hulse*, 3 B. & C. 757; *Doe v. Prosser*, Cowp. 217.

The act operates to make the possession of one tenant in common a separate possession from the time of the commencement of the tenancy in common, and not merely from the time of the passing of the act. *Doe v. Horrocks*, 1 C. & K. 566; see *Culley v. Taylerson*, 11 A. & E. 1008; *Tidball v. James*, 29 L. J., Ex. 91.

Possession by a younger brother is not to be deemed the possession, &c., of the heir (*ib.* s. 13).

The old rule of law was different. Lit. sec. 396; Co. Lit. 242 a; see *Doe v. Lawley*, 13 Q. B. 954.

SEC. 8.—Acknowledgment.

<i>Acknowledgment to Person entitled,</i>		<i>Answer in Chancery</i>	583
<i>or his Agent</i>	583	<i>Acknowledgment by Agent</i>	583

An acknowledgment of the title of the person entitled to any land or rent given to him or his agent, in writing, signed by the person in possession or in receipt of the rent, is equivalent to possession by the person to whom or to whose agent such acknowledgment shall be given, and his right shall be deemed to have first accrued when such acknowledgment, or the last of such acknowledgments, if more than one, was given, Act of W. 4 (s. 14). See *Incorp. Soc. v. Richards*, 1 Dr. & War. 258.

The principle underlying all the Statutes of Limitations is that a payment to prevent the barring by statute must be an acknowledgment by the person making the payment of his liability, and an admission of the title of the person to whom the payment is made. *Harlock v. Ashberry*, 19 Ch. D. 539.

An admission in a letter to the claimant's solicitor of rent being due is a sufficient acknowledgment. *Fursdon v. Clogg*, 10 M. & W. 572. A proposal to take a lease, signed on behalf of and in the presence of a person unable to write, is an acknowledgment by him. *Corp. of Dublin v. Judge*, 11 Ir. L. R. 8. An admission by answer in Chancery is sufficient. *Goode v. Job*, 1 E. & E. 6; see *Moodie v. Bannister*, 4 Drew. 433. An acknowledgment by deed has relation to the time of its execution, not of its date. *Jayne v. Hughes*, 10 Ex. 430. It must be signed by the party in possession, not by his agent. *Ley v. Peter*, 3 H. & N. 101. Comp. the cases on acknowledgment in the other chapters of this title; and as to a parol admission that a person is paying rent, *Doe v. Beckett*, 4 Q. B. 601, *ante*, p. 581.

An acknowledgment after the statutory period has run and an adverse title has been gained is inoperative to take the case out of the statute. *Re Alison*, 11 Ch. D. 284; *Sanders v. Sanders*, 19 Ch. D. 373; *Stansfield v. Hobson*, 3 D. M. & G. 620, is *contra* but not followed.

SEC. 9.—Disabilities.

<i>Infancy — Coverture — Lunacy —</i>		
<i>Absence</i>	584	<i>Continued Disability</i> 584 <i>Succession of Disabilities</i> 584

Persons under the disability of *infancy, idiotcy, lunacy, coverture, unsoundness of mind, or absence beyond seas*, and those claiming through them, were allowed ten (now six) years from the termination of the disability or death of the person to whom the right *first* accrued, W. 4 (s. 16). This section is repealed by s. 9 of the Act of 1874, but re-enacted from 1st Jan., 1879, *except* that six years only are allowed instead of ten after the termination of the disability or death (*ib.* s. 3), and also that no time is to be allowed for absence beyond seas (*ib.* s. 4). See *Thomas v. Thomas*, 2 K. & J. 79, *ante*, p. 577; *Nanney v. Williams*, 22 Bea. 452. In general, a person who enters on the estate of an infant is treated as a bailiff and made accountable accordingly. *Crowther v. Crowther*, 23 Beav. 305. Under this section the right is preserved if the person is under one disability, *e.g.* infancy, at the time the right accrues, and when that disability ceases is under another, for instance, *coverture* (*Borrows v. Ellison*, L. R., 6 Ex. 128; see *Pelley v. Bascombe*, 11 W. R. 766), subject nevertheless to the limit imposed by section 17, *infra*. Consider the observations on this section in *Owen v. De Beauvoir*, 16 M. & W. 567; 5 Ex. 182; and the remarks of Lord St. Leonards, R. P. St., 2nd ed., 71 *et seq.* This section did not apply as between mortgagor and mortgagee. *Kinsman v. Rouse*, 17 Ch. D. 104. The rule is the same under the recent Act of 1874. *Forster v. Patterson*, *ib.* 132.

The saving clause in sec. 16, *supra*, does not operate in any case longer than forty (now thirty) years *from the time the right first accrued*, notwithstanding the existence of disability during the *whole time*, or the ten (now six) years after disability, or death, have not expired, *ib.* (s. 17). This section is repealed by the Act of 1874 (s. 9), but is re-enacted with the exceptions that thirty years are substituted for forty, and six years for ten (*ib.* s. 5). See *Doe v. Bramston*, 3 A. & E. 63.

When any person shall be under any of the disabilities hereinbefore mentioned at the time at which his right first accrued, and shall die without having ceased to be under any such disability, no time beyond the said period of twenty(now twelve) years next after the right shall have first accrued, or the said period of ten (now six) years next after the time at which such person shall have died, shall be allowed by reason of any disability of any other person, Act of W. 4 (s. 18), act of 1874 (s. 9). See *Devine v. Holloway*, 14 Moo. P. C. 290.

No part of the United Kingdom, nor the islands of Man, Guernsey, Jersey, Alderney, or Sark, nor any islands adjacent to any of them (being part of the dominions of her Majesty), shall be deemed to be beyond seas within the meaning of the act, W. 4 (s. 19).

SEC. 10.—*Tenant in Tail.*

<i>Bar to, by Non-entry, bars Issue and Reversioners</i>	585	<i>Assurance by, not barring Remainders</i>	585
<i>Discontinuance</i>	585	<i>Object of Section</i>	585

When time is a bar to a tenant in tail, by reason of the entry, &c. not having been made within the time before limited, it operates equally against those claiming any estate he might lawfully have barred, Act of W. 4 (s. 21). And when time has begun to run against a tenant in tail, it will *continue* to run after his death against those whose rights he might lawfully have barred (*ib.* s. 22). *Abergavenny (E.) v. Brace*, L. R. 7 Ex. 145.

Thus, if there has been a *discontinuance* of the possession by the tenant in tail, time begins to run against him and his issue from the time of such discontinuance (*Austin v. Llewellyn*, 9 Ex. 276), and against those *in remainder* though under disabilities. *Goodall v. Skerratt*, 3 Drew. 216. As to the effect of a *conveyance* by the tenant in tail, see *Rimington v. Cannon*, 12 C. B. 16, 34, and sec. 23, *infra*; and as to the operation of the old Statute of Limitations in cases of estates tail, *Taylor v. Horde*, 1 Burr. 60.

If a tenant in tail makes an *assurance* not operative to bar estates, to take effect after or in defeasance of his estate tail, *possession* under such assurance *for twenty* (now twelve) *years after the time* at which such assurance, if *then executed* by such tenant in tail, or by the person who but for such assurance would be entitled, would without the consent of any other person have operated to bar such estates as aforesaid, will render such assurance valid against such estates, Act of W. 4 (s. 23). This is repealed by the act of 1874, but re-enacted by s. 6, twelve years being substituted for twenty. See *Doe v. Woodroffe*, 2 H. L. C. 811.

The object of this section is to make adverse possession for the statutory period under a base fee, created by a tenant in tail, as effectual as if (under the old law) a recovery had been duly suffered. Sug. R. P. St., 2nd ed., 86. This section only applies where the assurance by the tenant in tail is effectual to bar the issue in tail. *Morgan v. Morgan*, L. R., 10 Eq. 99; see *Penny v. Allen*, 7 D., M. & G. 409; consider the observations, Sug. R. P. St., 87 *et seq.* See as to possession under the will of a tenant in tail, *Williams v. Pott*, L. R., 12 Eq. 149. Possession must be under and by virtue of the base fee, not under and by virtue of a life estate preceding the base fee. *Mills v. Capel*, L. R., 20 Eq. 692.

SEC. 11.—*Time of Limitation in Equity same as at Law.*

<i>Bar to Legal is Bar to Equitable</i>		<i>Rule before Act.....</i>	586
<i>Right</i>	586	<i>Possession of Receiver.....</i>	586

No person claiming any land or rent in equity shall bring any suit to recover the same but within the period during which, by virtue of the provisions hereinbefore contained, he might have made an entry or distress, or brought an action to recover the same respectively, if he had been entitled at law to such estate, interest or right in or to the same as he shall claim therein in equity, Act of W. 4 (s. 24). See as to the application of this section and the Act of 7 Will. 4 & 1 Vict. c. 28, to foreclosure suits by a mortgagee, *post*, Chap. III.

Equitable rights are barred under sec. 24, *supra*, so far as they would have been barred if they had been legal rights. *Archbold v. Scully*, 9 H. L. C. 360; see *Penny v. Allen*, 7 D., M. & G. 409. Before this act courts of equity acted upon the provisions as to limitations of actions contained in the earlier Statutes of Limitations, and that period of time which was a statutory bar to actions at law was equally so in equity to suits founded on substantially the same right as the right to bring an action. *Hovenden v. Ld. Annesley*, 2 Sch. & L. 630; *Cholmondeley v. Clinton*, 2 J. & W. 156; *Re Cross*, 20 Ch. D. 109. As to the effect of the possession of a receiver of the Court of Chancery, see *Boehm v. Wood*, T. & R. 345; *Harrison v. Duignan*, 2 Dr. & War. 295; *H'ixon v. Vize*, 3 Dr. & War. 104; *Greenway v. Bromfield*, 9 Ha. 203.

SEC. 12.—*Express Trusts.*

<i>When Right first accrues</i>	586	<i>Purchasers with Notice</i>	588
<i>Rule prior to Act.....</i>	587	<i>Act of 1874—Judicature Act</i>	588
<i>Trustee and Cestui que Trust.....</i>	587	<i>Mistake by Trustees.....</i>	588
<i>Strangers and Cestui que Trust.....</i>	587	<i>Representatives of Deceased Trustees</i>	589
<i>What is an Express Trust.....</i>	587	<i>Cestui que Trust in Possession</i>	589
<i>Charge of Debts.....</i>	587	<i>Meaning of Cestui que Trust</i>	589
<i>Trust to pay Debts</i>	587	<i>Arrears of Rent or Interest</i>	589
<i>Legacies</i>	588	<i>Stale Demands</i>	589
<i>Term in Trustees</i>	588		

“ When any land or rent shall be vested in a trustee upon any express trust, the right of the cestui que trust, or any person claiming through him, to bring a suit against the trustee, or any person claiming through him, to recover such land or rent, shall be deemed to have first accrued, according to the meaning of this act, at and not before the time at which such land or rent shall have been conveyed to a purchaser for a valuable consideration, and shall then be deemed to have accrued only as against such purchaser and any person claiming

through him," Act of W. 4 (s. 25). By the Judicature Act, 1873, no claim of a *cestui que trust* against *his trustee* for any property held under an express trust or in respect of any breach of such trust shall be held to be barred by any Statute of Limitations, s. 15 (2). An express trust bars the statute equally as to personalty and realty by force of the Judicature Act. *Banner v. Berridge*, 18 Ch. D. 254. See the act of 1874, s. 10, *post*, p. 588.

In equity time was not a bar to a claim by a *cestui que trust* against his trustee in the case of an express trust (*Chalmer v. Bradley*, 1 J. & W. 51), but otherwise in cases of constructive trust. *Beckford v. Wade*, 17 Ves. 97. Thus time was held to be a bar as between *cestui que trust* and the person who had become possessed of the trust estate, even by reason of the breach of trust on the part of the trustee. *Bonney v. Ridgard*, 1 Cox, 145; *Townshend v. Townshend*, 1 B. C. C. 550, 554; *Andrew v. Wrigley*, 4 B. C. C. 125; *Beckford v. Wade*, *sup.*; see *Re Cross*, 20 Ch. D. 109. And in such cases twenty years, which was a statutory bar at law, was also, in general, a bar in equity to the claim of the *cestui que trust*. *Smith v. Clay*, *cit.* 3 B. C. C. 639, n.; *Cholmondeley v. Clinton*, 2 J. & W. 192; *Foley v. Hill*, 1 Ph. 399.

The term "express trust," in s. 25 of the Act of Will. 4, is used in opposition to trusts arising by implication, trusts resulting, or trusts by operation of law. *Dickenson v. Teasdale*, 1 D., J. & S. 52, 59. Thus, if a tenant for life renew leaseholds in his own name, this is a constructive trust by operation of law only, and time runs from the renewal. *Petre v. Petre*, 1 Drew. 371; *post*, tit. "TRUSTS." Where a person is in possession against both trustee and *cestui que trust*, this section does not apply. *Burroughs v. M'Creight*, 1 J. & L. 290; *Commissioners of Char. Don. v. Wybrants*, 2 J. & L. 191. That it may apply, there must be a trustee with an express trust and an estate in the land which is the subject-matter of the trust. *Dickenson v. Teasdale*, *sup.*; *Cunningham v. Foot*, 3 App. Ca. 974, 984; *Dawkins v. Ld. Penrhyn*, L. R., 4 App. Ca., 51; see *Sands to Thompson*, 22 Ch. D. 614, *ante*, p. 580.

A mere charge of debts or legacies on land does not in general create an express trust within the 25th section, but is within sec. 40, although there may be a direction to executors to raise the charge by mortgage or otherwise, inasmuch as the executors take no estate in the land, but a mere power to raise the money charged. See *Dickenson v. Teasdale*, *sup.* But a limitation or devise to trustees, upon trust to pay them, does. *Hunt v. Bateman*, 10 Ir. Eq. R. 360; *Dundas v. Blake*, 11 Ir. Eq. R. 138; *Burrowes v. Gore*, 6 H. L. C. 907; *Jacquet v. Jacquet*, 27 Bea. 332; *Watson v. Saul*, 1 Giff. 188; *Proud v. Proud*, 32 Bea. 234; *Francis v. Grover*, 5 Ha. 39; see *Cunningham v. Foot*, *sup.* In commenting on this section, Lord St. Leonards observes (R. P. St., 2nd ed., 104), that the *cestui que trust* would have the same remedy for any sum of money charged upon land or rent as he would have had if his right extended to the land or rent itself, citing *Burrowes v. Gore*, 6 H. L. C. 907; see *Jacquet v.*

Jacquet, 27 Bea. 332. The observations in *Young v. Wilton*, 10 Ir. Eq. Rep. (p. 19). *Knox v. Kelly*, 6 Ir. Eq. Rep. 285, and *Lord St. John v. Boughton*, 9 Sim. 223, are *contra*. See also the cases, *ante*, p. 587, and now the Act of 1874, s. 10, *infra*. There is no express trust as between a first mortgagee who has sold, having a surplus above his own claim, and a second mortgagee. *Banner v. Berridge*, 18 Ch. D. 254. And where there is a mortgage and trust for sale, this does not create an express trust. *Locking v. Parker*, L. R., 8 Ch. 30. Where there is a surplus, as to there being an express trust of the surplus, see *Warner v. Jacob*, 20 Ch. D. 220.

Although in general the right to a legacy is barred at the end of twenty years (see sec. 40, *post*), yet if it had become a trust fund it was within sec. 25. *Phillipo v. Munnings*, 2 M. & C. 309; see *Harcourt v. White*, 28 Bea. 303. And where a term was vested in trustees to secure a charge, the right of the *cestui que trust* continued as long as the trust subsisted. *Young v. Ld. Waterpark*, 13 Sim. 204; aff. 15 L. J. (N. S.) Ch. 63; *Cox v. Dolman*, 2 D., M. & G. 592; *Burrowes v. Gore*, *sup.* See now Act of 1874, s. 10, *infra*.

The ordinary vendor's lien for unpaid purchase-money does not create an express trust. *Toft v. Stephenson*, 1 D., M. & G. 28. The statute is not a bar as between the *cestui que trust* and persons claiming under the trustees who are volunteers (*Burroughs v. M'Creight*, 1 J. & L. 300, 304), or purchasers for value *with notice*. *Hicks v. Sallitt*, 3 D., M. & G. 782; see *Rolfe v. Gregory*, 11 Jur., N. S. 98; *Ernest v. Croysdill*, 2 D., F. & J. 175, 198; comp. the cases, *ante*, p. 587.

The preceding cases were decided on s. 25 of the Act of Will. 4.

Now, by the 37 & 38 Vict. c. 57 (1874), after the commencement of that act (1 Jan., 1879), "no action, suit, or other proceeding shall be brought to recover any *sum of money or legacy charged upon or payable out of any land or rent*, at law or in equity, and *secured by an express trust*, or to recover any *arrears of rent or of interest* in respect of any sum of money or legacy so charged or payable and so secured, or any damages in respect of such arrears, except within the time within which the same would be recoverable if there were not any such trust" (s. 10.) It will be seen that this section will now materially affect section 25 of the Act of Will. 4. Section 15 of the Judicature Act, *ante*, p. 587, will still, however, apply, it is considered, so far as regards the claim of a *cestui que trust* against his *trustee* as therein mentioned.

A mistake by a trustee in possession as to the persons equitably entitled, and his treating one person as entitled to property which, in fact, belongs to another, will not affect the rights of the latter. *Lister v. Pickford*, 34 Bea. 576. Under the act as between the *cestui que trust* and purchasers for value, time begins to run from the conveyance. A purchaser by the consideration of marriage is within the act. *Petre v. Petre*, 1 Drew. 371. Whether the bar is complete at the end of the statutory period, and conclusive against all, even *cestuis que trust under disabilities*, may be doubtful. See Lewin on Trusts, 7th ed., 747; *Att.-Gen. v. Magd. Coll.*, 18 Bea. 239, 250; 6 H. L. C. 189.

The personal representatives of a deceased trustee are liable to the extent of the assets in their hands to make good the loss occasioned by his breach of trust, and the Statute of Limitations, which would not be a bar in his favour, is equally unavailing for them. *Phillipo v. Munnings*, 2 M. & C. 309; see *Obce v. Bishop*, 1 D., F. & J. 137; *Butler v. Carter*, L. R., 5 Eq. 276; *Brittlebank v. Goodwin*, *ib.* 545; *Woodhouse v. Woodhouse*, L. R., 8 Eq. 514. The cases of *Dunne v. Doran*, 13 Ir. Eq. 545, and *Brereton v. Hutchinson*, 3 Ir. Ch. 361, are *contra*, but are not followed. A *cestui que trust in possession* (see *Melling v. Leak*, 16 C. B. 652) is in law tenant at will to the trustee (*Garrard v. Tuck*, 8 C. B. 231), and, being in possession under an express trust (*Doe v. Rock*, 4 M. & Gr. 30), time does not run against the trustee or other *cestui que trust* until the determination of such tenancy (*ib.*; *Petre v. Petre*, 1 Drew. 371); though when a person gains possession under a *cestui que trust*, and occupies, without payment of rent to, or acknowledgment of title in, anyone, the statute begins to run from that time against both *cestui que trust* and trustee. *Melling v. Leak*, *sup.* The term *cestui que trust* in section 7 (*ante*, p. 580) has been held to mean a *cestui que trust* under an express, not under an implied, trust. *Doe v. Rock*, 4 M. & Gr. 30. The 42nd section (*post*, p. 600), by which the recovery of arrears of rent or interest is limited to six years, did not apply as between trustee and *cestui que trust* (*post*, p. 600). See now Act of 1874, s. 10, and Judicature Act, s. 15, *ante*, p. 588.

Although charities are within the act, they are within the exception of the 25th section (*Com. Char. Don. v. Wybrants*, 2 Jo. & L. 182); consequently time is no bar as between charities and *their trustees*, though it is as between charities and other persons, for instance, *purchasers* from their trustees. *Ib.*; *Att.-Gen. v. Magd. Coll.*, 6 H. L. C. 189. The rule before the act was that length of possession would not prevail against charitable trusts, where the land was purchased with notice of the trust. *Att.-Gen. v. Christ's Hosp.*, 3 M. & K. 344; see *Att.-Gen. v. Mayor of Bristol*, 2 J. & W. 321. In conclusion it must be observed that, notwithstanding the terms of this section, the general rule is that stale demands are not to be encouraged. *M'Donnell v. White*, 11 H. L. C. 570; *Bright v. Leger-ton*, 2 D., F. & J. 606; see *Butler v. Carter*, L. R., 5 Eq. 276. *In re Cross*, 20 Ch. D. 109. Although time may not run by reason of an express trust, yet where the beneficiary or his representative has allowed a very long time to elapse without attempting to enforce the trust, equity will, when enforcing it, apply as to interest on the legacy, the principle of the statute. *Thompson v. Eastwood*, 2 App. C. 215. See *M'Donnell v. White*, 11 H. L. 570, 579.

SEC. 13.—*Concealed Fraud.*

<i>When Right first accrues</i>	590	<i>Fraudulent Representations</i>	590
<i>Mere wrongful Entry</i>	590	<i>Family Settlements</i>	590
<i>Length of Time no bar</i>	590	<i>Persons of unsound Mind</i>	590
<i>Secretly working Mines</i>	590	<i>Laches or Acquiescence</i>	591

In every case of a concealed fraud, the right shall be deemed to have first accrued at and not before the time at which such fraud shall, or, *with reasonable diligence*, might have been first known or discovered; nothing in this clause is to enable any owner of lands or rents to recover against any *bonâ fide* purchaser for value who has not assisted in the commission of such fraud, and who at the time that he made the purchase did not know and had no reason to believe that any such fraud had been committed, Act of W. 4 (s. 26). *Raines v. Buxton*, 14 Ch. D. 537. This does not apply to a case of a mere wrongful entry into possession, but to a case of designed fraud and concealment and possession by means of it. *Petre v. Petre*, 1 Drew. 397; Sug. R. P. St., 2nd ed., 98; see *Rolfe v. Gregory*, 11 Jur., N. S. 98. So where there are two sons, the elder in the order of birth being illegitimate and the younger legitimate, it is a concealed fraud if the parent designedly brings up the latter in the belief that his brother is legitimate. *Vane v. Vane*, L. R., 8 Ch. 383. A purchaser, although for value, who contracts through an agent who knows of the fraud, is not within the protection of the saving clause at the end of this section. *Ib.* See *Dean v. Thwaite*, 21 Bea. 621; *Rolland v. Hart*, L. R., 6 Ch. 678. This section is founded on the well-known principle of equity, that where there is fraud, no length of time will be a bar to it. See *Whalley v. Whalley*, 1 Mer. 436; *Trevelyan v. Charter*, 4 L. J., N. S. Ch. 209; *Rolfe v. Gregory*, 11 Jur., N. S. 98. But it must be proved that reasonable diligence in discovering the fraud was used. *Chetham v. Hoare*, L. R., 9 Eq. 571.

Although where a trustee receives money upon an express trust and wastes it, the statute does not run against the claim of the *cestui que trust*, yet where a trustee receives money not belonging to the *cestui que trust*, but which the *cestui que trust* can claim on the ground that the receipt of it was a fraud upon him, the Statute of Limitations will run against the claim of the *cestui que trust* from the time when he discovers the fraud. *The Met. Bank v. Heiron*, 5 Ex. D. 319. If the owner of surface land secretly works the mines underneath, which belong to the lord of the manor, this is a concealed fraud. *E. Dartmouth v. Spittle*, 19 W. R. 444. See *Ecc. Commissioners v. N. E. Ry. Co.*, 4 Ch. D. 845, 860; *Ashton v. Stock*, 25 W. R. 862; *Williams v. Raggett*, 46 L. J. Ch. 849; *Trotter v. Muclean*, 13 Ch. D. 574. In an action to recover damages for fraudulent representations, a reply to a defence of the Statute of Limitations, that the plaintiffs did not discover and had not reasonable means of discovering the fraud within six years before action is good. *Gibbs v. Guild*, 9 Q. B. D. 59. An agreement on a settlement of family disputes will

be set aside where one party has been guilty of gross fraud and concealment of the rights of the other. *Gordon v. Gordon*, 3 Sw. 400. Procuring instruments to be executed by a person of unsound mind is a fraud within this section. *Lewis v. Thomas*, 3 Ha. 26. There must, however, be no laches or acquiescence in the fraud by the person affected by it after he has discovered it. *Blennerhassett v. Day*, 2 B. & B. 118. The principle and doctrine of the court upon which the cases of acquiescence rest are recognized and embodied in the following section.

SEC. 14.—*Acquiescence.*

<i>Jurisdiction of Equity</i>	591		<i>Mistake</i>	591
-------------------------------------	-----	--	----------------------	-----

Nothing in this act contained shall be deemed to interfere with any rule or jurisdiction of courts of equity in refusing relief, on the ground of acquiescence or otherwise, to any person whose right to bring a suit may not be barred by virtue of this act, W. 4 (s. 27). Acquiescence implies knowledge of rights and of all the material circumstances of the case. *Marker v. Marker*, 9 Ha. 16; *Life Assoc. of Scotland v. Siddal*, 3 D., F. & J. 58. See the doctrine of acquiescence stated by Lord Cottenham in *Amherst v. D. of Leeds*, ante, p. 333. The question whether there has or has not been acquiescence does not arise where all parties are under the influence of a common mistake. *Cholmondeley v. Clinton*, 2 Mer. 171, 362. There can be no acquiescence in a transaction brought about by the exercise of undue influence so long as the influence continues. *Purcell v. M'Namara*, 14 Ves. 91, 122, ante, p. 310.

In cases on the subject of acquiescence before the act, it was held, that the question of acquiescence does not arise where a trustee purchases the property of his *cestui que trust*, until the latter knows that the former is the purchaser (*Randall v. Errington*, 10 Ves. 423), and that there must be clear evidence of acquiescence or confirmation. *Morse v. Royal*, 12 Ves. 355, 373. In *Browne v. Cross*, 14 Bea. 105, it seems to have been considered that a *cestui que trust*, though his interest is reversionary who knows of a breach of trust, is bound to take steps promptly to have the matter set right. The court, however, dissented from this view in *Life Assoc. of Scotland v. Siddal*, 3 D., F. & J. 58.

Section 28 relates to mortgages, post, Chap. II.

SEC. 15.—*Church Property—Suits in Ecclesiastical Courts.*

<i>Land or Rent</i>	592		<i>Suits in the Ecclesiastical Court</i> ...	592
<i>Advowsons</i>	592		<i>Tithes—Legacies</i>	592

The following sections prescribe the periods of limitation with respect to rights to church property :—

Land or rent must be recovered by spiritual or eleemosynary corporations sole within two incumbencies and six years, or sixty years after the time the right accrued, 3 & 4 Will. 4, c. 27 (s. 29).

Where land annexed to a deanery has become vested in the Ecclesiastical Commissioners by virtue of 3 & 4 Vict. c. 113, s. 50, their right of entry upon it is taken away by 3 & 4 Will. 4, c. 27, s. 2, when twenty years have elapsed without their obtaining possession thereof, although the dean to whose estate they have upon his death succeeded might have recovered the land within sixty years by force of the 3 & 4 Will. 4, c. 27, s. 29. *The Ecclesiastical Commissioners v. Rowe*, 4 Q. B. D. 63.

No advowson shall be recovered but within three incumbencies or sixty years (s. 30).

Incumbencies after lapse to be reckoned within the period, but not incumbencies after promotions to bishoprics (s. 31). See 6 & 7 Vict. c. 54, s. 3.

Every person claiming a right to present to or bestow any ecclesiastical benefice, as patron thereof, by virtue of any estate, interest or right which the owner of an estate tail in the advowson might have barred, shall be deemed to be a person claiming through the person entitled to such estate tail, and the right to bring any quare impedit, action or suit shall be limited accordingly, Act of W. 4 (s. 32).

No advowson shall be recovered after 100 years' adverse possession (s. 33).

Suits for tithes, legacies or other property in any spiritual court are to be subject to the same statutory limitations as actions at law or suits in equity (s. 43).

Sections 36, 37 and 38 relate to real and mixed actions, which are abolished; and section 39 to descent cast, discontinuance and warranty, which have no longer any operation to defeat any right of entry or action for the recovery of land. Section 40 is considered, *post*, Chap. III. By section 41 arrears of dower shall not be recovered for a longer period than six years before commencement of suit.

Section 42 is considered, Chap. IV.

The act does not extend to Scotland, but does to Ireland by the operation of section 44 (and last) and the 6 & 7 Vict. c. 54 (amended 7 & 8 Vict. c. 27).

CHAPTER II.

EQUITIES OF REDEMPTION.

<i>Acts of Will. 4, and 1874</i>	593	<i>When Time begins to run—Welsh</i>	
<i>Twenty, now Twelve, Years' Posses-</i>		<i>Mortgage</i>	594
<i>sion by Mortgagee a bar</i>	593	<i>Possession of Mortgagee must be ad-</i>	
<i>Several Mortgagors</i>	593	<i>verse</i>	594
<i>Several Mortgages</i>	593	<i>Acknowledgment of Title of Mort-</i>	
<i>Mortgage on Joint Account</i>	594	<i>gagor</i>	594, 595

By the 3 & 4 Will. 4, c. 27, s. 28, when a mortgagee shall have obtained possession or receipt of rent of any land comprised in his mortgage, the mortgagor, or any person claiming through him, shall not bring a suit to redeem the mortgage but within *twenty* (now 12) *years next after the time* at which the mortgagee obtained such possession or receipt, *or the time* of an acknowledgment of the mortgagor's right of redemption given to the mortgagor, or some person claiming his estate, or to the agent of such mortgagor or person, in writing signed by the mortgagee or the person claiming through him. An acknowledgment to any of such mortgagors or persons, his or their agent, shall be as effectual as if given to all; but an acknowledgment by any one or more of such mortgagees or persons shall be effectual only as against the party or parties signing and those claiming under, after or in defeazance of him or them. And when he or they shall be entitled to a divided part of the property comprised in the mortgage and not to any ascertained part of the mortgage money, the mortgagor or mortgagors shall be entitled to redeem the same divided part on payment, with interest, of the part of the mortgage money which shall bear the same proportion to the whole of the mortgage money as the value of such divided part shall bear to the value of the whole mortgaged property. This section is repealed by the Act of 1874 (s. 9), but re-enacted, twelve years being substituted, for twenty years (s. 7). The rule that prevailed prior to the statute of Will. 4, that no lapse of time barred the right of a mortgagor of lands to redeem the whole provided he held possession of part (*post*, p. 594), has been abolished by sect. 28 of the statute. Accordingly, where a mortgagee had been in undisturbed possession of part of the land comprised in the mortgage for the statutory period, the right of the mortgagor to redeem was held to be barred by that section, although he held possession of the remainder of the land. *Kinsman v. Rouse* 17 Ch. D. 104.

The latter part of this section only applies where there are several
W.—VOL. I. Q Q

mortgagees and where an account against one mortgagee will only bind that one, and not to the case of a mortgagee on a joint account. In such a case there must be an acknowledgment by all. *Richardson v. Younge*, L. R., 6 Ch. 478.

Prior to the act of W. 4 the rule of equity, by analogy to the earlier Statute of Limitations at law, was that, after twenty years' possession, a mortgagee should not be disturbed (*Anon.*, 3 Atk. 313; *Cholmondeley v. Clinton*, 2 J. & W. 191), unless the mortgagor was under certain disabilities (*ib.*), or there had been an acknowledgment of the mortgagor's equity. *Price v. Copner*, 1 S. & S. 347. The mortgagor's right was not barred if he was in possession of any *part* of the estate; for the rule to apply, the mortgagee must have been in possession of the *whole*. *Burke v. Lynch*, 2 Ba. & Be. 426; see *Blake v. Foster*, *ib.* 387; *Lake v. Thomas*, 3 Ves. 22. As to a sale by a mortgagee under a power of or trust for sale where he has been in possession twenty (now twelve) years. See *post*, tit. "MORTGAGE," ch. 9.

As to Welsh mortgages, possession by the mortgagee was part of the contract, and such mortgages were redeemable at any time, until the mortgagee had been in possession twenty years, after having been paid his principal and interest. *Yates v. Hambly*, 2 Atk. 360; *Fenwick v. Reed*, 1 Mer. 114. Such mortgages are now very uncommon (*post*, tit. "MORTGAGE"); and there is, it would seem, no decision as to the effect of the 3 & 4 Will. 4, c. 27, upon them.

The possession of the mortgagee must be adverse. Therefore if the tenant for life and the remainderman join in mortgaging, and the mortgagee afterwards *buys* the estate of the tenant for life, the time will not run during his life. *Hyde v. Dallaway*, 2 Ha. 528; see *Wynne v. Styan*, 2 Ph. 303; *Harrison v. Hollins*, 1 S. & S. 471. Where the possession is adverse, time runs against the mortgagor from the moment the mortgagee takes possession, and continues to run against all those claiming *under* the mortgagor, whatever may be the disabilities to which they may be subject (*Raffety v. King*, 1 Ke. 601), and although some of such claimants may be remaindermen, for *successive* rights are not given. Thus, where a person devises to several in succession and then mortgages, the bar to the testator is a bar to his devisees. *Browne v. Bp. of Cork*, 1 Dr. & Wal. 700.

A recital of the mortgage and assignment of it, subject to the equity of redemption, is no acknowledgment of the mortgagor's title, if he is no party to the assignment. *Lucas v. Dennison*, 13 Sim. 584; see *Batchelor v. Middleton*, 6 Ha. 75; comp. *Forsyth v. Bristowe*, 8 Ex. 716, *post*, p. 599, on the 40th sect. Whether an acknowledgment by an agent of the mortgagee would be good is doubtful. See *Hyde v. Johnson*, 2 B., N. C. 776 (on the 9 Geo. 4, c. 14). A written acknowledgment to a stranger is not sufficient. The acknowledgment must be to the mortgagor or his agent, who may be a person acting in that capacity without any formal or actual authority, at all events if the mortgagor adopts what has been done. *Trulock v. Robey*, 12 Sim. 402. In *Markwick v. Hardingham*, 15 Ch. D. 339, 352, James, L.J., delivering the judgment of the court, observed that "A statement to

A., or a communication with A. from which it is to be inferred that B. has a right to redeem, is not an acknowledgment of A.'s right, nor is it an acknowledgment to B. Nor is it the more so because A. had many years previously been the original mortgagor." An acknowledgment by the mortgagee to his own solicitor is insufficient. *Stansfield v. Hobson*, 16 Bea. 236. The acknowledgment is inoperative after the mortgagee has been in possession twenty years. *Re Alison*, 11 Ch. D. 284; *Sanders v. Sanders*, 19 Ch. D. 373. *Stansfield v. Hobson*, 3 D., M. & G. 620, is *contra*, but not followed. An express acknowledgment of the right to redeem is not necessary. Thus it has been held to be sufficient where the mortgagee wrote:—"I do not see the use of a meeting, unless some one is ready to pay me off." *Ib.*; see *Hodley v. Healey*, 6 Madd. 181; *Trulock v. Robey*, 12 Sim. 402; *Richardson v. Younge*, L. R., 10 Eq. 275. So an answer in Chancery is a sufficient acknowledgment. *Goode v. Job*, 1 E. & E. 6. *Qu.* whether keeping accounts of the rents received would be an acknowledgment (*Baker v. Wetton*, 14 Sim. 426); Lord St. Leonards appears to be of opinion that it would not be. Sugd. R. P. St., 2nd ed. 117. See *Newbould v. Smith*, 29 Ch. D. 882, *post*, p. 599.

The acknowledgment must be not merely that the mortgagee holds under a mortgage title, but that some person has a right to redeem him. *Thompson v. Bowyer*, 9 Jur. N. S. 863. An acknowledgment by the devisee in tail of the mortgagee is good against those *in remainder* under the devise. *Pendleton v. Rooth*, 1 D., F. & J. 81; see the observations on this case, Sug. R. P. St., 2nd ed. 113 *et seq.*; comp. the cases on acknowledgment in the other chapters of this title. The saving clauses of the act in cases of disability (*ante*, p. 584) do not apply to the case of a mortgagor. *Kinsman v. Rouse*, 17 Ch. D. 104; *Forster v. Patterson*, *ib.* 132, a case under the Act of 1874. As to actions of ejectment and foreclosure suits by a mortgagee, see *post*, Chap. III.

CHAPTER III.

MORTGAGE AND JUDGMENT DEBTS—LIENS—CHARGES—LEGACIES.

<i>Act of Will. 4, c. 27, and 1874</i>	595	<i>Suits by one Creditor</i>	597
<i>Twenty, now Twelve, Years a Bar</i> 595, 596		<i>Lien of unpaid Vendor</i>	597
<i>Unless part Payment or Acknowledgment</i>	596	<i>Legacies</i>	598
<i>Presumption prior to Act</i>	596	<i>Probate Notice to Legatees</i>	598
<i>Ejectment and Foreclosure by Mortgagee</i>	596	<i>Cases of Intestacy</i>	598
<i>1 Vict. c. 28</i>	596	<i>Present Right to receive</i>	598
<i>When Time begins to run</i>	596	<i>Payment</i>	598
<i>Payment or part Payment</i>	596	<i>By whom</i>	599
		<i>Acknowledgment</i>	599
		<i>Absence—Imprisonment</i>	599

By the 3 & 4 Will. 4, c. 27, s. 40, no action, suit or other proceeding shall be brought to recover any sum of money secured by any

mortgage, judgment or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within twenty (now twelve) years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money, or some interest thereon, shall have been paid (see *Harlock v. Ashberry*, *post*, p. 597), or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto, or his agent; and in such case no such action or suit or proceeding shall be brought but within *twenty* (now *twelve*) years after such payment or acknowledgment or the last of such payments or acknowledgments, if more than one, was given. This section is repealed by the act of 1874, s. 9, but re-enacted, twelve years being substituted for twenty years (s. 8). The limitation of twelve years imposed by s. 8, to actions and suits for the recovery of money charged on land applies to the personal remedy on the covenant in a mortgage deed as well as to the remedy against the land. *Sutton v. Sutton*, 22 Ch. D. 511. So where a mortgage debt is secured by a collateral bond, the act equally applies to the remedy on the bond. *Fearnside v. Flint*, *ib.* 579. But not where the action is to recover an indemnity against the non-payment of mortgage chargeable on land. *Lindsell v. Phillips*, 30 Ch. D. 291.

Before the statute, possession by the mortgagor for twenty-five years (*Hillary v. Waller*, 12 Ves. 266), or even, it would seem, twenty years (*Christophers v. Sparke*, 2 J. & W. 233), without payment of interest, raised a presumption of satisfaction of the mortgage debt. By this section the period for the recovery of the mortgage debt is limited. But there is no express provision in the act with regard to actions of ejectment and foreclosure suits by a mortgagee. As to actions of ejectment by a mortgagee, it was observed by Patteson, J., in *Doe v. Williams* (5 A. & E. 291), that he could not say how far under section 3 (of the act of Will. 4) it was necessary for the mortgagee to bring his action within twenty years from the *day of default*. If this section was intended to comprehend the case of a mortgagee, it was very ill penned; and the 40th section, if meant to apply to actions of ejectment, was still worse penned. This expression of opinion was followed (see per Lord Campbell, *Doe v. Eyre*, 17 Q. B. 366, 367) by the 1 Vict. c. 28, by which it is enacted, that any mortgagee of *land* (within the definition in the 3 & 4 Will. 4, c. 27, s. 1) may make an entry or bring an action at law or suit in equity to recover such land at any time within twenty (now twelve) years next after the *last payment* of any part of the *principal money or interest* secured by the mortgage, although more than twenty years may have elapsed since the time at which the right first accrued. See act of 1874, altering twenty to twelve years (s. 9). The same principle of construction is applicable to this act and to the 40th section of the 3 & 4 Will. 4, c. 27. *Chinnery v. Evans*, 11 H. L. C. 115. The payment of principal or interest must be made by the mortgagor or some person

bound to pay principal or interest on his behalf. So the word "paid" in 3 & 4 Will. 4, c. 27, s. 40, involves by implication the addition of "by the person liable to pay." Thus a payment of rent made by a tenant of the mortgaged property to the mortgagee in consequence of a notice by the mortgagee requiring the rent to be paid to him is not such a payment. *Harlock v. Ashberry*, 19 Ch. D. 539.

The payment of interest by the receiver of the Court of Chancery of *one* estate only, comprised with others in one mortgage, keeps alive the mortgagee's right as to *all* the estates. *Ib.*; comp. *Bolding v. Lane*, 1 D., J. & S. 122; *post*, p. 602, on section 42. The time to bring ejectment by a mortgagee begins in general to run from the execution of the mortgage deed, unless there is a provision that the mortgagor shall remain in possession until the day of default in payment. *Doe v. Lightfoot*, 8 M. & W. 553. In *Pugh v. Heath*, L. R., 7 App. C. 235, there was, prior to the act of 1874, a legal mortgage of freehold land in 1856. There was no possession by the mortgagee, and no payment of principal or interest to him, nor any acknowledgment of his title. In 1870 proceedings were taken by the mortgagee for redemption or foreclosure; ultimately in 1877 an order absolute for foreclosure. In 1878 an action was brought by the mortgagee to recover possession of the land. It was held that although brought more than twenty years after the date of the mortgage deed the action was not barred by the Statute of Limitations (3 & 4 Will. 4, c. 27, and 1 Vict. c. 28). The act of 1 Vict. enables a mortgagee to recover in certain cases when the mortgagor would be barred, if when the mortgage was made he was not barred. *Doe v. Eyre*, 17 Q. B. 366; *Doe v. Massy*, *ib.* 373. Thus payment of interest by a mortgagor may keep alive the right of a mortgagee against a *tenant in possession*, though by reason of his non-payment of rent to the mortgagor *his* right is barred. *Ford v. Ager*, 2 H. & C. 279; see *Murphy v. Sterne*, 1 Dr. & Wal. 236; *Thorp v. Facey*, 12 Jur., N. S. 741; consider the observations, Sug. R. P. St., 2nd ed. 30, 31.

The right to bring a foreclosure suit falls within the 24th section of the 3 & 4 Will. 4, c. 27, and 1 Vict. c. 28. *Wrixon v. Vize*, 3 Dr. & War. 104, 118. Such a suit is not a suit for the recovery of money charged on the land, though it may lead to it, but a suit to obtain the equity of redemption, which in equity is an actual estate. *Ib.*; questioning *Dearman v. Wyche*, 9 Sim. 570. Before the statute, a bill filed by one creditor on behalf of himself and other creditors, prevented the statute from running against those creditors who came in under the decree. *Sterndale v. Hankinson*, 1 Sim. 393; see *Birmingham v. Burke*, 2 J. & L. 699. And this would still seem to be the rule since the act. *Bennett v. Bernard*, 12 Ir. Eq. Rep. 229; *Carroll v. Darcy*, 10 Ir. Eq. Rep. 321; *Berrington v. Evans*, 1 Y. & C., Ex. 434, appears *contrà*, but is explained, Sug. R. P. St., 2nd ed. 124 *et seq.* In *Re Greaves*, 18 Ch. D. 551, 553, Jessel, M.R., referring to *Sterndale v. Hankinson*, *sup.*, observed, "Creditors had better not rely upon that decision for the future." The lien of an unpaid vendor, the purchaser being let into possession, is within section 40 of the act of Will. 4, but it does

not create an *express trust*. *Toft v. Stephenson*, 1 D., M. & G. 28. Money due on a bond in which the heirs of the obligor are bound would seem not to be money charged upon or payable out of land within this section. *Roddam v. Morley*, 1 D. & J. 1. Section 40 applies to legacies payable out of personalty as well as realty. *Shepard v. Duke*, 9 Sim. 567; and to a residue of personal estate. *Prior v. Horniblow*, 2 Y. & C., Ex. 200; see *Christian v. Devereux*, 12 Sim. 264. A personal annuity is a legacy within this section. Sug. R. P. St. 2nd ed. 138. "The probate of the will is notice to everybody having any claim, and the statute does not provide any indemnity or save any rights because a legatee does not know of his legacy." *Per* Lord Romilly, M.R., *Cadbury v. Smith*, L. R., 9 Eq. 43. The right of the residuary legatee may be good as to assets possessed by the executor *within* twenty years of the claim, though barred as to assets possessed by him before that time. *Adams v. Barry*, 2 Coll. 290; *Bright v. Larcher*, 4 D. & J. 608; see *Sly v. Blake*, 29 Ch. D. 964. Although legacies may be charged on real estate, this did not create an express trust within section 25 (*Proud v. Proud*, 32 Bea. 234), unless the executor constituted himself a trustee of the legacy. *Tyson v. Jackson*, 30 Beav. 384. See now *ante*, p. 588. As to an acknowledgment by one of two executors, see *Holland v. Clark*, 1 Y. & C. C. 151.

When the person liable to pay a legacy and the person entitled to receive it are the same, no question of limitation under the statute can arise. *Binns v. Nichols*, L. R., 2 Eq. 256; see *Burrell v. Lord Egremont*, 7 Bea. 205; *Seagram v. Knight*, L. R., 2 Ch. 628.

The provisions of section 40 are extended by the 23 & 24 Vict. c. 38, s. 13, to cases of intestacy, and the period of twenty years is made a bar to suits against an administrator for the recovery of any part of an intestate's estate, unless there has been accounting part payment, or an acknowledgment in writing by the person accountable, or his agent, to the person entitled or his agent. This section is not repealed or affected by the act of 1874. It is retrospective. *Sly v. Blake*, 29 Ch. D. 964. An acknowledgment or payment, within the statutory period, may give a right in respect of one fund, but not as to another the right to which is barred, *ib*.

By the words "a present right to receive" in section 40 of the 3 & 4 Will. 4, c. 27, is to be understood "an *immediate* right without waiting for the happening of any future event." *Farran v. Beresford*, 10 Cl. & F. 319, 334. But legatees whose legacies are subject to prior charges are not barred while any prior charge subsists (*Faulkner v. Daniel*, 3 Ha. 212); and if an estate on which a legacy is charged is so incumbered that it is uncertain whether the legacy will be paid, it is doubtful whether a present right to receive it can be said to exist within the meaning of the act. *Ravenscroft v. Frisby*, 1 Coll. 22. And if a legacy be given to one for life, with remainder to another, the latter has no present right until the death of the former. *Prior v. Horniblow*, 24 Bea. 448; *Earle v. Bellingham*, 24 Bea. 445.

Section 40 (*ante*, p. 596) does not expressly state by whom interest is to be paid. Payment, however, by an agent duly authorized would

be sufficient, though not if made by a mere stranger. *Homan v. Andrews*, 1 Ir. Ch. R. 106. See *Chinnery v. Evans*, 11 H. L. C. 115. Payment by the mortgagor's widow, who is entitled to dower, and is in possession with the consent of the heir of the mortgagor, is sufficient. *Ames v. Mannering*, 26 Bea. 583. But if made by the devisee of an estate charged with part of the debt, it will not be good against the devisee of another estate charged with other part of the debt. *Dickenson v. Teasdale*, 1 D., J. & S. 57. The receipt of rents by a mortgagee in possession has been held to be equivalent to part payment to him. *Brocklehurst v. Jessop*, 7 Sim. 438. But this case has not been followed. *Putnam v. Bates*, 3 Russ. 188; *Fordham v. Wallis*, 10 Ha. 228; *Chinnery v. Evans*, 11 H. L. C. 115; *Cockburn v. Edwards*, 18 Ch. D. 449. But there may be an arrangement to that effect. *Ib.*; consider *White v. Hillacre*, 3 Y. & C., Ex. 607. Payment of interest by a receiver in chancery is sufficient as payment by an agent of the party liable. *Chinnery v. Evans*, *sup.* Acknowledgments by part payment, or by admission in writing, are placed upon the same footing, so far as regards their sufficiency to take a case out of the statute. *Ib.* As to the necessity of an actual payment in money, see *Maber v. Maber*, L. R., 2 Ex. 153.

By section 40, *sup.*, acknowledgment by an agent of the party liable is expressly made sufficient; but this is not the case in s. 14, *ante*, p. 583, and s. 28, *ante*, p. 593: it would seem, therefore, that the operation of section 40 was intended to be larger in this respect. An acknowledgment by the solicitor of the party liable will be sufficient. *Toft v. Stephenson*, 1 D., M. & G. 28. If there is evidence that he was acting as agent. *Newbould v. Smith*, 29 Ch. D. 882. So, if made by a trustee to pay debts. *Ld. St. John v. Boughton*, 9 Sim. 219. An acknowledgment that interest has been paid may be by a recital in a transfer of the equity of redemption. *Forsyth v. Bristowe*, 8 Ex. 716; comp. *Lucas v. Denison*, 13 Sim. 584, *ante*, p. 594, on the 28th section. So by an entry in the books of the party receiving it, unless the entry would revive a debt, otherwise barred, due to the person making the entry. *Newbould v. Smith*, *sup.* Such an entry would really be in favour of the party making it. See *Massey v. Allen*, 13 Ch. D. 558; *Smith v. Blakey*, L. R., 2 Q. B. 326.

In *Forsyth v. Bristowe*, *sup.*, it was doubted whether sec. 40 applied to any but remedies against the realty, and therefore whether it extended to actions on mortgage, covenants or bonds. If so, the acknowledgment must be to the party entitled or his agent, whereas on an ordinary covenant or bond, the acknowledgment, though not to the party entitled or his agent, would be sufficient. See the cases, *ante*, p. 595.

The 19 & 20 Vict. c. 97, s. 10, enacts, amongst other things, that no person shall be entitled to any further time to bring an action or suit with respect to which the period of limitation is fixed by (*inter alia*) sections 40, *ante*, and 42, *post*, of the 3 & 4 Will. 4, c. 27, merely by reason of his absence beyond seas or imprisonment at the time of the accrual of the right.

CHAPTER IV.

ARREARS OF RENT AND INTEREST.

3 & 4 Will. 4, c. 27, s. 42	600	<i>Redemption Suit</i>	601
<i>Six Years' Statutory Bar</i>	600	<i>Foreclosure Suit</i>	601
<i>Annuities—Secured by Deed</i>	600	<i>Secured by Term</i>	601
<i>Judgments</i>	601	<i>By Trust</i>	602
<i>Mortgagees</i>	601	<i>Acknowledgment</i>	602
<i>Money secured on Land and by</i>		<i>Persons under Disabilities</i>	602
<i>Specialty</i>	601	<i>Part Payment</i>	602

By the 3 & 4 Will. 4, s. 42, no *arrears of rent or of interest* in respect of *money charged upon or payable out of any land or rent*, or in respect of any *legacy*, or any *damages*, in respect of such *arrears of rent or interest*, shall be recovered but within *six years* next after the same shall have become due, or next after an *acknowledgment* of the same in writing shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable, or his agent. Where any prior mortgagee or other incumbrancer shall have been in possession of any land, or in the receipt of the profits thereof, within one year next before an action or suit shall be brought by any subsequent mortgagee or other incumbrancer on the same land, the latter may recover the arrears of interest which shall have become due during the whole time of such possession or receipt as aforesaid, although exceeding the six years. An annuity charged by will on land comes within this section, and only six years' arrears are recoverable. *Ferguson v. Livingston*, 9 Ir. Eq. R. 202; see *James v. Salter*, 3 B. N. C. 544, 552. A mere personal annuity, however, is not within it (*Roch v. Callen*, 6 Ha. 531; *Re Ashwell's Will*, Johns. 112); nor an annuity charged on a reversionary interest, so long as it is reversionary. *Wheeler v. Howell*, 3 K. & J. 198. Where the annuity is secured by deed, twenty years' arrears may be recovered under the 3 & 4 Will. 4, c. 42 (*post*, Chap. V.), s. 3 (*Paget v. Foley*, 2 B. N. C. 679; *Strachan v. Thomas*, 12 A. & E. 536; *Manning v. Phelps*, 10 Ex. 59); and where there was a trust for the payment of the annuity, the right to arrears was not limited to six years (*Playfair v. Cooper*, 17 Bea. 187); so where the annuity was secured by a term. *Snow v. Booth*, 2 K. & J. 132; aff. 2 Jur., N. S. 244; see *Knight v. Bowyer*, 4 Jur., N. S. 569. See now the Act of 1874, s. 10, *ante*, p. 588. Where there has been no claim for an annuity charged on land for upwards of twelve years, although it may be the subject of an express trust, the right to past arrears is barred by the operation of this act, *ante*, p. 588, although the annuity may continue payable from the time of the claim. *Hughes v. Coles*, 27 Ch. D. 231. An interest in

or right to a share of money to arise from the sale of real estate is money payable out of land within section 3 of the 3 & 4 Will. 4, c. 42 (*post*, Chap. V.). *Bowyer v. Woodman*, L. R., 3 Eq. 313. A mortgagee, irrespective of any covenant, is entitled to six years' arrears. *Shaw v. Johnson*, 1 Dr. & S. 412. A judgment creditor who obtains possession is an incumbrancer within this act. *Henry v. Smith*, 2 Dr. & W. 381.

In those cases in which a mortgagee or other person has the security of land as well as that of a bond, covenant or judgment for payment of money, this section must be read in connection with section 3 of the 3 & 4 Will. 4, c. 42. *Post*, Chap. V. Construing the two sections together, with reference to claims for interest, the result is that a person who has the double security has his remedy against the land for the six years' arrears under the 3 & 4 Will. 4, c. 27, s. 42, and under the specialty or judgment for the remainder of the arrears. *Hunter v. Nockolds*, 1 Mac. & G. 640, overruling *Du Vigier v. Lee*, 2 Ha. 326; and see *Shaw v. Johnson*, 1 Dr. & S. 419; *Hughes v. Kelly*, 3 Dr. & War. 482. And if the covenant cannot be made available, only six years' arrears are recoverable. *Bowyer v. Woodman*, L. R., 3 Eq. 313.

When the arrears can be *tacked*, as they in general can, against the heir or devisee of the mortgagor (see tit. "MORTGAGE") in a redemption suit by either of them, the arrears, though for more than six years, must be paid. *Elvy v. Norwood*, 5 De G. & S. 240. Whether this would be so in a suit by the mortgagor himself, see *ib.*; *Sinclair v. Jackson*, 17 Bea. 405. In a foreclosure suit under an ordinary mortgage deed only six years' arrears are recoverable. *Round v. Bell*, 30 Bea. 221; *Shaw v. Johnson*, 1 Dr. & S. 412; *Du Vigier v. Lee*, 2 Ha. 326, *contra*, is overruled. And although the interest mortgaged is reversionary, only six years' arrears can be recovered under this section. *Vincent v. Going*, 1 J. & Lat. 697; *Sinclair v. Jackson*, *sup.*; *Wheeler v. Howell*, 3 K. & J. 198. But a mortgagee is entitled to recover the whole arrears of interest where the mortgage is not a charge on real estate within the meaning of sect. 42. *Smith v. Hill*, 9 Ch. D. 143. As between the mortgagee in possession of a tenant for life and the remainderman there is no fiduciary relation, and if the tenant for life disappears and at the expiration of seven years after the disappearance, the time of death is fixed by the court to have taken place soon after the disappearance, the remainderman not being guilty of laches will be entitled to the back rents, but only for six years under this section. *Hickman v. Upsall*, 4 Ch. D. 144.

Where there is a *term*, though a dry, satisfied term (*Cox v. Dolman*, 2 D., M. & G. 592; *Snow v. Booth*, 8 D., M. & G. 69), assigned, or agreed to be assigned, as security for payment of principal and interest, the arrears recoverable will not be limited to six years. *Shaw v. Johnson*, 1 Dr. & Sm. 412.

After a sale by a mortgagee under a power of sale, it was held, in a suit by a mortgagor to recover the surplus money, that the mortgagee could only retain six years' arrears (*Mason v. Broadbent*, 33 Bea.

296); but this decision has been questioned in *Edmunds v. Waugh*, L. R., 1 Eq. 418. In the latter case the mortgaged property was sold by the trustees of the mortgagee, and the proceeds paid into court in a suit for the administration of the mortgagee's estate. It was held, on a petition by the trustees for payment out of the fund to satisfy the arrears of interest, that such arrears were not limited to six years.

Where money was paid into court under the Lands Clauses Act for purchase of land which was subject to an equitable mortgage by deposit, with a memorandum undertaking to give a legal mortgage; on petition by the mortgagee for payment out—it was held, that only six years' arrears of interest could be charged. *In re Stead's Mortgaged Estates*, 2 Ch. D. 713.

Formerly where there was a trust for payment of the mortgage debt, the right to recover arrears was not limited to six years. *Lewis v. Duncombe*, 29 Bea. 175; *Shaw v. Johnson*, 1 Dr. & S. 412; see *Cox v. Dolman*, 2 D., M. & G. 592; *Hughes v. Williams*, 3 Mac. & G. 683. See now *ante*, p. 588, Act of 1874, s. 10.

An acknowledgment by the tenant for life of a settled estate, of arrears of interest being due on a mortgage, takes the case out of the statute as against those in remainder. *Re FitzMaurice*, 15 Ir. Ch. R. 445.

Where there are several mortgagees, a written acknowledgment by the mortgagor of interest, barred by the statute, being due on one of them, will not be sufficient to make it chargeable on the estate as against a subsequent mortgagee. *Bolding v. Lane*, 1 D., J. & S. 122; comp. *Chinnery v. Evans*, 11 H. L. C. 115; *ante*, p. 596, on sec. 40; and see the cases on acknowledgment in the other chapters of this title.

There is no exception in this section with respect to persons who are under disabilities. Sug. R. P. St., 2nd ed. 140. Neither is there any provision making *part payment* equivalent to acknowledgment. *Ib.* 141; see *Chinnery v. Evans*, 11 H. L. C. 115.

CHAPTER V.

SPECIALTIES—RECOGNIZANCES.

3 & 4 Will. 4, c. 42	602	<i>Acknowledgment by Party or Agent</i>	603
<i>Twenty Years' Statutory Bar</i>	602	<i>Part Payment</i>	604
<i>Mortgage Covenants—Twelve Years</i>		<i>By or to whom</i>	604
<i>the Bar</i>	603	<i>By Party interested</i>	604
<i>Disabilities</i>	603	<i>Parties or Agents</i>	604

By the 3 & 4 Will. 4, c. 42, actions of debt for rent upon any indenture of demise, actions of covenant or debt upon any bond or other specialty; and actions of debt or *scire facias* upon recognizances, must

be brought within *twenty years* after the cause of such actions or suits. The act does not extend to any action given by any statute where the time for bringing such action is or shall be by any statute specially limited (s. 3). Specialty debts in India have no higher legal value nor greater efficacy than simple contract-debts; and the same period of limitation, viz., three years, bars the remedy for both, but where an action on a bond executed in India is brought in England, the bond cannot be treated as a simple contract; and, therefore, the remedy is not barred until after the lapse of twenty years. *Alliance Bank of Simla v. Carey*, 5 C. P. D. 429. The statutory bar under the act of 1874 is twelve years to actions on covenants for repayment of mortgage debts secured by a mortgage of land. *Sutton v. Sutton*, 22 Ch. D. 511, *ante*, p. 596.

Under a bond or covenant by a husband on his marriage to pay a sum of money to trustees, the first trust of the interest being for himself for life, time does not run during his life, at all events unless there is a time fixed with certainty for payment and investment of the money in other securities. *Mills v. Borthwick*, 11 Jur., N. S. 558. But under a covenant to pay at a particular time, the statute begins to run from that time. *Stone v. Stone*, L. R., 5 Ch. 74.

Persons under the *disability* of minority, coverture, lunacy (and formerly absence beyond seas, repealed 19 & 20 Vict. c. 97, s. 10), have the same time after the disability has ceased; where *defendants are beyond seas*, plaintiffs have the same time after their return. 3 & 4 Will. 4, c. 42, s. 4. As to what places are beyond seas, see sec. 7, which is the same as sec. 19 of the 3 & 4 Will. 4, c. 27, *ante*, p. 584.

If any *acknowledgment* be made, either by writing signed by the party liable by virtue of such indenture, specialty or recognizance, or his agent, or by part payment or part satisfaction on account of any principal or interest being then due thereon, the person entitled may bring his action for the money remaining unpaid, and so acknowledged to be due, within *twenty years* after such *acknowledgment* by writing or part payment or part satisfaction as aforesaid, or in case the person entitled to such action shall at the time of such acknowledgment be under such disability as aforesaid (except absence beyond seas, *sup.*), or the party making such acknowledgment be, at the time of making the same, *beyond the seas*, then within *twenty years* after such disability shall have ceased as aforesaid, or the party shall have returned from beyond seas, as the case may be. 3 & 4 Will. 4, c. 42, s. 5.

See as to an acknowledgment being valid, although not made to the creditor or his agent, but to some third person, *Forsyth v. Bristowe*, 8 Ex. 716. In *Moodie v. Bannister*, 4 Drew, 433, an admission by an answer in Chancery was held sufficient. A simple admission of the debt being due is sufficient under this section. *Ib.*; comp. the cases on the 9 Geo. 4, c. 14, s. 1, *post*, Chap. VI. This section, it will be observed, makes the *acknowledgment* by the agent valid, but there is no reference to an agent in the latter part as to part payment. But it has been held that payment by an agent is sufficient, and that

the assignee of an equity of redemption is an agent of the mortgagor within this section. *Forsyth v. Bristowe*, 8 Ex. 716.

It was observed by Lord Chelmsford, L. C., in *Coope v. Cresswell* (L. R., 2 Ch. 124), that it could hardly have been intended that payment by a *stranger* should be sufficient. Where a devisee for life paid interest on a specialty of his testator in which the heirs were bound, it was held to be a sufficient acknowledgment within this section. *Roddam v. Morley*, 1 D. & J. 1, which is approved of by Lord St. Leonards, R. P. St., 2nd ed. 145. In *Coope v. Cresswell*, *sup.*, it was held that payment by trustees of an estate devised in trust for A. for life, with remainder over, of interest upon a specialty debt of the testator was insufficient to prevent the statute being pleaded by the tenant for life.

The payment must be by a party interested,—by a party who, unless he paid it, would lose his land. *Toft v. Stephenson*, 1 D., M. & G. 40; see *Pears v. Laing*, L. R., 12 Eq. 41. This section is in terms limited to the “party” (in the singular) “liable or his agent.” It must, however, be read as if it extended also to more than one and their agents. See *Roddam v. Morley*, *sup.*

As to actions under the 3 & 4 Will. 4, c. 42, not being upon specialties or recognizances, see *infra*, Chap. VI.

CHAPTER VI.

ACTION OF ACCOUNT—ON THE CASE—NON-SPECIALTY DEBTS.

<i>Six Years' Non-claim a Bar</i>	604	<i>Denial of Liability</i>	606
<i>When Time begins to run</i>	605	<i>Simple—Conditional Promise</i>	607
<i>Rule in Equity</i>	605	<i>Acknowledgment—To whom</i>	607
<i>Stale Demands</i>	605	<i>Part Payment</i>	607
<i>Concealed Fraud</i>	605	<i>By Agent</i>	607
<i>Acknowledgment</i>	606	<i>Appropriation of Payments</i>	608
<i>Qualifications of—Conditions</i>	606	<i>Trust Money</i>	608

By the 21 Jac. 1, c. 16, actions of account and upon the case (including ordinary actions on assumpsit (*Battley v. Faulkner*, 3 B. & Al. 294) and merchants' accounts (19 & 20 Vict. c. 97, s. 9), actions of debt not on specialty and debt for rent (not by indenture (3 & 4 Will. 4, c. 42, s. 3, *ante*, p. 602), are to be commenced within six years next after the cause of such actions. 21 Jac. 1, c. 16 (s. 3). Persons under the disability of minority, coverture or lunacy have the same period to bring actions after the disability has ceased. 21 Jac. 1, c. 16 (s. 7.) So they had formerly if imprisoned or beyond seas (*ib.*), but this was altered by the 19 & 20 Vict. c. 97, s. 10, which section is retrospective. *Pardo v. Bingham*, L. R., 4 Ch. 735. By the 4 & 5 Anne, c. 3, (c. 16 Ruff.), s. 19, if *defendants* are absent beyond seas at the time of the accrual of the cause of action, the period for bringing the action runs from the time of their return. The places which are

“beyond seas” within the meaning of this act are mentioned in s. 12 of the 19 & 20 Vict. c. 19, and are the same as those mentioned in the 3 & 4 Will. 4, c. 27, s. 19, *ante*, p. 584.

It may also be mentioned that by the 3 & 4 Will. 4, c. 42, (*ante*, Chap. V.), actions of debt on awards where the submission is not by specialty; or for copyhold fines; or for an escape; or for money levied on a writ of *fi. fa.*, are to be brought within six years, and actions for penalties given to the party grieved by any statute within two years, after cause of action (s. 3). The provisions as to special statutory limitations, *ib.*, but not as to acknowledgments (s. 5), apply to such actions. *Ante*, p. 603. As to acknowledgment under 21 Jac. 1, c. 16, see *post*, p. 606.

In contracts time begins to run from the breach. *E. In. Co. v. Paul*, 7 Moo. P. C. 85; in the case of a bill or note from the time of payment (*Wheatley v. Williams*, 1 M. & W. 533); if payable at sight, from presentment (*Holmes v. Kerrison*, 2 Taun. 323); but if *on demand*, from the date (*Norton v. Ellam*, 2 M. & W. 461), though if at a certain period *after demand*, at the expiration of that time after demand. *Thorp v. Booth*, Ry. & M. 388. Payment of interest is evidence of a demand having been made. *Brown v. Rutherford*, 14 Ch. D. 687. On a sale of goods on credit, time begins to run when the time of credit expires. *Helps v. Winterbottom*, 2 B. & Ad. 431. If time has once begun to run against a debt in the debtor's lifetime, it will not stop on his death until a personal representative is constituted to him (*Freaker v. Craneheldt*, 3 M. & C. 499; *Rhodes v. Smethurst*, 6 M. & W. 351); *secus*, where an action has been commenced in the debtor's lifetime, but abates by his death. *Curlewis v. Mornington*, 7 E. & B. 283; *aff.* 4 Jur., N. S. 1102. Where a debtor takes out administration to his creditor the running of the statute will be suspended during the administration. *Seagram v. Knight*, L. R., 2 Ch. 628.

Where a wrongful act is done, causing damage, and subsequently there is fresh damage arising from the same act, the statute runs from the time of the subsequent damage and not from the original act. See *Mitchell v. Darley Main Co.*, 14 Q. B. D. 125 (under appeal).

Although the 21 Jac. 1, c. 16, does not apply to any equitable demand, equity adopts the same limitation in cases analogous to those at law. *Stackhouse v. Barnston*, 10 Ves. 466. Time is a bar in equity to stale demands independently of the statute. *Ib.*; *Harcourt v. White*, 28 Bea. 303; *Brown v. Rutherford*, 14 Ch. D. 687. None of the statutes which have been referred to in this chapter contain any provision as to fraud or concealed fraud similar to that in section 13 of the 3 & 4 Will. 4, c. 27. In cases not within the last mentioned statute before the Judicature Act, if the cause of action arose more than six years before action brought, it was no answer at law to a plea of the Statute of Limitations to allege that by means of the concealed fraud of the defendant which could not have been discovered with reasonable diligence within the six years, it was not known until after the statutory period had elapsed that the

plaintiff had a cause of action. *Imperial Gas Co. v. London Gas Co.*, 10 Ex. 39; *Hunter v. Gibbons*, 1 H. & N. 459. There were indeed the *dicta* to the contrary, of Lord Mansfield in *Bree v. Holbeck*, 2 Doug. 654, and of Bayley and Holroyd, J.J., in *Clark v. Hougham*, 2 B. & C. 149. Since the Judicature Act, however, such an answer to a plea of the statute has been held by the Court of Appeal to be good. *Gibbs v. Guild*, 9 Q. B. D. 59, Holker, L.J., diss. This decision is in accordance with the rule in equity. *Booth v. Ld. Warrington*, 4 B. P. C. 163; see *Hovenden v. Ld. Annesley*, 2 Sch. & L. 663; *Ecc. Comrs. Eng. v. N. E. R. Co.*, 4 Ch. D. 845.

A right of action barred by the statute of James may be taken out of it by an acknowledgment, which must now be in writing, signed by the party chargeable (9 Geo. 4, c. 14, s. 1), or by his *agent* duly authorized. 19 & 20 Vict. c. 27, s. 13. A signature may be by the name being written at the commencement of a statement. *Holmes v. Mackrell*, 3 C. B., N. S. 789. If the acknowledgment is lost or not dated, parol evidence of it, or of the date of it, may be given. *Haydon v. Williams*, 7 Bing. 163; *Edmunds v. Downes*, 2 C. & M. 459. To take a case out of the statute, the acknowledgment must contain an express or implied promise to pay (*Lindsell v. Bonsor*, 2 B. N. C. 241); and an absolute admission, not qualified in any way, of the debt being due will be sufficient, as from such an admission the law will imply a promise to pay. *Tanner v. Smart*, 6 B. & C. 603, 606; *Philips v. Philips*, 3 Ha. 299; *Smith v. Thorne*, 18 Q. B. 134; see *Hart v. Prendergast*, 14 M. & W. 741, 746; *Williams v. Griffith*, 3 Ex. 335; *Godwin v. Culley*, 4 H. & N. 373; *Cornforth v. Smithard*, 5 H. & N. 13; *Edmonds v. Goater*, 15 Bea. 415; *Lee v. Wilnot*, L. R., 1 Ex. 364; *Green v. Humphreys*, 26 Ch. D. 474; comp. *Moodie v. Bannister*, 4 Drew. 433, on the 3 & 4 Will. 4, c. 42, s. 5, *ante*, p. 603. But there must be no qualification of the promise, and it must not be a mere simple expression of hope to be able to pay at some future time or the like. *Smith v. Thorne*, 18 Q. B. 134; see *Cripps v. Davis*, 12 M. & W. 159; *Francis v. Hawkesley*, 1 E. & E. 1052. An admission of the debt, coupled with a denial of the liability to pay it, is insufficient. *Brigstocke v. Smith*, 1 C. & M. 483; *Colledge v. Horn*, 3 Bing. 119; *A'Court v. Cross*, *ib.* 329. An acknowledgment within six years of an unsettled account pending, and a promise to pay what should be found due, takes the case out of the statute. *Banner v. Berridge*, 18 Ch. D. 254.

As to partnership accounts, see *post*, tit. "PARTNERSHIP," Ch. IV.

With regard to conditional promises, it was laid down, in effect, in *Philips v. Philips* (3 Ha. 281, 299), that an acknowledgment operated to revive the old debt, and that it was revived as a consideration for a new promise, which was the measure of the creditor's right; if it was a simple acknowledgment, the law implied a promise to pay, if a conditional promise, for instance, to pay out of a particular fund, or when the debtor was able, the creditor could claim no more than what the promise gave him. See *Mitchell's Claim*, L. R., 6 Ch. 822; *Buckmaster v. Russell*, 10 C. B., N. S. 745; *Quincey v. Sharpe*, 1 Ex. D.

72; *Green v. Humphreys*, 26 Ch. D. 474. If the promise is to pay when able, the new statutory period begins to run from the time of the ability to pay, though the creditor had no notice of it. *Waters v. Thanet*, 2 Q. B. 757; *Hammond v. Smith*, 33 Bea. 452. A request to a person to send in his account means an account for the purpose of settling it, and amounts to a promise to pay the balance due on the account, and takes the case out of the statute. *Quincey v. Sharpe*, 1 Ex. D. 72; see *Prance v. Sympton*, Kay, 678; *Chasemore v. Turner*, L. R., 10 Q. B. 500. In *In re River Steamer Co.*, L. R., 6 Ch. p. 828, Mellish, L. J., said, "There must be one of these three things to take the case out of the statute. Either there must be an acknowledgment of the debt, from which a promise to pay is to be implied, or secondly, there must be an unconditional promise to pay the debt, or thirdly, there must be a conditional promise to pay the debt, and evidence that the condition has been performed." Conditional promises only are insufficient where there is no proof of the substantial fulfilment of the conditions. *Meyerhoff v. Froehlich*, 4 C. P. D. 63.

The 21 Jac. 1, c. 16, and 9 Geo. 4, c. 14, contain no provisions as to whom the acknowledgment may be made. Prior to these statutes an acknowledgment to a third person was sufficient. *Mountstephen v. Brooke*, 3 B. & Al. 141. And it would seem still that an acknowledgment need not necessarily be made to the plaintiff or his agent, but that an acknowledgment to third persons would, or at all events might, be sufficient. Consider the observations of Parke, B., in *Forsyth v. Bristowe* (8 Ex. 716), on the 3 & 4 Will. 4, c. 42 (*ante*, p. 603), in which, as in the acts now being considered, there is no provision as to the person to whom the acknowledgment is to be made; and see *Fuller v. Redman*, 26 Bea. 614; *Goate v. Goate*, 1 H. & N. 29. See, however, the observations of Martin, B., and Bramwell, B., in *Godwin v. Culley*, 4 H. & N. 379, 380. As to an acknowledgment by one of two or more joint contractors, see *post*, tit. "PARTNERSHIP."

Part payment of principal or interest is, and was before the 9 Geo. 4, c. 14, sufficient to take the case out of the statute of James, though not so expressly provided, and the act of Geo. 4 does not affect this rule (s. 1). Such a payment is in effect an acknowledgment. The payment must be on account of, and as part of, the debt. *Tippets v. Heane*, 1 C., M. & R. 252. Part payment in goods, if taken as money, is sufficient (*Hart v. Nash*, 2 C., M. & R. 337); so by bill or note (*Irving v. Veitch*, 3 M. & W. 90), though not paid. *Turney v. Dodwell*, 3 E. & B. 136. An actual payment of money is not necessary to constitute a payment within the statute. If the debtor is about to pay, and the creditor stops him and gives a receipt for what is due, that is sufficient. *Maber v. Maber*, L. R., 2 Ex. 153, Bramwell, B., *diss.* Part payment after action brought will not take a debt out of the statute. *Bateman v. Pinder*, 3 Q. B. 574. In general, part payment by an agent is sufficient, though not made so by statute (see *Rew v. Pettet*, 1 A. & E. 196; *Worthington v. Grimsditch*, 7 Q. B. 479; comp. *Whitley v. Lowe*, 2 D. & J. 704; *Brown v. Gordon*, 16 Bea. 302), unless he exceed his authority by paying as part that which

he was only authorized to pay as *the whole*. *Linsell v. Bonsor*, 2 B. N. C. 241.

A parol acknowledgment of *part payment* is not within the statute of Geo. 4, and is sufficient to take a debt out of the statute. *Cleave v. Jones*, 6 Ex. 573; see *Edwards v. Janes*, 1 K. & J. 534; *Briggs v. Wilson*, 5 D., M. & G. 12.

Where there are two debts, one barred and the other not, and a payment is made, but not specifically appropriated by the debtor, it would appear, *prima facie*, that it is made on account of the debt not barred (*Nash v. Hodgson*, 6 D., M. & G. 474), subject to the effect of any evidence leading to a different conclusion. *Walker v. Butler*, 6 E. & B. 506; see *Burn v. Boulton*, 2 C. B. 476; *Wycombe Union v. Eton Union*, 1 H. & N. 687. As to the right of a creditor to appropriate a payment generally to a particular debt, see *Mills v. Fowkes*, 5 B. N. C. 455; *Clayton's Case*, 1 Mer. 572, 605; *Thompson v. Hudson*, L. R., 6 Ch. 320. In connection with the subject of the appropriation of payments, which in some cases may affect the application of the Statute of Limitations, it may be observed that if money held by a person in a fiduciary character, though not as trustee, has been paid by him to his account at his bankers, the person for whom he held the money can follow it, and has a charge on the balance in the bankers' hands. *Knatchbull v. Hallett*, 13 Ch. D. 696. In this case the court dissented from *Ex parte Dale & Co.*, 11 Ch. D. 772. If a person who holds money as a trustee or in a fiduciary character pays it to his account at his bankers, and mixes it with his own money, and afterwards draws out sums by cheques in the ordinary manner, the rule in *Clayton's Case* (1 Mer. 572), attributing the first drawings out to the first payments in, does not apply; and the drawer must be taken to have drawn out his own money in preference to the trust money. Thesiger, L.J., *diss. Ib.*; not following *Pennell v. Deffell*, 4 D., M. & G. 372. As between two *cestuis que trust* whose money the trustee has paid into his own account at his bankers, the rule in *Clayton's Case* applies, so that the first sum paid in will be held to have been first drawn out. *Ib.*, per Fry, L.J.

Where the relation of trustee and *cestui que trust* is constituted with reference to the due payment of or accounting for a sum of money, the statute has no application. *Burdick v. Garrick*, L. R., 5 Ch. 233. By resolutions of an association in the nature of a benefit society, certain pensions were to be given to the widows of the members, upon certain conditions. The funds of the association were vested in trustees. It was held that neither they nor the association were trustees for the widow of any member, so as to prevent the claim from being barred by lapse of time. *Edwards v. Warden*, L. R., 9 Ch. 495. And a person who borrows trust money, knowing it to be such, cannot set up the statute against the *cestui que trust*. *Spickernell v. Hotham*, Kay, 669; *Bridgman v. Gill*, 24 Bea. 302; *Ernest v. Croysdill*, 2 D., F. & J. 175.

MARRIAGE SETTLEMENTS.

PART I.—OF EXECUTORY SETTLEMENTS, p. 610.

CH. 1.—IN PURSUANCE OF MARRIAGE ARTICLES AND AGREEMENTS, p. 610.

SEC. 1.—FORM OF ARTICLES—STATUTE OF FRAUDS, p. 610.

SEC. 2.—OF THE CONSTRUCTION OF ARTICLES OR AGREEMENTS, p. 615.

SEC. 3.—SPECIFIC PERFORMANCE OF ARTICLES AND AGREEMENTS, p. 619.

CH. 2.—IN PURSUANCE OF WILLS, p. 622.

PART II.—OF EXECUTED SETTLEMENTS, p. 625.

CH. 1.—GENERAL OPERATION OF A MARRIAGE SETTLEMENT, p. 625.

CH. 2.—OF THE MARRIAGE CONSIDERATION, p. 628.

CH. 3.—AGREEMENTS IN FRAUD OF ARTICLES OR SETTLEMENTS, p. 630.

CH. 4.—WHO MAY MAKE SETTLEMENTS, p. 631.

CH. 5.—OF THE HUSBAND'S INTEREST, p. 635.

CH. 6.—OF THE WIFE'S INTEREST, p. 636.

SEC. 1.—JOINTURE, p. 636.

SEC. 2.—PIN MONEY, p. 639.

CH. 7.—OF THE INTERESTS OF THE CHILDREN UNDER SETTLEMENTS OF PERSONAL ESTATE, p. 639.

CH. 8.—OF THE INTERESTS OF CHILDREN UNDER SETTLEMENTS OF REAL ESTATE, p. 642.

SEC. 1.—OF THE ELDEST SON, p. 642.

SEC. 2.—OF THE YOUNGER CHILDREN'S PORTIONS, p. 643.

§ 1.—TIME OF PAYMENT OF PORTIONS, p. 643.

§ 2.—MODE OF RAISING PORTIONS, p. 645.

§ 3.—AMOUNT TO BE RAISED, p. 646.

§ 4.—ON WHAT PROPERTY CHARGED, p. 647.

§ 5.—INTEREST ON PORTIONS, p. 648.

§ 6.—MAINTENANCE, p. 650.

CH. 9.—VOLUNTARY REMAINDERS AND ULTIMATE LIMITATIONS, p. 655.

CH. 10.—COVENANTS IN SETTLEMENTS, p. 660.

SEC. 1.—TO SETTLE FUTURE-ACQUIRED PROPERTY, p. 660.

SEC. 2.—TO SETTLE OR PURCHASE LANDS, p. 667.

SEC. 3.—TO LEAVE PROPERTY, p. 669.

SEC. 4.—AS TO POLICIES OF ASSURANCE, p. 671.

CH. 11.—CONSTRUCTION OF SETTLEMENTS, p. 672.

CH. 12.—REFORMING AND SETTING ASIDE SETTLEMENTS, p. 674.

PART I.

EXECUTORY SETTLEMENTS.

CHAPTER I.

IN PURSUANCE OF MARRIAGE ARTICLES AND AGREEMENTS.

SEC. 1.—*Form of Articles or Agreements—Statute of Frauds.*

<i>Definition of Marriage Settlement</i>	610	<i>Expression of Intention, Wish, &c.</i> ..	612
<i>Requisites of Marriage Articles or Agreements</i>	611	<i>Knowledge of Promise necessary</i> ...	613
<i>Statute of Frauds, s. 4</i>	611	<i>Unsigned Instructions — Fraud —</i>	
<i>Distinction between Executed and Executory Settlements</i>	611	<i>Part Performance</i>	613
<i>Promise to marry</i>	611	<i>Marriage is not Part Performance.</i>	613
<i>Consideration need not be expressed</i>		<i>Part Performance must be unequivocal</i>	613
— <i>Form of Agreement</i>	612	<i>On Part of Promisor or Promisee</i> .	613
<i>Note or Memorandum</i>	612	<i>Certainty of Agreement</i>	614
<i>Bond—Letters</i>	612	<i>Verbal ante-nuptial Agreement and post-nuptial Settlement</i>	614
<i>Agreement must be absolute</i>	612	<i>Is not binding</i>	614

It may be premised that perhaps no definition of a marriage settlement would materially tend to render more clear the ordinary popular conception of an instrument of so very common and familiar a nature,

and so widely known. It may, however, for general purposes be described as an instrument executed before marriage, and wholly or partly in consideration of it, by which the enjoyment and devolution of real or personal estate is regulated. If the marriage is not solemnised, the court will order a fund agreed to be settled in consideration of it, to be transferred to the intending settlor. *Essery v. Cowlard*, 26 Ch. D. 191; see *Robinson v. Dickenson*, 3 Russ. 399; *Page v. Horne*, 11 Bea. 227.

A post-nuptial settlement is not a marriage settlement in the proper sense of the term, though expressed to be in consideration of the marriage, but is merely voluntary, unless it rests upon some *fresh* consideration. A marriage settlement in the largest sense of the term need not be by deed. As will be seen, whatever the form of the instrument, due effect will be given to it in equity. In considering the effect of agreements or articles made on the occasion of marriage, which have not assumed the shape of formal settlements, the first question that arises is this, whether the agreement is such that equity will take cognizance of it, and, if necessary, enforce it. This question leads immediately to the consideration of the 4th section of the Statute of Frauds, 29 Car. 2, c. 3, by which it is enacted, that no action shall be brought whereby to charge any person upon any agreement made upon consideration of marriage, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be made in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized. This statute has already been (*ante*, p. 77) and will hereafter be referred to (tit. "VENDOR AND PURCHASER"); and some cases decided upon other parts of this section, and cited elsewhere, will be referred to in this title, but repetition will as much as possible be avoided. Where a father in consideration of the marriage of his daughter made a verbal promise to pay his daughter and her husband 500*l.*, and died intestate without performing his promise, and the daughter took out administration to his estate, it was held that the administratrix could not retain the debt out of the assets. The promise is not binding under the Statute of Frauds, and does not create a debt as against the estate of the promisor. *Fidd v. White*, 29 Ch. D. 358.

Marriage settlements are either executed, that is, instruments more or less formal and complete, which are intended to be final, and to represent the contract which the parties to it have entered into; or executory, that is, not final, but resting on a mere agreement, or on a direction in a will, and as a general rule requiring another instrument, the final settlement, to be executed, to give full effect to such agreement or direction. It will be convenient to consider, first, executory settlements, then executed settlements.

The statute does not apply to a mere *promise to marry*, which need not be in writing. *Cork v. Baker*, 1 Str. 34. The contracts contemplated by the statute are those made in consideration of the *marriage itself*. See *Lassence v. Tierney*, 1 Mac. & G. 551; *Warden v. Jones*, 2 D. & J. 76.

The agreement need not show on the face of it that marriage is the consideration, if sufficient appears, coupled with the other evidence in the case, that it was the consideration. See *Hammersley v. De Biel*, 12 C. & F. 45; *Shadwell v. Shadwell*, 7 Jur., N. S. 311. The agreement or note thereof in writing need not be of a formal character, but it must be complete in itself (*Huddleston v. Briscoe*, 11 Ves. 583; *Stratford v. Bosworth*, 2 Ves. & B. 341; *Lj. Thynne v. E. of Glengall*, 2 H. L. C. 131), though one of a more formal and final character may be contemplated (*ante*, p. 92), as in the ordinary case of marriage articles executed preparatory to a settlement. The promise or contract may be in the form of a bond or other security given, for instance, by the intended husband to his intended wife, which may be enforced after the determination of the marriage, though it may be in some cases suspended at law during its continuance. *Cannell v. Buckle*, 2 P. W. 243; *Acton v. Peirce*, 2 Ver. 480; see *Fitzgerald v. Fitzgerald*, L. R., 2 P. C. 83.

So the contract may be by letters (*Wankford v. Fotherley*, 2 Ver. 322; *Luders v. Anstey*, 4 Ves. 501; 5 Ves. 213; see *Caton v. Caton*, L. R., 2 H. L. C. 127), though written to a third person (*Moore v. Hart*, 1 Ver. 110, 200), and a written promise revoked by some writing may be revived by a parol promise. *Bird v. Blossie*, 2 Vent. 361. See the cases on that part of the statute relating to contracts concerning lands, *post*, tit. "VENDOR AND PURCHASER;" where, also, the cases on the subject of *signature* are collected. The promise must be absolute,—not that the promiser *may* do something, for instance, pay a portion or leave property, or the like. *Randal v. Morgan*, 12 Ves. 67; comp. *Saunders v. Cramer*, 3 Dr. & War. 87. And a mere expression of a desire or intention is not, in general, sufficient where it is not equivalent in equity to a promise or engagement. *Maunsell v. White*, 4 H. L. C. 1039. Where the suitor wrote to the parent of the lady, "If your daughter has money my wish and intention would be that it should be settled for her separate use;" this was held binding, as the marriage took place on the faith of it. *Alt v. Alt*, 4 Giff. 84. So where the solicitor of the father of the intended wife wrote to the solicitor of the intended husband, stating that the father did not intend exercising a particular power, and that the intended wife would in consequence have a particular property. *Walford v. Gray*, 11 Jur., N. S. 106; on appeal, *ib.*, 473. So where the lady's father wrote that he would allow his daughter 100*l.* per annum, and at his decease she should have her share of the property he died possessed of. It was held, however, that she was not entitled to any part of his *freehold* property. *Laver v. Fielder*, 32 Bea. 1; *Coverdale v. Eastwood*, L. R., 15 Eq. 121. Although the letters may be lost, if their contents can be proved, the agreement will be enforced. *Gilchrist v. Herbert*, 20 W. R. 348. But a letter to the trustee of the lady merely expressing a wish that her property should be settled upon her, the marriage taking place the same day, is not binding on either the husband or wife. *Beaumont v. Carter*, 32 Bea. 586. A mere promise by A., although in writing, to provide for B., on the

faith of which the parent of C. allows her to marry B., there being no communication between A. and the parent and no connection between the promise and her consent, is not binding on A.'s representatives. *Dashwood v. Jermyn*, 12 Ch. D. 776.

Although a parent, prior to the marriage of a child, may in writing state his intention of making a division of his property at his death between his children, yet if a settlement, to which he is a party, be executed, and there is no covenant or agreement by him to that effect, he will not be bound. *Loxley v. Heath*, 1 D., F. & J. 489; *Kingdon v. Tagert*, *In re Badcock*, 17 Ch. D. 361. A knowledge of the promise is necessary, otherwise the party seeking to enforce it cannot be supposed to have married on the faith of it. *Ayliffe v. Tracy*, 2 P. W. 65. Mere instructions for an agreement, or a memorandum of the terms of an agreement incomplete and unsigned, will not be binding within the statute (*E. of Glengall v. Thynne*, 2 H. L. C. 131; *Redding v. Wilkes*, 3 B. C. C. 400), though in the handwriting of the party sought to be charged. See *Caton v. Caton*, L. R., 2 H. L. 127.

Fraud or part performance will take the case out of the statute. The marriage itself, however, is not a part performance of the agreement. See *Montacute v. Maxwell*, 1 P. W. 618; *Redding v. Wilkes*, 3 B. C. C. 400; *Lassence v. Tierney*, 1 Mac. & G. 551; *Warden v. Jones*, 2 D. & J. 76. In *Jeston v. Key*, L. R., 6 Ch. 610, Mellish, L. J., is reported to have said, "But the contract" (antenuptial articles, to which the father of the intended wife was a party, and by which he entered into covenants) "was partly performed by the marriage." *Ib.* p. 613. But this would seem contrary to the authorities above cited. With respect to the sufficiency of the part performance the act must be unequivocal (*Frame v. Dawson*, 14 Ves. 386); and if it might be done with other views than in part performance it will be insufficient. See *Gunter v. Halsey*, Amb. 586; *Ex parte Hooper*, 19 Ves. 479; 1 Mer. 7. And the act in part performance may be after as well as before the marriage, and it would seem may be on the part of the promiser as well as of the promisee. In *Taylor v. Beech* (1 Ves. sen. 297), it was agreed between the intended husband and wife that he should pay the interest of 500*l.* to her separate use during her life, and the principal after her decease to her appointees. The agreement could not be reduced into a settlement before the marriage took place, but the husband afterwards made some alterations in the draft, and delivered it to his wife, and paid her the dividends during her life. It was held that there was such a part performance of the agreement as took it out of the statute.

In *Surcome v. Pinniger* (3 De G., M. & G. 571), the father of the intended wife, shortly before her marriage, told her intended husband that he meant to give certain property on the marriage. After the marriage he gave up possession of the property to the husband, to whom he delivered the title deeds of the property, and to whom also he directed the tenants to pay the rents. This was held a sufficient part performance to take the case out of the statute. And see *Hammersley*

v. *De Biel* (3 Bea. 469; 12 Cl. & F. 64, n.), on the point of part performance. In *Surcome v. Pinniger*, Turner, L. J., expressly laid it down that the delivering up of possession to the husband (by the party to be charged, the *defendant*) was part performance. 3 D., M. & G., p. 575. *Ungley v. Ungley*, 5 Ch. D. 887. But in *Caton v. Caton* (L. R., 1 Ch. 137; *S. C.*, on app., L. R., 2 H. L. C. 127), Lord Cranworth, C., seems to have thought that the acts of part performance could not be by the party sought to be charged. See the judgment (L. R., 1 Ch. 148) and cases there put as illustrations of the doctrine stated by his lordship. In order that the doctrine of part performance may be applicable, the contract must be certain (*Randall v. Morgan*, 12 Ves. 67; *Hammersley v. De Biel*, 12 Cl. & F. 45; *Lady Thynne v. E. Glengall*, 2 H. L. C. 131), and the acts in part performance equally certain. See *Gulliver v. Gulliver*, 2 Jur., N. S. 700.

It is now settled that a post-nuptial settlement in pursuance of a mere *verbal* ante-nuptial agreement is not binding. *Warden v. Jones*, 2 D. & J. 76, 86. There was, however, at least one actual decision, viz. *Dundas v. Dutens* (2 Cox, 235), to the contrary. In *Hammersley v. De Biel* (12 Cl. & F. 61), Lord Cottenham refers to *Hodgson v. Hutchenson* (5 Vin. Ab. 522, pl. 34), *Taylor v. Beech* (1 Ves. sen. 297), and *Montacute v. Maxwell*, 1 P. W. 618), as being *decisions* that the post-nuptial settlement would be supported by the ante-nuptial verbal promise. On a close examination, however, of these cases, the *decisions* would appear to have turned on other points, though the opinions of the judges were to the effect stated by Lord Cottenham. There is also the great weight of Lord Cottenham's own opinion, and that of Turner, L. J., in *Surcome v. Pinniger* (3 D., M. & G. 571), to the same effect. And see *Lassence v. Tierney*, 1 Mac. & G. 551, 571; *Barkworth v. Young*, 4 Drew. 1. However, the rule must now be considered as settled by *Warden v. Jones*, *supra*; see *Spicer v. Spicer*, 24 Bea. 365; *Goldicutt v. Townsend*, 28 Bea. 445; *Hogarth v. Phillips*, 4 Drew. 360; *Mignan v. Parry*, 31 Bea. 211; *Trowell v. Shenton*, 8 Ch. D. 318. A parol agreement prior to marriage as to particular property which is actually transferred to trustees, and held by them upon the trusts verbally agreed upon, is binding, although the deed declaring the trusts may not be executed until after the marriage. *Cooper v. Wormald*, 27 Bea. 266, 270; cons. *Trowell v. Shenton*, *sup.* For the cases upon the point of the *signature* of the party to be charged, see *post*, tit. "VENDOR AND PURCHASER."

SEC. 2.—Of the Construction of Articles or Agreements.

<i>Difference between Articles and Settlement</i>	615	<i>Application of Rule in Shelley's Case—continued.</i>	
<i>Articles or defective Settlement</i>	615	<i>Gavelkind and Borough English Lands</i>	617
<i>Articles followed by ante-nuptial Settlement</i>	615	<i>Covenant to settle</i>	617
<i>Settlement contrary to Agreement</i>	615	<i>Parent taking Estate Tail in Part and for Life in Remainder</i>	617
<i>Articles followed by post-nuptial Settlement</i>	616	<i>Issue—Heirs of the body</i>	617
<i>Articles recited, but not produced</i>	616	<i>Daughters take in Default of Sons</i>	617
<i>Articles not followed by Settlement are binding</i>	616	<i>Children taking as Tenants in Common</i>	618
<i>Form of Articles immaterial</i>	616	<i>As Joint Tenants</i>	618
<i>Executory and Executed Trusts: Former moulded according to Intention</i>	616	<i>Cross-remainders — Perpetuities — Powers</i>	618
<i>Not the latter</i>	616	<i>What are Cross-remainders</i> ..	618
<i>Application of Rule in Shelley's Case</i>	617	<i>Perpetuities</i>	618
<i>In Executory Trusts Estate Tail of Parent cut down</i>	617	<i>Usual Powers</i>	619
<i>Purchasers with and without Notice</i>	617	<i>Power of Leasing</i>	619
		<i>Sale and Exchange</i>	619
		<i>Not Power to Jointure</i>	619
		<i>To appoint new Trustees</i>	619

Difference between Articles and Settlement.] There is a marked distinction between marriage articles in the proper sense of the term, contemplating some further settlement, and an incomplete or defective settlement. Equity will disregard the strict legal construction of the words in articles, and effectuate what it presumes to be the intention of the parties, particularly in favour of the issue of the marriage. Where, however, the instrument is a final settlement, though defective, equity will not treat it as executory, and will not, in general, unless there are grounds for *reforming it*, vary or alter the instrument, and it must be construed as at law. See *White v. Thornborough*, 2 Ver. 702. And it makes no difference in this respect that in order to give full effect to its provisions, some future act may remain to be done. *De Havilland v. De Saumarez*, 14 W. R. 118. When an *ante-nuptial* settlement purports to be *in pursuance of articles*, and there is any variance, there no evidence is necessary in order to have the settlement corrected; for it must be governed by the articles. And even though the settlement may contain no reference to them, if it can be shown that the settlement was intended to be in conformity with them, and there is clear evidence showing that the discrepancy has arisen from a mistake, the court will reform the settlement and make it conformable to the intention of the parties. *Bold v. Hutchinson*, 5 De G., M. & G. 558, 568; *West v. Erisey*, 1 B. P. C. 225; consider *Lorley v. Heath*, 1 D., F & J. 489.

So equity will alter a settlement drawn up contrary to the terms of the agreement for it, and the property will be considered as settled according to such terms. *Corley v. Ld. Stafford*, 1 D. & J. 238. But, of course, a settlement may, and often does, vary from the agree-

ment, both being ante-nuptial; for between the making of the agreement and the final settlement, the parties may desire to vary the former, and to this, of course, there can be no objection. *Legg v. Goldwire*, Ca. t. Tal. 20; see *Loxley v. Heath*, 1 D., F. & J. 489. If the ante-nuptial agreement be not followed by an ante-nuptial settlement, any *post-nuptial* settlement must of necessity be in accordance with the articles, as unsupported by the latter the settlement would be merely voluntary. *Legg v. Goldwire*, Ca. t. Tal. 20; *Streatfield v. Streatfield*, *ib.* 176; see *Glanville v. Payne*, 2 Atk. 39. As hereafter mentioned, however, where the articles are executory they may be moulded by the court to effectuate the intention of the parties, *post*, pp. 622 *et seq.* But variations from the articles are, as a general rule, unauthorized, whether they consist of additions or omissions. Thus where a trust in articles as to the income of property was for the intended wife's own absolute use and benefit, free from marital control and liability, it was held, that a restraint clause against anticipation ought not to be inserted in the settlement. *Symonds v. Wilkes*, 11 Jur., N. S. 659. And if the articles contain covenants which are omitted in the settlement, they will nevertheless be considered as subsisting. *Speake v. Speake*, 1 Ver. 218.

But if the articles cannot be produced, and there is a post-nuptial settlement in which they are merely *recited*, the settlement will not be governed by the recital, if there is any variance between them. *Mignan v. Parry*, 31 Bea. 211; see *Cordwell v. Mackrill*, 2 Ed. 344; *Thompson v. Simpson*, 1 Dr. & War. 491. Articles duly signed, not followed by any settlement, form a binding contract capable of being enforced at the instance of any person who would be entitled to enforce any claim under the settlement, had such a settlement been made in pursuance of the articles, *post*, Sec. 3. The form of the articles is immaterial. Whether by bond, agreement or otherwise, they will be specifically executed. And the insertion of penalties for non-performance will not exclude the jurisdiction of equity. *Howard v. Hopkins*, 2 Atk. 371; *Chilliner v. Chilliner*, 2 Ves. sen. 528; *Logan v. Wienholt*, 1 Cl. & Fin. 611, 630. Articles expressly confined to the issue of one marriage will not be construed so as to extend to the issue of another marriage. See *Hart v. Middlehurst*, 3 Atk. 371; *D. of Bedford v. M. Abercorn*, 1 M. & C. 314. Where the trusts expressed in the articles are *executory*, they will in some cases be moulded and carried into effect according to what the court presumes to be the intention of the parties. But if the trusts are *executed*, equity follows the law, and they must receive the same construction in equity as similar legal limitations would at law. *Wright v. Pearson*, 1 Ed. 119; *Austen v. Taylor*, *ib.* 361; *Jervoise v. D. of Northumberland*, 1 Jac. & W. 571; *Boswell v. Dillon*, Dru. t. Sug. 291. It is sometimes difficult to determine whether trusts are executory or executed. In general they are of the former kind, when it is clear that something remains to be done, that is, where the trusts are left to be executed in a more careful and more accurate manner. *Ld. Glenorchy v. Bosville*, Ca. t. Tal. 3, 19.

Application of Rule in Shelley's Case.] Where the trusts are executory, and according to their *legal construction* the parent would, under the rule in *Shelley's Case* (*ante*, p. 217), take an estate tail, the limitations will be moulded so as to give the parent an estate for life, with remainder to the children in strict settlement; and the rule applies whether there are articles only (*Jones v. Laughton*, 1 Eq. Ca. Ab. 392, pl. 2; *Naudick v. Wilkes*, *ib.* 393, pl. 5; *Trevor v. Trevor*, 1 P. W. 622; 5 B. P. C. 122), or articles and a settlement afterwards in pursuance of the articles. *Honor v. Honor*, 1 P. W. 123; *West v. Errissey*, 2 P. W. 349; 1 B. P. C. 225; *Streatfield v. Streatfield*, Ca. t. Tal. 176; see *Rochfort v. Fitzmaurice*, 2 Dr. & W. 1; *Lambert v. Peyton*, 8 H. L. C. 1. But where articles before marriage are followed by a settlement also before marriage, but not in pursuance of the articles, the rule does not apply. *Legg v. Goldwire*, Ca. t. Tal. 20; *Partyn v. Roberts*, Amb. 315. The principle of *Honor v. Honor* and the other cases cited *supra* will not, however, be applied to defeat the title of a purchaser without notice (*Warwick v. Warwick*, 3 Atk. 298); *secus*, where the purchaser has notice. *Davies v. Davies*, 4 Bea. 54. The construction, by which the parent takes an estate for life only, applies to lands in gavelkind (*Roberts v. Dixwell*, 1 Atk. 609), and borough English (*Starkey v. Starkey*, 8 Bac. Ab. 302); and the settlement must be made according to the common law and not according to the custom.

Where by the articles an estate is *actually settled* in tail, and there is a covenant to settle other lands to the same uses, it may be a question whether the latter are to be limited in strict settlement or not. It has been held, indeed, that under a *will* directing a settlement this may be done. *Papillon v. Voice*, 2 P. W. 471; see *Fearne*, Con. Rem. 145 *et seq.* But not where the testator declares his own uses and trusts, and is in fact his own conveyancer. *Austen v. Taylor*, 1 Ed. 361. If in the articles different limitations are used, showing an intention to create an estate tail as to part of the property, that intention will not be affected, though as to the remainder the trusts will be moulded, giving the parent an estate for life only. *Anon.*, 2 Ves. sen. 359; see *Howel v. Howel*, *ib.* 358. The rules which have been stated are the same if the word "issue" is used instead of the words "heirs of the body" (*Dod v. Dod*, Amb. 274; *Villiers v. Villiers*, 2 Atk. 73); and where the trusts are executory, the limitations will be moulded so as to give the estate to daughters in default of sons. *Hart v. Middlehurst*, 3 Atk. 371; see *Ld. Glenorchy v. Bosville*, Ca. t. Tal. 3, on a will; *Blackburn v. Stables*, 2 V. & B. 369.

In *Phillips v. James* (3 D., J. & S. 72), the father of the intended husband covenanted, by marriage articles, to convey an estate for the benefit of his son during his life, remainder for the use and benefit of the issue of the son by his wife, their heirs and assigns for ever. The issue of the marriage consisted of a son and two daughters. It was held, that by the settlement an estate tail should be given to the son, with remainder to the daughters as tenants in common, with cross-remainders between them. Knight Bruce, L.J., *diss.*, who thought

the three children should take the fee. See *Marshall v. Baker* (9 Jur., N. S. 396), in which it was held that the word "issue" in a covenant to settle after-acquired property meant children. Such a covenant is construed as for a strict settlement, and precludes the husband from making charges in favour of the younger children. *Grier v. Grier*, L. R., 5 H. L. C. 688. In this case Lord Cairns observed in substance, pp. 706, 707, that the court, in executing the articles, would not have taken away from the husband any life interest, and in directing a settlement of the property would have reserved to him a life estate, and would not have created immediate interests in the children, and would also have made, under the term "issue," a provision in some way or other for the whole of the children of the marriage, both male and female, by raising and creating estates in tail. A strict settlement, however, will not be decreed, if the court is satisfied that the children were intended to take *in common* under the description of issue. Therefore, if articles direct an estate to be settled upon the issue whether sons or daughters, or to the issue share and share alike, the settlement must be carried out for the benefit of all the children equally. *Taggart v. Taggart*, 1 Sch. & L. 84; *Lowther v. Ld. Westmoreland*, 1 Cox, 64. A construction creating a joint tenancy is not favoured, and if a trust strictly construed would create such a tenancy among issue or children, it will, if possible, be moulded into a tenancy in common. See *Taggart v. Taggart*, *sup.*; cons. *Liddard v. Liddard*, 28 Bea. 266.

Cross-remainders—Perpetuities—Powers.] A question frequently arises on the construction of marriage articles, whether the issue of the marriage are to take amongst themselves by way of *cross-remainder* or not. Cross-remainders arise "when lands are given in undivided shares to two or more for particular estates, so as that upon the determination of the particular estates in any of those shares they remain over to the other grantees, and the reversioner or remainderman is not let in till the determination of all the particular estates. The grantees take their original shares as tenants in common, and the remainders limited among them on the failure of the particular estates are known by the appellation of cross-remainders. These remainders may be raised both by deed and will: in deeds, when the limitations are legal, they can only be created by express words, but in wills they may be raised by implication." Co. Litt. 195 b, n. (1), by Butler. But although cross-remainders will not be implied in a deed where the limitations are legal (*Doe v. Dorrell*, 5 T. R. 518; *Edwards v. Alliston*, 4 Russ. 78), they will in marriage articles where the trusts are executory. *West v. Errissey*, 2 P. W. 349; see the settlement directed by the House of Lords, *ib.* 355; 1 B. P. C. 225.

Where the intention would violate the rule of law against perpetuities (see that tit.), it will be carried into execution only as far as such rules will allow. As if by the articles an estate is to be settled on children and their children and so on (through successive generations) *for life*, the settlement must be carried out by giving the settlor an

estate for life, with remainder to his first and other sons in tail. See *Humberston v. Humberston*, 1 P. W. 332, on a will.

Where there is a proviso in marriage articles or direction in a will that the settlement shall contain all usual powers and provisions, this authorizes the insertion of powers of leasing, sale and exchange and the like, being for the *general management and better enjoyment* of the estates, by all persons interested. *Hill v. Hill*, 6 Sim. 136; *D. of Bedford v. M. of Abercorn*, 1 M. & Cr. 312. But not, it would seem, of any powers which confer a personal privilege, as of jointuring, raising money, portions, or the like. *Higginson v. Barneby*, 2 S. & S. 516; *Hill v. Hill*, *sup.* A power to appoint new trustees is a proper and reasonable power to be inserted. *Lindow v. Fleetwood*, 6 Sim. 152. See now 44 & 45 Vict. c. 41, s. 31, *post*, tit. "TRUSTS."

In a will directing a settlement to be made, but without any reference to powers, the usual powers of leasing, sale and exchange, appointment of new trustees, &c., were directed to be inserted in it. *Turner v. Sargent*, 17 Bea. 515; *Wise v. Piper*, 13 Ch. D. 848; see *Scott v. Steward*, 27 Bea. 367.

SEC. 3.—Specific Performance of Marriage Articles.

<i>At whose Instance</i>	619	<i>Husband or Wife are not Purchasers</i>	
<i>Certainty of Articles</i>	619	<i>for Relations</i>	621
<i>Husband and Wife</i>	619	<i>Articles executed in toto</i>	621
<i>Wife's Adultery no Bar</i>	620	<i>Voluntary Limitations preceding</i>	
<i>Form of Settlement</i>	620	<i>Limitations for Value</i>	621
<i>Issue of Marriage</i>	620	<i>Non-performance by one Party</i>	621
<i>Strangers, Purchasers or Volunteers</i>	620	<i>Condition precedent</i>	622
<i>Children of former Marriage</i>	620	<i>Against whom enforced</i>	622
<i>Illegitimate Child</i>	620	<i>Parties or Representatives</i>	622
<i>Other Children of Settlor</i>	620	<i>Purchasers with Notice</i>	622

It is scarcely necessary to premise that equity cannot specifically execute articles which are uncertain or unintelligible. For the court must be clearly informed what the intention is, before it can decree it to be carried out. *Bromley v. Jefferies*, 2 Ver. 415; *Franks v. Martin*, 1 Ed. 309; see *Woodcock v. Monckton*, 1 Coll. 273. Where no objection arises on this ground, equity will specifically execute marriage articles at the instance of all who are within the marriage consideration, namely, the husband and wife and their issue, and purchasers for value under the articles, but not at the suit of mere volunteers, though where equity executes the articles, it does so *in toto*, and limitations to volunteers must be inserted (*post*, p. 621). The husband, wife and issue of the marriage can enforce performance of the marriage articles against all who are bound by them. In equity husband and wife are regarded merely as ordinary contracting parties. *Cannel v. Buckle*, 2 P. W. 243. When from the nature of the contract an action is the proper remedy, as where a bond is given to, or covenant entered

into with, the wife in consideration of marriage, the wife surviving may sue on it against the husband's representatives. *Fitzgerald v. Fitzgerald*, L. R., 2 P. C. 83. The wife's adultery will be no bar to her right to have the articles enforced. *Sidney v. Sidney*, 3 P. W. 269; *Seagrave v. Seagrave*, 13 Ves. 439, 443.

With reference to the form of settlement and powers of appointment to children, in *Cogan v. Duffield*, 2 Ch. D. 44, Baggallay, L.J., observed (p. 49) that "The mode of settling a wife's fortune which is approved by the court, is to give her the first life interest for her separate use, then a life interest to the husband, then (subject to the powers given to the husband and wife of appointing the fund among the issue of the marriage), it is given equally to such of the children as being sons attain twenty-one, or being daughters attain that age or marry; if there is no child who being a son attains twenty-one, or being a daughter attains twenty-one or marries, then, if the wife survives, the fund is limited to her, but if she dies in her husband's lifetime she has a general power of appointment over it (see *In re Sampson & Wall*, 25 Ch. D. 482), and in default of any exercise of that power it is given to her next of kin as if she had died intestate and without having married." In *Oliver v. Oliver*, 10 Ch. D. 765, on a question of the settlement of the wife's property, an exclusive power of appointment among the children was given to the wife, Fry, J., observing (p. 768) that he wished he could insert a joint power to the husband and wife, but the authorities did not go to that extent. But in *Gowan v. Gowan*, 17 Ch. D. 778, Jessel, M.R., authorized the insertion of a joint power, observing that *Cogan v. Duffield*, *sup.*, did not appear to have been cited to Fry, J., and quoting the observations of Baggallay, L.J., (*sup.*), in that case.

Where the children of the marriage or their issue are claimants, they have an equity to enforce specific performance of articles or an executory settlement against their parents, and all others bound by such articles or settlement. *Trevor v. Trevor*, 1 P. W. 622; *West v. Errissey*, 2 P. W. 349; *Parkes v. White*, 11 Ves. 228; *Rothwell v. Rothwell*, 2 S. & S. 217; *Lloyd v. Lloyd*, 2 M. & C. 192. A mere stranger may become a purchaser under the articles, of a benefit or interest, and his equity is as capable of being enforced as if he claimed directly under the marriage consideration. *Heap v. Tonge*, 9 Ha. 104. But executory agreements in favour of volunteers will not be specifically executed at their instance, for example, a covenant in marriage articles in favour of a stranger. *Sutton v. Chetwynd*, 3 Mer. 249. Though if the settlor can be considered as purchasing the interest for him, the covenant will be good. *S. C.*, 1 T. & R. 296; *Heap v. Tonge* (*sup.*). Limitations to, or benefits for, the children of a former marriage will, in general, be supported. *Ithell v. Beane*, 1 Ves. sen. 215; *Newstead v. Searles*, 1 Atk. 265; and can be enforced by them. *Gale v. Gale*, 6 Ch. D. 144; see *Mackie v. Herbertson*, 9 App. C. 303, 306. Even a settlement, on the marriage of a female, in favour of her illegitimate child is good. *Clarke v. Wright*, 6 H. & N. 849. See as to this case, *Gale v. Gale*, 6 Ch. D. 144, 152. In *Mackie v. Herbert-*

son, *sup.*, the Earl of Selborne, L.C., observed (p. 324), on *Clarke v. Wright (sup.)*, "That case seems to go beyond the previous cases under the Statutes of Elizabeth." So, where on the marriage of one child, the parent settles property and inserts limitations in trust for the benefit of his other children. *Goring v. Nash*, 3 Atk. 186.

The husband cannot be considered as purchasing for his own relations, for example, a brother (*Johnson v. Legard*, T. & R. 281; *Stackpoole v. Stackpoole*, 4 Dr. & W. 320), comp. *Pulvertoft v. Pulvertoft*, 18 Ves. p. 92, in which the observations had reference to the case of a person specifically contracting not on his own marriage, but on that of another, a son, for instance, for benefits to third persons. Consider in such cases the necessity of *both* contracting parties having some interest in the property agreed to be settled. *Ib.*; *Osgood v. Strode*, 2 P. W. 256. But in cases of this description, where the settlement but for the marriage would be upon a mere volunteer, it must have been stipulated for as part of the marriage contract and not a mere settlement quite irrespective of such contract, although contained in the settlement. In such case a limitation even to a child by a former marriage is void as against a subsequent purchaser from the settlor. *Price v. Jenkins*, 4 Ch. D. 483, cons. the judgment where the prior cases are commented upon.

It is, however, a rule of equity that articles must be specifically executed *in toto* or not at all. Where, therefore, the suit is instituted by a purchaser under the articles, and the court directs that a settlement shall be executed, all limitations contained in the articles must be inserted, although the effect may be to give the estate ultimately to a mere volunteer as against the heir of the settlor. But this will not be done where the interests of purchasers for value would be affected. *Davenport v. Bishopp*, 1 Ph. 698. See further as to voluntary remainders, *post*, Part II. Chap. IX. Limitations to collaterals or strangers will also, in general, be valid where such limitations *precede* others supported by the marriage consideration, otherwise the latter might be defeated. *Clayton v. Ld. Wilton*, Sug. Ven. & Pur. 716. See *Price v. Jenkins*, L. R., 4 Ch. D. 483, 489.

Non-performance of the articles by one party to them is, in general, no excuse for non-performance by another. Thus if the husband agree to settle a jointure in consideration of the intended wife's father paying a portion, the jointure must be settled although the portion be not paid. *Perkins v. Thornton*, Amb. 502; *Jeston v. Key*, L. R., 6 Ch. 610. But performance by one party may be made a condition precedent to performance by another (*Popham v. Bampffield*, 1 Ver. 83), though in *Ld. Faversham v. Watson* (Fr. Ch. 35, 36), it was said, that if the interests of *the issue* were in question the articles would be executed in their favour, though the consideration had not been performed. See *Cheeke v. Ld. Lisle*, Fr. Ch. 302; *Woodcock v. Monckton*, 1 Coll. 278, per Bruce, V.-C. In *Lloyd v. Lloyd*, 2 M. & Cr. 204, Lord Cottenham, in adverting to this question, observed, that unquestionably, even in the case of a marriage settlement, the covenants may be so framed as to be mutually dependent; and that if

it be clear, on the face of the settlement, that such was the intention, the intention must prevail. And it seems clear that performance may be made conditional on the happening of a particular event or on the performance of some act by another person. In a *post-nuptial* settlement, where covenants were entered into by one party in consideration of a settlement by another party, which the latter was not bound to make and did not make, the former was held not bound in equity by his covenants. *Woodcock v. Monckton*, 1 Coll. 273; see *Jeston v. Key*, L. R., 6 Ch. 610. Although in suits between parties to the marriage articles, non-performance of them by some other contracting party may sometimes be a defence, this can rarely be the case when the suit is instituted by the *issue* of the marriage. *Lloyd v. Lloyd*, 2 M. & Cr. 192.

Specific performance of the articles will be enforced *against* those who have contracted by them and against their real and personal representatives and persons claiming under them as mere volunteers (*Trevor v. Trevor*, 1 P. W. 622; *Pulvertoft v. Pulvertoft*, 18 Ves. 92); and against purchasers (including mortgagees) with notice (*Davies v. Davies*, 4 Bea. 54), but not against such purchasers without notice. *Warwick v. Warwick*, 3 Atk. 293.

CHAPTER II.

OF EXECUTORY SETTLEMENTS IN PURSUANCE OF WILLS.

<i>Generally construed like Articles...</i>	622	<i>May mean Children.....</i>	624
<i>Presumption in favour of Issue.....</i>	623	<i>Limitations too remote</i>	624
<i>Rule in Shelley's Case.....</i>	623	<i>Estates to go with a Title</i>	624
<i>Intention to provide for Issue not presumed</i>	623	<i>Impeachment of Waste</i>	624
<i>Where collected from Will.....</i>	623	<i>Particular Settlements directed by the Court</i>	624
<i>To convey as Counsel advise</i>	623	<i>Excluding Husband.....</i>	624
<i>Direction to convey for Life, Remainders over</i>	623	<i>Where Power given to Wife</i>	624
<i>Testator his own Conveyancer</i>	623	<i>To be settled strictly</i>	625
<i>Equitable and Legal Limitations...</i>	623	<i>Money paid without Settlement.....</i>	625
<i>Word "Issue"</i>	624	<i>Discretionary Power in Trustees ...</i>	625
<i>Comprises Daughters</i>	624	<i>Whether Trust for Settlement imperative</i>	625

SETTLEMENTS which a testator directs to be made are to a great extent subject to the same rules as settlements agreed to be executed under articles. Thus, it has been laid down that executory trusts in marriage articles and in wills are construed in the same way. *Ly. Lincoln v. D. of Newcastle*, 12 Ves. 230. There is, however, this qualification, that in marriage articles *the issue to be provided*

for and the considerations that belong peculiarly to *them* afford *primâ facie* evidence of intent which does not belong to executory trusts under wills: *allowing for that*, an executory trust in a will is to be executed in the same way as an executory trust in marriage articles. *Jerroise v. D. of Northumberland*, 1 J. & W. 574; see *Blackburn v. Stables*, 2 V. & B. 369.

In marriage articles an intention to provide for the issue of the marriage is presumed. Therefore, as we have seen, if the trusts are executory, the husband will not in general be allowed to take an estate tail to the exclusion of his children. In wills, however, a gift to a person which, according to the rule in *Shelley's Case*, would give the parent an estate tail will not necessarily be cut down to an estate for life with remainder to the children in tail, unless some intention to that effect can be collected from the will. As where there is a direction to settle property on A. and the heirs of his body, taking care that it shall not be in A.'s power to *dock the entail*. *Leonard v. E. Sussex*, 2 Ver. 526. So, where there is a direction that a settlement shall be made as counsel shall advise. *Bastard v. Proby*, 2 Cox, 6; see *Read v. Snell*, 2 Atk. 642. So, where there is a *direction to convey* to A. for life without impeachment of waste, with remainder to trustees to preserve contingent remainders, with remainder to the heirs of the body of A. *Ld. Glenorchy v. Bosville*, Ca. t. Tal. 3; *Papillon v. Voice*, 2 P. W. 471 (the point as to the money directed to be invested); comp. *Austen v. Taylor*, 1 Ed. 361. But in the last mentioned case if there had been an *immediate devise* to A., with the same limitations and remainders, he would have taken an estate tail. *Papillon v. Voice*, *sup.* (point as to the land devised). And if it appears that the testator has been, as it is often termed, *his own conveyancer*, then, although he may direct property to be conveyed or settled, this will not make the trusts executory in the sense that the court has the power of moulding them according to what may be conceived to have been his intention. *Austen v. Taylor*, 1 Ed. 361, 369, n. (a); see *East v. Twyford*, 9 Ha. 713; *Egerton v. E. Brownlow*, 4 H. L. C., judgment of Lord St. Leonards, p. 210; *Thompson v. Fisher*, L. R., 10 Eq. 207. So, if the testator has made a positive settlement, the court cannot add to it in any way. *Fullerton v. Martin*, 1 Dr. & S. 31; see *De Havilland v. De Saumarez*, 14 W. R. 118. And if a settlement be directed which does not comprise the whole interest in the property, for instance, does not exhaust the fee, the court has no power to direct a settlement which does exhaust the fee. *Head v. Godlee*, *Reynolds v. Godlee*, Johns. 536.

Trusts will not be considered as executory where there is a devise giving an *equitable* estate of inheritance any more than where there is a devise of the *legal* estate of inheritance; for limitations of a trust either of realty or personalty are construed like similar limitations of the legal estate, unless there is a plain intent to the contrary. *Garth v. Baldwin*, 2 Ves. sen. 646, 655; *Wright v. Pearson*, Amb. 358. The doctrine laid down by Lord Hardwicke in *Bagshaw*

v. Spencer (2 Atk. 577) is contra, but must now be considered as overruled. As the word "issue," though a word of limitation like the words "heirs of the body," is of a more flexible character where it is used in a will, there will be greater scope for the court to mould the limitations in strict settlement than where words of strict limitation are used, like heirs of the body. See *Ld. Glenorchy v. Bosville*, Ca. t. Tal. 3; *Meure v. Meure*, 2 Atk. 265; and generally as to the word "issue," *post*, tit. "WILLS." The term "issue" comprises daughters, and is in this respect like "heirs of the body," and where under these expressions in wills a strict settlement is directed, the limitations will be the usual limitations in strict settlement, and daughters must be included after sons. See *Ld. Glenorchy v. Bosville*, Ca. t. Tal. 3. And if a testator directs a settlement on the issue of A. in tail male in strict settlement, there must, following the limitation to the sons of A. in tail male, be a limitation to the daughters of A. but also in tail male. *Trevor v. Trevor*, 1 H. L. C. 239. The word "issue," however, in wills directing a settlement, will sometimes, as in other cases in wills, be construed to mean children. *Williams v. Teale*, 6 Ha. 239. Where there is a direction to settle in such a way that some of the limitations would be void for remoteness, the court will modify the limitations so as to make them consistent with the rules of law and equity. *Lyddon v. Ellison*, 19 Bea. 565. As to a settlement of estates which are directed to be settled in strict settlement, so as to go with a title, see *Bankes v. Ly. Despencer*, 11 Sim. 508; *Visc. Holmesdale v. West*, L. R., 4 H. L. 543; *S. C.*, L. R., 12 Eq. 280. Where a will directs a settlement upon successive tenants for life, the settlement to contain "all usual and proper provisions," the tenant for life will not be made punishable for waste. *Davenport v. Davenport*, 1 H. & M. 775. Nor will he where the trust is for the settlement of estates in strict settlement. *Stanley v. Coulthurst*, L. R., 10 Eq. 250. *Secus*, where words importing a larger estate than an estate for life are cut down to an estate for life, as where the words *primâ facie* give an estate tail, which is reduced to an estate for life, with remainder in tail. *Ib.*; see *Leonard v. E. Sussex*, 2 Ver. 526, and the cases, *ante*, p. 623.

Under a direction to settle personal estate on a female for her separate use for life, and then on her issue, with remainder to the testator's nephew, a settlement was directed giving her a life interest to her separate use, with remainder to her children, in default of children to the nephew, thus excluding the husband from any participation. *Stonor v. Curwen*, 5 Sim. 264; see *Young v. Mackintosh*, 13 Sim. 445. Under a direction to settle a fund upon the testator's daughter and her issue, not subject to the debts, &c. of any husband, the settlement ordered by the court gave the daughter a power of appointment by will in default of issue. *Stanley v. Jackman*, 23 Bea. 450; see *Simons v. Horwood*, 1 Keen, 7. And where the will directed that property should be settled for the benefit of the testator's daughter as his trustees should think fit, the court approved of a power enabling the daughter to appoint a life interest in the

property of her husband. *Charlton v. Rendall*, 11 Ha. 296. In *Lock v. Bagley* (L. R., 4 Eq. 122), under a direction to settle daughters' shares strictly: it was held that the income of each daughter's share should, during the joint lives of herself and her husband, be paid to her for life for her separate use without power of anticipation; and if she died first, then her share should go as she should by will appoint, and, in default of appointment, to her next of kin exclusively of her husband, and if she survived then to her absolutely.

Under a bequest to a female at twenty-one, with a direction to settle the fund on her for life and afterwards on her children, and the bequest took effect when she was fifty-five years of age and had no children, the court allowed the fund to be paid to her. *Lyddon v. Ellison*, 19 Bea. 565. A discretionary power vested in trustees to regulate the terms of the settlement must be exercised in the lifetime of the person upon whom the settlement is to be made; otherwise the gift on limitations expressed in default of or subject to the exercise of such power will take effect. *Lancashire v. Lancashire*, 2 Ph. 657. There are cases in which a gift or legacy is coupled with an expression of desire or confidence that it may be settled in a particular manner. *Cons. Eaton v. Barker*, 2 Coll. 124; *Knight v. Knight*, 3 Bea. 148, 173. In such cases the question would seem to be, whether the fund is impressed with a trust to which effect must be given in equity, or whether the testator or donor has merely indicated his wishes, which the donee or legatee is at liberty to disregard. Every case of this description must depend upon the particular language of the gift.

PART II.

OF EXECUTED SETTLEMENTS.

CHAPTER I.

GENERAL OPERATION OF A MARRIAGE SETTLEMENT.

<i>Settlements generally</i>	625	<i>Scotch Deed</i>	627
<i>Property must be bound by Settlement</i>	626	<i>Revocation before Marriage</i>	627
<i>Wife's future Property</i>	626	<i>After Marriage they are absolutely binding</i>	627
<i>Settlements made Abroad</i>	626	<i>Settlements lost or destroyed</i>	627

MARRIAGE settlements may be as varied, and the provisions in them as numerous, as the different kinds of property which are capable of being settled. Almost universally, however, there are provisions for

the husband, the wife, and the issue of the marriage. When property, whether real or personal, is settled, there are usually many trusts and powers by which the management, enjoyment and devolution of the settled property are regulated. These subjects are considered partly under the following sections of this title in due course, and partly under other titles, particularly "POWERS" and "TRUSTS." As to powers and trusts which affect property, they are to a great extent the same, whether contained in wills or settlements, and by being considered under distinct titles unnecessary repetition is to a great extent avoided. As a marriage settlement will only affect the property comprised in it or made subject to its provisions, for instance, future-acquired property agreed to be settled in a particular manner, all other property, whether of the husband or wife, on which the settlement does not operate and cannot operate at any future time, will be subject to the same rules as ordinary unsettled property. See tit. "HUSBAND AND WIFE." And as it is necessary that a valid marriage should be contracted in order that the rights affecting property by reason of marriage may arise, where there is no settlement, so such a marriage is equally necessary where it is the consideration for the settlement; for if the marriage be invalid, the trusts until the marriage alone operate. *Chapman v. Bradley*, 4 D. J. & S. 71; *Pawson v. Brown*, 13 Ch. D. 202; comp. *Ayerst v. Jenkins*, L. R., 16 Eq. 275.

It was at one time considered that a settlement by the husband on the wife gave him an absolute right to her portion or future property, though there was no agreement to that effect. *Blois v. Hereford*, 2 Ver. 501; see n. (D) to *Ld. Carteret v. Paschal*, 3 P. W. 199, ed. Cox; and n. 4, 2 Ver. 503, ed. Raithby, and cases there cited. But this is not now the doctrine of the court. In *Garforth v. Bradley* (2 Ves. sen. 677), Lord Hardwicke observed, that if the settlement on the wife was in consideration of her present portion or fortune, without reference to what came afterwards, and the husband did not reduce it into possession, it would survive to the wife in equity as well as by the rule of law. But the husband may be a purchaser of the whole fortune of his wife, present and future; and in such a case she is not entitled to any provision out of property accruing in her right after the marriage. *Ib.* This of course depends upon the terms of the settlement, which must clearly express or import that the husband is to take absolutely. *Druce v. Denison*, 6 Ves. 385; *Salvey v. Salvey*, Amb. 692; *Mitford v. Mitford*, 9 Ves. 87; *Carr v. Taylor*, 10 Ves. 574. Cons. now the effect of the Married Women's Property Acts, *ante*, pp. 357—360.

Where a contract is made between persons domiciled in a foreign country, and in a form known to the law of that country, the court in administering the rights of parties under it, will in general give it the same construction and effect, as the foreign law would have given to it. *Anstruther v. Adair*, 2 M. & K. 513. A marriage contract respecting personal estate made abroad between foreigners will be specifically enforced here, though the terms of it refer to foreign customs. *Feaubert v. Turst*, Pr. Ch. 207. But although parties are

domiciled abroad, and one of them is a foreigner, a deed by them settling the wife's *property in England*, though executed abroad, is construed according to the English law. *Van Grutton v. Digby*, 31 Bea. 561. A deed in the Scotch form made between parties, some of whom are domiciled in Scotland, others in England, will be construed, so far as it concerns the former, according to the Scotch law, and so far as it concerns the latter, according to the English law. *Duncan v. Campbell*, 12 Sim. 616. A settlement on a marriage in *England* between a domiciled Turkish subject and an English lady, on the faith of his promise to reside in *England*, is to be governed by English law. A divorce in *Turkey*, the effect of which by Turkish law was to annul the settlement, but which was pronounced without notice to the wife or other persons interested under the settlement, will be disregarded. *Colliss v. Hector*, L. R., 19 Eq. 334. In *Lang v. Lang* (8 Sim. 451), a settlement was made at the Mauritius between British subjects, reciting that they intended to marry according to English law; and reciting further, but contrary to the fact, that the intended husband had received 4,000*l.* from the intended wife to be invested for her benefit; and that if he did not invest this sum she should be entitled to take it out of his assets at his death. He died intestate. The wife was held entitled to the 4,000*l.*, and also to a distributive share of the residue. See tit. "CONTRACTS," *ante*, p. 67 *et seq.*

A settlement, though executed, may, as a general rule, be revoked by the parties at any time before the marriage, and a fresh settlement executed. In *Robinson v. Dickenson* (3 Russ. 399), a settlement in contemplation of marriage was executed, and the marriage ceremony was performed. It was afterwards discovered that the marriage was void. The parties then revoked the settlement, executed another containing different trusts, and were legally married; and it was held that the second settlement was valid. But, in *Page v. Horne* (11 Bea. 227), where, under very special circumstances, a settlement made with the consent of the intended wife's guardians was revoked without their consent, and the marriage took place without any fresh settlement being executed, the Master of the Rolls, though with *considerable doubt*, decided that the settlement was nevertheless valid and subsisting. After the marriage, the settlement (unless where there is a mistake which may be rectified) is absolutely binding, and a divorce, though upon the ground of the wife's adultery, does not give the Court of Chancery jurisdiction to set it aside. *Evans v. Carrington*, 2 D., F. & J. 481. See, as to the statutory jurisdiction of the Divorce Court in such cases, *post*, Chap. XII. Equity exercises the same jurisdiction with respect to lost or destroyed settlements as it does in the case of lost deeds. Upon sufficient evidence, the same relief will be administered as if the settlements were produced. *Bates v. Heard*, Dick. 4.

CHAPTER II.

OF THE MARRIAGE CONSIDERATION.

<i>Is valuable</i>	628	<i>Part of Scheme to defraud</i>	629
<i>Settlement not followed by Marriage</i>	628	<i>False Recitals</i>	629
<i>Second Marriage</i>	628	<i>Insolvency of Husband</i>	629
<i>Where Marriage will not support</i> ...	628	<i>Bankruptcy Provisions</i>	629

MARRIAGE is a valuable consideration,—indeed the highest known to the law. *Per* Sir J. Romilly, M.R., *Ford v. Stuart*, 15 Bea. 499; and see *Fraser v. Thompson*, 4 D. & J. 661. Usually the possibility of the marriage not taking place is provided for by directing the trustees to hold the settled property in trust for those to whom it belongs until the marriage, and thenceforth upon the trusts to arise on that event. But apart from this it seems clear that a settlement in contemplation of marriage will have no operation in equity unless the marriage takes place. *Hamond v. Hicks*, 1 Ver. 432. See *Mitford v. Reynolds*, 16 Sim. 130; *Chapman v. Bradley*, 4 D., J. & S. 71; *Pawson v. Brown*, 13 Ch. D. 202; comp. *Ayerst v. Jenkins*, L. R., 16 Eq. 275. On the marriage of a widow or widower whose property is to be settled, it is important to ascertain whether there has been a settlement of it made on the previous marriage, especially if there has been any issue of such marriage. In *Edwards v. Freeman* (2 P. W. 435, 439), and *Hart v. Middlehurst* (3 Atk. 371), the articles made on the first marriage were suppressed; in the former case, to the prejudice of the child of the first marriage, in the latter to the prejudice of the children of the second marriage. As to settlements made by an intended wife in fraud of the marriage treaty, see *infra*, Chap. III.; and as to settlements by a lady not in contemplation of marriage, and which the court will set aside by reason of their being voluntary and improvident, see *ante*, p. 307. As to the operation of a settlement in protecting devised or descended property against the creditors of the deviser or ancestor, see *ante*, p. 266. A voluntary bond or obligation, if settled in consideration of marriage, ceases to be voluntary. *Payne v. Mortimer*, 1 Giff. 118.

Although marriage is a valuable consideration, it will not support every settlement on the intended wife and issue of the marriage. Thus, if the marriage be merely part of a scheme, and the settlement a mere fraudulent device to withdraw property from the husband's creditors, it will be void against creditors. *Colombine v. Penhall*, 1 Sm. & G. 228; *Bulmer v. Hunter*, L. R., 8 Eq. 46. In *Fraser v. Thompson* (4 D. & J. 659), the engagement between the parties had

been of some standing, and the wife would not marry without a settlement (to her separate use for life), which comprised great part of the husband's property. She had full knowledge that he was greatly embarrassed at the time of the marriage, and he was even indebted to herself. He afterwards became bankrupt. It was held that the settlement was invalid against the assignees. But in *Campion v. Cotton* (17 Ves. 264), it was held that the mere fact that the settlement contained a false recital that the property was the wife's would not render the settlement void as against creditors, though the settlor was indebted at the time of the marriage, and his wife was aware of it. And where the intended husband covenanted to settle *all* his own and his intended wife's future property, and was insolvent at the time, but his wife was not aware of it, and shortly after the marriage he became insolvent under the act then in force, the settlement was supported. *Hardey v. Green*, 12 Bea. 182; *Keran v. Crauford*, 6 Ch. D. 29.

There are various provisions in the Bankruptcy Acts relating to marriage settlements and covenants in them. For the sake of convenience these will be mentioned together.

By the 46 & 47 Vict. c. 52, Bankruptcy Act, 1883 (in operation 1st January, 1884), in either of the following cases; that is to say,

1. In the case of a settlement made before and in consideration of marriage, where the settlor is not at the time of making the settlement able to pay all his debts without the aid of the property comprised in the settlement; or
2. In the case of any covenant or contract made in consideration of marriage for the future settlement on or for the settlor's wife or children of any money or property wherein he had not at the date of his marriage any estate or interest (not being money or property of or in right of his wife);

If the settlor is adjudged bankrupt, or compounds or arranges with his creditors, and it appears to the court that such settlement, covenant, or contract was made in order to defeat or delay creditors, or was unjustifiable having regard to the state of the settlor's affairs at the time when it was made, the court may refuse or suspend an order of discharge, or grant an order subject to conditions, or refuse to approve a composition or arrangement, as the case may be, in like manner as in cases where the debtor has been guilty of fraud (s. 29).

Section 47 has already been stated, *ante*, pp. 292, 293.

Any covenant or contract made in consideration of marriage for the future settlement on or for the settlor's wife or children of any money or property wherein he had not at the date of his marriage any estate or interest, whether vested or contingent in possession or remainder, and not being money or property of or in right of his wife, shall, on his becoming bankrupt before the property or money has been actually transferred or paid pursuant to the contract or covenant, be void against the trustee in the bankruptcy (*ib.* (2)).

Settlement shall for the purposes of this section include any conveyance or transfer of property (*ib.* (3)).

This section corresponds in substance with s. 91 of the Bankruptcy

Act of 1869, s. 91, except that the settlements there referred to were "by a trader."

A covenant by a trader in a settlement, prior to the Bankruptcy Act of 1869, to settle all his future acquired real or personal estate, is void against his creditors if he become bankrupt. *Ex parte Bolland, Re Clint*, L. R., 17 Eq. 115. In this case the point was raised with reference to some particular shares standing in the settlor's name at the time of his bankruptcy, but the reasoning of the Vice-Chancellor applied to the covenant generally. See *ib.*, p. 120. The 91st section (*sup.*) was held not to apply to a common covenant by the husband to pay a sum of money to the trustees of the settlement. The intention of the legislature was to prevent a settlement of property expected to accrue at a future time in which the settlor had no present interest. *Ex parte Bishop*, L. R., 8 Ch. 718.

CHAPTER III.

AGREEMENTS IN FRAUD OF MARRIAGE ARTICLES OR SETTLEMENTS.

<i>Fraudulent Bonds, &c.</i>	630	<i>Marriage Brocade Bonds</i>	631
<i>Party to, relieved from</i>	630	<i>Bonds to marry</i>	631

AGREEMENTS in fraud of marriage articles or settlements are void, and conveyances and assurances in pursuance of them will in general be set aside. *Peyton v. Blodwell*, 1 Ver. 240. Upon this principle a bond by the husband to return part of his wife's portion was ordered to be delivered up, where a third person had made a settlement in consideration of the portion. *Turton v. Benson*, 1 P. W. 496. So an agreement by the husband to indemnify his father against a jointure or provision made by him upon the son's wife or children will be void. *Palmer v. Neave*, 11 Ves. 165. So a secret agreement to give an equivalent for the release of a jointure or the like. *Lamlee v. Hanman*, 2 Ver. 466, 499; comp. *Roberts v. Roberts*, 3 P. W. 66. The rule is the same where the agreement is made by the wife (*Gale v. Lindo*, 1 Ver. 475), or by the husband and wife (*Redman v. Redman*, *ib.* 348); and in some cases the party bound by it, though privy to the fraud, may be relieved against it (*ib.*); particularly when other persons are living who are interested in its being set aside, for instance, the wife or children. *Thompson v. Harrison*, 1 Cox, 344. Upon this principle, also, no binding private arrangement can be entered into between the trustee of the settlement and the husband to make the trust fund liable for the engagements of the latter, when the property moves from the wife, and is settled to her separate use. *Morris v. Clarkson*, 1 Jac. & W. 107. Where a parent or guardian, or other

person, bargains for any benefit to himself as the price of consenting to or bringing about a marriage, such agreement and all securities for effectuating it will be void. *Keat v. Allen*, 2 Ver. 588; *D. of Hamilton v. Mohun*, *ib.* 652; *Smith v. Aykwell*, 3 Atk. 566. And all payments made under them will be ordered to be refunded. *Smith v. Bruning*, 2 Ver. 392. Such agreements and securities are contrary to public policy, and cannot be rendered valid by subsequent confirmation. *Shirley v. Martin*, cited 1 Ba. & B. 358. As to bonds or other securities to marry or pay a sum of money in default, see *Key v. Bradshaw*, 2 Ver. 102; *Cock v. Richards*, 10 Ves. 429.

CHAPTER IV.

WHO MAY MAKE SETTLEMENTS.

<i>All Persons in general competent ...</i>	631	<i>Dissolution of Marriage</i>	633
<i>As to Lunatics</i>	631	<i>Consent of Parents or Guardians...</i>	633
<i>Contracts of Infants voidable</i>	631	<i>Court cannot bind Infant except</i>	
<i>Bar of Dower</i>	632	<i>under Statute.....</i>	633
<i>Share under Statute of Distributions</i>	632	<i>Settlement by Male Infants</i>	634
<i>Settlements of Real Estate of Female Infants</i>	632	<i>Voluntary, though confirmed.....</i>	634
<i>Effect of—Confirmation</i>	632	<i>Representation by Infant that he</i>	
<i>Bind Husband</i>	632	<i>was of Age.....</i>	634
<i>Effect of Settlement not confirmed .</i>	632	<i>18 & 19 Vict. c. 43</i>	634
<i>Misrepresentation by Wife.....</i>	632	<i>Infants may make Settlements</i>	634
<i>Settlements of Personal Estate by</i>		<i>Sanction of Court.....</i>	634
<i>Female Infants</i>	633	<i>Infant dying under Age.....</i>	634
<i>Personalty in Possession.....</i>	633	<i>Where, does not apply.....</i>	634
<i>Personalty in Reversion, &c.....</i>	633	<i>Propriety of Marriage</i>	634
<i>As to Confirmation</i>	633	<i>Post-nuptial Settlements.....</i>	635
		<i>Infants wards of Court or not</i>	635

As a rule no question arises as to the competency of the intended husband or wife to make a settlement, for in general all persons are competent except lunatics and infants. With respect to lunatics there would seem to be no case in which a marriage settlement has been sought to be set aside on the ground of the lunacy of one of the contracting parties. But, if established, the incapacity to contract would be a ground for avoiding the settlement. See *ante*, p. 69. In the case of infants, as will be seen, they were never wholly incompetent, and their powers have, subject to the sanction of the Court of Chancery, been very much increased by an act of parliament, the 18 & 19 Vict. c. 43 (Malins' Act). The contracts of infants are now in many cases absolutely void, and incapable of being confirmed. See *ante*, p. 69. But contracts with reference to marriage are not subject to the statute there referred to, which, as will be seen, is limited in its operation. With respect to female infants, prior to the 18 & 19 Vict. c. 43, settle-

ments were only binding upon them in certain respects, and as to certain kinds of property. Thus the right of dower of a female infant might, and still may be, barred by a proper provision or jointure made for her before marriage, in like manner as if she were adult. This, however, is by force of the statute 27 Hen. 8, c. 10, not by reason of her being able to contract to deprive herself of dower. *E. of Bucks v. Drury*, 2 Ed. 39, 60; *Glover v. Bates*, 1 Atk. 439; see *post*, "JOINTURE," p. 636.

A female infant may also by settlement be barred of her share of her husband's personal estate under the Statute of Distributions, where a provision is made for her by the settlement. 2 Ed. 70. A settlement or agreement by a female infant with reference to her real estate is not binding on her unless duly confirmed on her attaining her majority. *Milner v. Ld. Harewood*, 18 Ves. 259. The confirmation must be by a proper deed duly acknowledged, for the mere execution by her after her majority of a deed confirming the settlement *without an acknowledgment*, as required by the Fines and Recoveries Abolition Act, is insufficient. *Field v. Moore*, 7 D., M. & G. 691; *Campbell v. Ingilby*, 21 Bea. 567. As to a settlement, though confirmed, being voluntary, see *Honywood v. Honywood*, 20 Bea. 451. And as to this case, *Trowell v. Shenton*, 8 Ch. D. 318, 321. Until confirmation by the wife the settlement has a qualified effect only. Thus it precludes the husband during the coverture from doing anything himself or concurring in any act of his wife inconsistent with the settlement (*Durnford v. Lane*, 1 B. C. C. 106; *Milner v. Ld. Harewood*, 18 Ves. 275; *Pimm v. Insall*, 7 Ha. 193), and the wife may compel him to give effect to it, if she adopts it. *Field v. Moore*, 7 De G., M. & G. 691, 716; *Hobson v. Ferraby*, 2 Coll. 412; *D'Arcy v. Maddock*, 4 Ir. Ch. Rep. 40; *Barrow v. Barrow*, 4 K. & J. 409.

In *Savill v. Savill* (2 Coll. 271), the husband covenanted that on his wife attaining her majority her real estate should be settled with an ultimate limitation in default of issue on her heirs, and her personalty with an ultimate limitation to her next of kin. The settlement was not confirmed, and the wife died without issue. Her heir-at-law was held entitled to her realty, and her husband to her personalty, the next of kin being mere volunteers. See *Campbell v. Ingilby*, 21 Bea. 567. In *Sharpe v. Foy* (L. R., 4 Ch. 35), a settlement was made on the marriage of a female infant, in which the husband covenanted that he and his wife, if she consented, would settle her real estate on her attaining her majority. No settlement was made after she attained her majority, but she and her husband subsequently mortgaged the property, representing to the mortgagee that there was no settlement. The deed was duly acknowledged, but the mortgagee previous to the acknowledgment, but after the advance of the money and execution of the deed, had notice of the settlement. It was held that the wife's misrepresentations constituted a fraud which bound her estate, and that the mortgagee had priority over those interested under the settlement.

Even before the 18 & 19 Vict. c. 43, presently noticed, a settlement might have been made on the marriage of a female infant of such personalty belonging to her as, by reason of the marriage, would if there were no settlement vest in her husband on the marriage. This, however, was in point of fact the settlement of the husband, as without it such property would, as the law then stood, have come to him absolutely *jure mariti*. See *Simson v. Jones*, 2 R. & My. 365, 374; see now the acts of 1870 and 1882, *ante*, tit. "HUSBAND AND WIFE."

Where the settlement is of such personal estate as will not vest absolutely in the husband *jure mariti*, as where it is separate or reversionary estate, the wife will not be bound by the settlement, unless after attaining her majority she confirms it (see *Milner v. Ld. Harewood*), or by her acts after attaining her majority, is to be considered as having acquiesced in or adopted the settlement. *Ashton v. M'Dougall*, 5 Bea. 56; *Davies v. Davies*, L. R., 9 Eq. 468. An appointment of new trustees operates as a confirmation. *Merryweather v. Jones*, 4 Giff. 509. So, in general, consenting to decrees affecting, or presenting petitions in respect of, the settled property. *White v. Cox*, 2 Ch. D. 387. Where the property is personalty and in court, the wife on attaining her majority must consent to a transfer of the fund. *Day v. Day*, 11 Bea. 35.

In *Swift v. Wenman* (L. R., 10 Eq. 15), on the marriage of a female under age, there was an agreement to settle personal property to which she would become entitled on attaining twenty-one on herself for life, with remainder to her husband for life, and if he should die in her lifetime and in default of children for her absolutely; there were no children, and nothing was done to confirm the agreement on the wife attaining twenty-one. It was held that, on the marriage being dissolved at the wife's instance, she was absolutely entitled to the property.

It was formerly considered that the consent of parents or guardians would be binding on an infant in respect of marriage contracts made by them on behalf of the infant. *Harvey v. Ashley*, 3 Atk. 607. It is now settled, however, that such consent will not have this effect. *Field v. Moore*, 7 De G., M. & G. 691, 707. But though parents or guardians cannot bind an infant who would not otherwise be bound, their assent to the settlement would seem in many cases useful, in some necessary, if it be not made under the provisions of the 17 & 18 Vict. c. 83. Thus in those cases in which the wife was barred of her dower by an equitable jointure, the assent of parents or guardians was relied upon, and seems even to have been considered necessary. *E. of Bucks v. Drury*, 2 Ed. 60, 65; *Corbet v. Corbet*, 5 Russ. 254; *Simson v. Jones*, 2 R. & My. 365, 377. So where she was barred of her thirds. *Ib.*

The Court of Chancery has no power, except under the 18 & 19 Vict. c. 43 (*post*), to bind the real property of an infant, though a ward of the court. *Savill v. Savill*, 2 Coll. 721; *Field v. Moore*, 7 De G., M. & G. 691, 709. But the court has this power in respect

of the personal estate of a female infant ward. *Simson v. Jones*, 2 Russ. & M. 365.

Settlements by male infants of their own property, unless under the statute presently noticed, are as inoperative as those by female infants. See *Caruthers v. Caruthers*, 4 B. C. C. 500, 510; *Kingsman v. Kingsman*, 6 Q. B. D. 122. But if a male under age married an adult female who covenanted that *her own* estate should be settled, this covenant was binding upon him. *Slocombe v. Glubb*, 2 B. C. C. 545; *Strathmore v. Bowes*, 1 Ves. jun. 28. And a settlement by an infant, though confirmed on his attaining his majority, would, unless under the act presently noticed, be voluntary. *Honywood v. Honwood*, 20 Bea. 451. See as to this case, *Trowell v. Shenton*, 8 Ch. D. 318, 321. But though the infant will not (unless in the excepted case before mentioned) be bound by his contract unless he confirms it when of age, yet if at the time of the marriage he represented that he was of age, he cannot afterwards set up the falsehood of this representation in order to avoid the contract (*Nelson v. Stocker*, 5 Jur., N. S. 262; *S. C.*, 751, 753), unless the party to whom the representation was made knew it to be false. *Ib.*, see *Cory v. Gertcken*, 2 Madd. 40.

Now by the 18 & 19 Vict. c. 43 (Ireland, 23 & 24 Vict. c. 83), "Every infant upon or in contemplation of marriage may with the sanction of the Court of Chancery, make a valid settlement, of all or any part of his or her property, or over which he or she has any power of appointment; and every conveyance, appointment, or assignment thereof, executed by such infant with the approbation of the said court, shall be as valid as if the person executing the same were of the full age of twenty-one years. This enactment shall not extend to powers of which it is expressly declared that they shall not be exercised by an infant (s. 1). *In re Sampson & Wall*, 25 Ch. D. 482, it was held by the Earl of Selborne, L. C., and Fry, L. J. (*dubitante* Cotton, L. J.), that under the act a post-nuptial settlement of an infant's property may be made. In this case the infant was a ward of court. See *Powell v. Oakley*, *post*, p. 635.

In case any appointment under a power, or any disentailing assurance, shall have been executed by any infant tenant in tail under the provisions of this act, and such infant shall afterwards die under age, such appointment or disentailing assurance shall thereupon become absolutely void (s. 2).

The sanction of the court to such settlements may be given upon petition without a suit, if there be no guardian the court may require a guardian to be appointed or not as it shall think fit; and that any person interested or appearing to be interested in the property should be served with notice of such petition (s. 3).

Nothing in this act shall apply to any male infant under the age of twenty years, or to any female under the age of seventeen years (s. 4).

Under this act, the court will not inquire into the propriety of a

marriage sanctioned by the father of the infant. *Re Dalton*, 6 D., M. & G. 201; cons. *Re Strong*, 2 Jur., N. S. 1241. The court has power under the act to order a *post-nuptial* settlement where the infant is a *ward of court*. *Powell v. Oakley*, 34 Bea. 575. But otherwise it has been held where the infant is not. *Re Potter*, L. R., 7 Eq. 484. See *In re Sampson & Wall*, ante, p. 634, and *qu.*, if the court has this power *only* where the infant is a ward of court. Where by order of a Vice-Chancellor, indentures of settlement were directed to be executed by a married woman who was an infant, the court allowed the certificate of acknowledgment under 3 & 4 Wm. 4, c. 74, s. 84, to be varied by omitting the words "of full age." *In re Lacey*, 6 Q. B. D. 154.

CHAPTER V.

HUSBAND'S INTEREST UNDER THE SETTLEMENT.

<i>In Real Estate</i>	635	<i>Aliter of his own Property</i>	635
<i>In Personal Estate</i>	635	<i>Except to extent of Property received from Wife</i>	636
<i>Limitation for Husband until Bankruptcy</i>	635	<i>Effect where Provision for Children on Husband's Bankruptcy</i>	636
<i>Of Wife's Property good</i>	635		

WHEN real estate of the husband is settled, he almost, as a matter of course, takes a life interest in it, without impeachment of waste; and usually also after intermediate limitations, sometimes to the wife for life, then to the issue of the marriage; sometimes to the issue only; he takes the ultimate remainder in default of issue. Frequently, also, he takes a life interest in his wife's real estate, subject to her prior life interest. With reference to personal property, or real estate directed to be converted and the proceeds invested, he usually takes the first life interest in his own property, and a life interest subject to her prior life interest in her property. Not unfrequently there is a clause of forfeiture in the event of his becoming bankrupt or assigning, charging or incumbering his life interest. Without such a clause, the husband's life interest, or any other interest which he may take under the settlement, will vest in his trustee (formerly assignees) on his bankruptcy. *Stratton v. Hale*, 2 B. C. C. 490. Although one life interest of the husband was held to be forfeited on his bankruptcy, yet inasmuch as, in events which had happened, he took another life interest not determinable on his bankruptcy, this vested in his trustee. *Upton v. Brown*, 12 Ch. D. 872.

Even where there is such a clause, its validity depends upon circumstances. Thus a limitation of the wife's property to the husband until his bankruptcy, then over, is good (*Ex parte Cooke*, 8 Ves. 353; *Ex parte Hinton*, 14 Ves. 598; *Lester v. Garland*, 1 Sw. 481, n.); but not of the husband's own property, except to the

extent of the wife's property received by him or agreed to be settled. To this extent limitations by him of his property and bonds given by him, to take effect on his bankruptcy, will be good. *Higinbotham v. Holme*, 19 Ves. 87; *Phipps v. Ennismore*, 4 Russ. 131; see *Nixon v. Verry*, 29 Ch. D. 196; *Holmes v. Penney*, 3 K. & J. 90, 102; *Montefiore v. Behrens*, 35 Bea. 95. In *Brooke v. Pearson* (27 Bea. 181), an estate of the husband was settled, in consideration of property of the wife, upon trust for the husband until he should sell, mortgage or incumber the same, or should become bankrupt or insolvent; in any of which events the wife was to receive an annuity of 300*l.* to her separate use. The husband mortgaged the estate and afterwards became bankrupt; the wife was held entitled to her annuity from the date of the mortgage. *Whitmore v. Mason*, 2 J. & H. 214. A trust for the benefit of a person until his bankruptcy or insolvency, then in the discretion of the trustees, for the subsistence of himself and family, was held, in *Rippon v. Norton* (2 Bea. 63), on the insolvency taking place, to entitle his three children to three-fourths of the fund, and the assignees to the remaining fourth; see *Holmes v. Penny*, *sup.* In *Page v. Way* (3 Bea. 20), where the trusts were similar, the assignees were held to be entitled to everything, subject to what was proper to be allowed for the maintenance of the wife and children, which the master was to settle. See *Kearsley v. Woodcock*, 3 Ha. 185; *Wallace v. Anderson*, 16 Bea. 533. A limitation to the husband for life, or until bankruptcy, then to the wife for life, with remainder if she should pre-decease her husband, after his death or sooner if he should become bankrupt, to the children *then living*, means children living at the wife's death, not at the time of the bankruptcy. In *re Edgington's Trust*, 3 Drew. 202. See as to limitations until bankruptcy under wills, *post*, tit. "VESTING AND DIVESTING OF ESTATES," Chap. II. s. 10. Comp. *Robertson v. Richardson*, 30 Ch. D. 623.

CHAPTER VI.

PROVISION FOR WIFE.

SEC. 1.—*Jointure.*

<i>Provisions for Wife in general</i>	636	<i>At what Time ascertained</i>	638
<i>Jointure in Bar of Dower</i>	637	<i>Deficiency</i>	638
27 Hen. 8, c. 10.	637	<i>Covenant as to Right to distrain</i> ...	638
<i>Requisites of Legal Jointure</i>	637	<i>Satisfaction of</i>	638
<i>Jointure by Agreement</i>	637	<i>No Interest on Arrears</i>	638
<i>By Tenant in Tail—Deed not en-</i>		<i>Release—Confirmation</i>	638
<i>rolled</i>	637	<i>Wife's Equities after</i>	638
<i>Elopement or Adultery no Bar</i>	637	<i>Of Part not Release of the Whole</i> ...	638
<i>Value, &c. of Jointure</i>	638	<i>Jointress having Title Deeds</i>	638

THE interest which the wife takes in the settled property depends of course upon the settlement. When the property belongs to the

husband and consists of real estate, there is frequently a jointure rent-charge given to the wife, and sometimes an annuity for pin money. When the property, whether real or personal, belongs to her, she usually takes an interest in it, or some part of it, for her life to her separate use, with restraint on anticipation. The cases on this subject have already been considered (*ante*, tit. HUSBAND AND WIFE). With respect to the wife's right to dower, *ante*, p. 368.

One method of barring it was by giving the wife a provision or jointure in lieu of it. But a provision for the wife may be, in the ordinary and popular acceptance of the term, a jointure, though not intended to be in bar of dower. It was common, before the Statute of Uses, to convey estates to trustees to the use of the husband. As the trustees took the legal estate, the wife, not being dowable of a trust, would have been without a provision but for the practice of making one for her, by the husband taking a conveyance from his trustees of some part of his property to himself and wife in joint tenancy. "A jointure, strictly speaking, signifies a joint estate limited to both husband and wife, but in common acceptance extends also to a sole estate limited to the wife only." 2 Bl. Com. 137. The limitation to them jointly gave the wife an estate by *survivorship* on the death of her husband in her lifetime.

When the Statute of Uses turned the use into possession the wife would have been dowable of all her husband's estates, but for the provision in the act, that the wife should not be entitled to dower where she had a jointure settled upon her. See 27 Hen. 8, c. 10. The chief requisites of a good *legal jointure* in bar of dower are thus (in substance) stated by a learned writer. 1 Rep. Husband and Wife, by Jacob, 464 *et seq.*; and see Co. Litt. 36 b.

1. The jointure must necessarily commence at the husband's death.
2. It must be limited to the wife solely, or to her and her husband jointly.
3. It must be for her life or greater estate (Co. Litt. 36 b), or be determinable by her own act.
4. It must be made before the marriage; if after, it is voidable at her election on her husband's death. *Ib.*; *Frank v. Frank*, 3 M. & Cr. 170.
5. The jointure must be expressed to be in satisfaction of dower.
6. At law the jointure cannot be out of a *trust* estate, but otherwise in equity.

The wife, though an infant, is bound by a proper jointure (*ante*, p. 632). When she is of age she may agree to accept her husband's bond as a provision for a competent jointure in bar of her dower (*Dyke v. Rendall*, 2 D., M. & G. 209), or any provision out of his personality. *Caruthers v. Caruthers*, 4 B. C. C. 500, 513. A jointure by the husband tenant in tail, though void as against the remainderman, the deed not being enrolled under the act, is a bar of the wife's dower. *Cooper v. Cooper*, 6 Ir. Ch. Rep. 217. This was on the Irish Act, but the rule would be the same in England, for the provisions in both acts as to enrolment are alike. A jointure in lieu of dower and thirds at common law is no bar of a distributive share under an intestacy. *Colleton v. Garth*, 6 Sim. 19. The wife's elopement or adultery does

not bar her right to her jointure. *Sidney v. Sidney*, 3 P. W. 269; *Seagrave v. Seagrave*, 13 Ves. 443.

A covenant that the jointure estates are of a particular value means of that value at the time of the settlement, not that they shall continue of that value. *Speake v. Speake*, 1 Ver. 217; see *Wace v. Bickerton*, 3 De G. & S. 757. If the rents of *other* settled estates are bound by covenant to make good any deficiency in the jointure estates, the covenant is a lien on the former estates in case of deficiency. *Eustace v. Keightley*, 4 B. P. C. 588. And a covenant to charge after-acquired estates with the jointure binds an estate contracted for. *Warde v. Warde*, 16 Bea. 103. In *Monypenny v. Monypenny* (3 D. & J. 572), the husband granted a rent-charge to his wife out of an estate which he held only for his own life, and covenanted that she might distrain. It was held that the wife had a remedy under the covenant after her husband's death, and that damages were recoverable proportioned to the loss sustained by reason of the covenant not being available against the land. A devise of all the covenantor's lands in a particular place to the wife for her life is no satisfaction of a covenant that jointure lands are of a *particular value* if they are not (*Prince v. Stebbing*, 2 Ves. sen. 409); but a devise of the whole of the jointure lands to the wife for life will, if they are of sufficient value, be a satisfaction of the covenant; and a devise of part a satisfaction *pro tanto*, the jointure being apportioned rateably on the respective properties charged with it (*Eyre v. Green*, 2 Coll. 527), unless a contrary intention appear by the will. *Powell v. Grigby*, 3 Cl. & Fin. 103. Interest is not allowed on arrears of jointure except in very special cases. *Anon.*, 2 Ves. sen. 661.

Where a jointress to facilitate a sale releases the estate charged with her jointure, and agrees to accept the *income* of investments arising from and representing the proceeds of the sale, such income being at the time equal in amount to the jointure, the *capital* of such investments must in general make good any deficiency of income occasioned by reason of the substituted security proving insufficient (*Arundell v. Arundell*, 1 M. & K. 316). When the wife releases the jointure lands to enable her husband to mortgage, her right will subsist as against the equity of redemption. *Wood v. Wood*, 7 Bea. 183. A release of a *rent charge*, when a jointure is a rent charge, is not now a release of the whole, although formerly it was. 22 & 23 Vict. c. 35, s. 10. A jointress, who is in possession of the title deeds, is not obliged to produce or deliver them up unless her jointure is confirmed. *Petre v. Petre*, 3 Atk. 511; *Ford v. Perring*, 1 Ves. jun. 76.

SEC. 2.—*Pin Money.*

What it is—Application of 939 | *Savings—Arrears*..... 639

By the expression *pin money* is usually understood money to be expended by the wife in dress and ornaments suitable to her station in life. The wife is not liable to account for its application, but it is said to be coupled with a *duty* to apply it for her dress, ornaments, &c. *Howard v. Digby*, 2 Cl. & Fin. 634; Sug., H. L. Ca. 162; *Jodrell v. Jodrell*, 9 Bea. 45. That duty performed, she is entitled to any savings in like manner as other savings of property settled to her separate use. *Sir P. Neal's Case*, cited Pr. Ch. 44. If the husband has provided for his wife's dress, &c., she cannot claim any arrears at his death (*Fowler v. Fowler*, 3 P. W. 355; *Howard v. Digby*, *sup.*); unless, perhaps, where they have previously been demanded of him and he has promised to pay them. See *Ridout v. Lewis*, 1 Atk. 269; *Foss v. Foss*, 15 Ir. Ch. 215; *Edgeworth v. Edgeworth*, 16 Ir. Ch. R. 348. As a general rule an account for it will not be carried back beyond one year. *Ld. Townshend v. Windham*, 2 Ves. sen. 7; *Peacock v. Monk*, *ib.* 190; *Thrupp v. Harman*, 3 M. & K. 513.

CHAPTER VII.

OF THE INTERESTS OF THE CHILDREN UNDER SETTLEMENTS OF
PERSONAL ESTATE.

<i>Usual Provisions—Hotchpot clause</i>	639	<i>Advancement — Maintenance—Ac-</i>	
<i>Hotchpot—Meaning of</i>	640	<i>cumulation</i>	641
<i>Right of Appointee to share in</i>		<i>Object of Advancement</i>	641
<i>unappointed Fund</i>	640	<i>How exercised</i>	641
<i>When Appointee excluded</i>	640	<i>Marriage of Daughter</i> ...	641
<i>May keep appointed Fund and</i>		<i>Consent by Tenant for Life</i> ...	641
<i>give up unappointed Share</i> ...	640	<i>Advancement by the Court</i>	641
<i>Several Hotchpot Clauses</i>	640	<i>Accumulation Clause</i>	642

Usual Provisions—Hotchpot Clause.] The usual provisions for children in a settlement of personal estate, or real estate directed to be sold, are, subject to the life interests of the husband and wife, for all the children (and sometimes remoter issue) of the marriage as the parents or survivor of them shall appoint, and subject to and in default of appointment, for sons who attain twenty-one, and daughters who attain that age or marry under it. Thus no interest will vest in them unless they attain the prescribed age, or, being daughters, marry

under it. See *post*, tit. "VESTING AND DIVESTING OF ESTATES." There are also, in general, provisions for advancement, maintenance and accumulation.

The settled trust funds are usually subject to the appointment of the parents. It not unfrequently happened that, by reason of a partial exercise of a power, its objects became entitled to participate in the fund subject to it in unequal shares, though this result might have been quite contrary to the intention of the appointor. Thus, on a partial appointment being made to one object and no appointment to the others, the appointee took his own appointed part, and in addition an equal share with the others of the unappointed part. Nothing indeed is better established by the authorities than the rule that an appointee, object of the power, is entitled to share in the unappointed fund. *Wilson v. Piggott*, 2 Ves. jun. 351; *Fordyce v. Bridges*, 2 Ph. 497, 513; *Wombwell v. Hanrott*, 14 Bea. 143. And his right will not be excluded by the appointment being expressed to be of his *share* of the fund or portion (*ib.*), or *in lieu* of all claims for the original or principal share in the trust fund, unless followed by a proviso that the appointment shall not affect the right of *accruer and survivorship*, the intention in that case being clear to *limit the right* to the case of *accruer and survivorship* on the death of the other objects of the power. *Foster v. Cautley*, 6 D., M. & G. 55. The right of the appointee will also be excluded where the appointment recites the desire of the appointor that the fund shall be equally divided between the objects of the powers. *Fortescue v. Gregor*, 5 Ves. 553; *Alloway v. Alloway*, 4 Dr. & War. 386, 391. But the general rule being as stated, it follows that a child to whom an appointment has been made will have an advantage over any other child or the representatives of any deceased child to whom no appointment has been made. To prevent this it has become usual to insert what is termed the hotchpot* clause, by the operation of which no child taking under an appointment can claim a share of the unappointed fund without bringing his *appointed share* into the common stock, a division of which is then made between the children equally. Of course, however, the appointee is not bound to do this, unless he claims a part of the unappointed fund; but he may elect to keep his appointed share and give up his right to any unappointed part of the fund. The hotchpot clause is founded upon the same principle as the provision relating to hotchpot in the Statute of Distributions. *Ante*, p. 284. Where separate sums are settled by separate deeds, each containing the hotchpot clause, the clauses are distinct and operate only on the funds respectively subject to them. *Montague v. Montague*, 15 Bea. 565. Life interests and reversionary interests must be brought into hotchpot under the usual hotchpot clause. *Eales v. Drake*, 1 Ch. D. 217, case under a will.

Advancement—Maintenance—Accumulation.] The usual power

* According to Littleton, the word means pudding. See Co. Lit. 176 b, 177 a.

of advancement authorizes the trustees (in the lifetime of the parents or survivor, with their, his, or her consent) to raise a part, not in general exceeding half of the expectant share of any child for his or her advancement in life. Such a power is usually exercised by the trustees raising the sum authorized or part of it, and applying it either in apprenticing the child, or (formerly) buying him a commission, setting him up in business, &c., as in their discretion may be best for his interests. When a daughter is an object of the power, it also authorizes an appointment on her marriage. *Lloyd v. Cocker*, 27 Bea. 645. In *Roper Curzon v. Roper Curzon* (L. R., 11 Eq. 452), the court allowed a sum to be advanced after the marriage of a son, and settled upon the trusts of a post-nuptial settlement by him, he having no other provision, and the parents, the tenants for life, consenting. A power of advancement (under a will), for setting up the children of the testator in business, does not justify trustees in advancing the share of a married daughter for the purpose of paying her husband's debts. But the share may be advanced to set up the daughter in business, her husband covenanting that it shall be for her separate use. *Talbot v. Marshfield*, L. R., 3 Ch. 622; *Re Kershaw's Trusts*, L. R., 6 Eq. 322. If the advancement be once completed, as formerly by the purchase of a commission, though it might from circumstances be sold again almost immediately afterwards, the purchase-money, in the absence of fraud, belonged to the child advanced. *Lawrie v. Bankes*, 4 K. & J. 142. Where a sum was directed to be applied in the purchase of a commission for A., and in consequence of the abolition of such purchases, it could not be so applied, it was held, that A. was not entitled to the money. *Re Ward's Trusts*, L. R., 7 Ch. 727. Where trustees were empowered under a will at any time or times during the life of A., to apply any part of a fund not exceeding one moiety in or towards his preferment or advancement, or otherwise for his benefit as the trustees should in their discretion think fit, and at the date of the will A. was thirty years of age, and had been married for nearly three years. It was held that the trustees might apply one moiety of the trust fund in payment of debts incurred by A., the interest on which absorbed nearly the whole of A.'s income, and the principal of which he was unable to pay out of his own resources. *Lowther v. Bentinck*, L. R., 19 Eq. 166. If there is a bequest to daughters who shall attain twenty-five or marry under that age, and a power of advancing part of their shares for their benefit, the trustees may apply such part for their maintenance, where the only provision for maintenance ceases when they attain twenty-one. *Re Breed's Will*, 1 Ch. D. 226.

The power of a tenant for life to consent to an advancement is extinguished if he parts with his life estate. *Noel v. Ld. Henley*, M'Clel. & Y. 303. To give effect to his consent in such a case would enable him to derogate from his own grant. But a wife who has a life interest in a fund, with power of consenting to an advance for her children, and who, on her husband's death, marries again without a settlement and without doing anything to affect her power,

may consent to the advance, though her second husband has assigned her life interest. *Whitmarsh v. Robertson*, 1 Coll. 570.

In cases in which the question of advancement has been before the court, it has frequently broken into the capital of a child's share for the purpose of his advancement. *Walker v. Wetherell*, 6 Ves. 474.

The settlement then usually provides for the application of the income of the expectant shares of the children for their maintenance and education, the surplus income being directed to be accumulated, eventually to follow the destination of the fund out of which it proceeded. Formerly, by the 23 & 24 Vict. c. 145, provisions for these purposes were to be taken as included in settlements, unless there was a direction to the contrary. See now Conveyancing Act, s. 43, *post*, Chap. VIII. Settlements of real estate usually contain also various powers of leasing, sale, &c. These will be noticed, *post*, in tit. "POWERS." And as to investments of monies, see tit. "TRUSTS."

CHAPTER VIII.

OF THE INTERESTS OF CHILDREN UNDER SETTLEMENTS OF REAL ESTATE.

SEC. 1.—*Of the Eldest Son.*

Trustees to preserve 642 | *Limitations in Tail* 642

FOLLOWING the limitations of life estates to the parents or one of them, there was almost invariably, formerly, a limitation to trustees to preserve the contingent remainders of the children or others in remainder. See now tit. "WILLS," Chapter on Contingent Remainders and Executory Devises.

The limitations of real estate in strict settlement are (subject to life estates) to the first and other sons in tail, then for the daughters in tail in common, with cross remainders between them, with, in general, an ultimate remainder to the settlor in fee. When any estate is by marriage or any other settlement settled in remainder to children, with remainders over, any posthumous child may take as if born in the father's lifetime. 10 & 11 Will. 3, c. 22, 16 (Ruff.) s. 1. So where he is entitled under a will. *Recre v. Long*, 1 Salk. 227; see Co. Lit. 298 a (n. 3). There are generally provisions (which will be considered in the next section) for raising portions for younger children. Commonly, where real estate of small or moderate value is settled, there is a trust for sale, the proceeds being held upon trusts for all the children, and there is not, or not often, any distinction in favour of the eldest son. In such cases, therefore, there is no difference between settlements of real estate directed to be sold and those of

ordinary personal estate, *ante*, Ch. VII. It not unfrequently happens that the estate limited to the eldest son is subject, on his becoming entitled to another specified estate, to a shifting clause, carrying over the settled estate to a younger brother. These clauses will be considered in tit. "USES." Again, a younger child becoming an eldest son may, by reason of the family or other estate being limited to him as eldest, be excluded from a younger child's portion, which he would otherwise have taken. This subject will be considered in tit. "POWERS."

SEC. 2.—Of the Younger Children—Portions.

§ 1. Time of raising and paying Portions.

<i>Ordinary Provisions</i>	643	<i>Portions secured by Term and not</i>	
<i>Usually subject to Appointment</i> ...	643	<i>subject to prior Life Interests</i> ...	643
<i>In Default to Sons at Twenty-one,</i>		<i>Subject to Prior Life Interests</i>	644
<i>Daughters at Twenty-one or Mar-</i>		<i>Cannot be raised to prejudice of</i>	
<i>riage</i>	643	<i>Jointress</i>	644
<i>Limitation to Issue</i>	643	<i>Assets marshalled</i>	644

In settlements of real estate there are usually provisions for raising portions for the younger children of the marriage; in general, where the property is large, by means of a term vested in trustees. Like shares in settled personal estate, portions are almost invariably subject to a power of appointment in the parents or one of them. In default of appointment, the portions are in general (subject to the parents' life interests) payable to sons at twenty-one and to daughters at that age or on marriage under that age. Sometimes the powers of the settlement are not limited to children, but extend to the issue of the marriage generally; and where this is the case, and the word is used in its larger sense of all descendants, it will be construed accordingly. But if the context shows that the word is to be used in its more limited sense of children, it will be restricted accordingly. *Marshall v. Baker*, 31 Bea. 608. There are in general hotchpot, advancement and maintenance clauses corresponding with similar clauses relating to settlements of personal estate (*ante*, p. 640), and clauses of survivorship and accruer; by the operation of which the portion of a child who does not take a vested interest goes over (subject to any appointment to the contrary) to the children who do. In general where, as is usual, the eldest son takes the estate (*ante*, p. 642), he is excluded from any participation in the portions. See, as to a proviso avoiding portions in the event of the estates shifting, *Visct. Holmesdale v. West*, L. R., 12 Eq. 280, *post*, tit. "USES."

Where the portions are secured by a term, if the payment of them be not expressly made subject to the life interests of the parents, as is now almost invariably the case, the portions will be raiseable in their lifetime, though the term may be reversionary. *Corbett v. Maidwell*,

1 Salk. 159, and many other cases cited in *Codrington v. Foley*, 6 Ves. 364, 371; *Michell v. Michell*, 4 Bea. 549; *Massy v. Lloyd*, 10 H. L. C. 248; see a very useful note (3) to *Smith v. Evans*, Amb. by Blunt, 633. But if the term or other estate of the trustees cannot be made available in the lifetime of the tenants for life, the portion cannot then be raised (*Butler v. Duncomb*, 1 P. W. 448; *Brome v. Berkley*, 2 P. W. 485), or even in some cases where the term precedes the life estate. *Lawson v. Swetenham*, 18 Bea. 98. Where the portions are subject to contingencies, they are not raiseable during a life estate, unless the contingencies have happened. *Codrington v. Ld. Foley*, 6 Ves. 376. So if the portions are subject to a power which is exercised, they cannot be raised against the tenant for life. *Wynter v. Bold*, 1 S. & S. 507. Portions cannot be raised to the prejudice of a jointress. *Churchman v. Harvey*, Amb. 335; *Hall v. Carter*, 2 Atk. 356. Nor can portions which are payable after satisfaction of debts be raised until the debts are discharged. *Daly v. French*, 6 B. P. C. 55. Where a term is created to secure portions, with power to revoke it, the portions cannot be raised while the power subsists. *Reresby v. Newland*, 2 P. W. 101.

Equity will marshal assets in favour of children entitled to portions. Thus, where a jointure rent-charge is charged upon an estate and also secured by covenant, and portions are charged upon the estate, but not otherwise secured, equity will decree the rent-charge to be satisfied out of the assets bound by the covenant, if sufficient, leaving the estate clear to discharge the portions. *Reeve v. Reeve*, 1 Ver. 219; *Lanoy v. D. of Athol*, 2 Atk. 444. It does not appear to be settled whether the court will allow all the portions when charged on land—*presumptive* as well as vested—to be raised, or only the latter. Upon this point the authorities are conflicting. In some cases, the court has allowed the whole sum to be raised at once, though some of the children were then under age, and had not acquired vested interests; the portions of the latter being invested in government securities for them, or for those entitled in default of their attaining vested interests. *Gillibrand v. Goold*, 5 Sim. 149; *Leech v. Leech*, 2 Dr. & War. 568. In others, the court has refused to allow the amount of portions not immediately payable to be raised at the instance of the eldest son, who was desirous of having the estate discharged from them. This would involve, the court said, a change of the security and a diminution of interest. *Dickinson v. Dickinson*, 3 B. C. C. 19; *Wynter v. Bold*, 1 S. & S. 507; *Sheppard v. Wilson*, 4 Ha. 392.

§ 2. *Mode of raising Portions.*

<i>Payable out of Securities</i>	645	<i>Power to mortgage authorizes Sale</i> .	645
<i>Portions charged on Land</i>	645	<i>Portions raised</i>	646
<i>Out of Rents and Profits</i>	645	<i>Land discharged</i>	646
<i>Cutting Timber—Working Mines</i> ...	645	<i>Cost of raising falls on Estate</i>	646
<i>Sale authorized</i>	645	<i>Advance by Father</i>	646
<i>Power to appoint</i>	645	<i>Release by advanced Child to</i>	
<i>Although a mere Charge, Sale or</i>		<i>Father</i>	646
<i>Mortgage allowed</i>	645	<i>Keeping Charge on Foot</i>	646

When portions are invested in the funds or other securities or on mortgage, the portions are raised by realizing the securities, the portions being paid out of the monies thus raised to the children or others entitled. If the portions are charged on land, the mode of raising them is usually pointed out by the settlement, and is generally out of the rents and profits of the estate, or by demise, sale or mortgage. Portions are sometimes directed to be raised out of *yearly* rents and profits, or even rents and profits generally. In such cases it was held formerly that there could be no sale or mortgage of the estate. *Trafford v. Ashton*, 1 P. W. 415; *Evelyn v. Evelyn*, 2 P. W. 666. It was held, however, in an early case, that where the ordinary profits (by reason of the term being too short) were not sufficient to raise a portion, timber might be felled, or a mine worked, for the portion against the heir (*Offley v. Offley*, Pr. Ch. 27); and the rule was gradually extended, until the court at length construed the power to raise portions out of rents and profits generally as authorizing a *sale or mortgage* of the lands, unless where restricted by the context. *Ly. Shrewsbury v. Ld. Shrewsbury*, 1 Ves. jun. 233; see 2 Ves. jun. 481, n.; *Bootle v. Blundell*, 19 Ves. 528 (on a will). The question being one of intention (*Wilson v. Halliley*, 1 R. & My. 590), the construction authorizing a sale or mortgage will not be affected by the direction being to raise as soon as *conveniently may be* (*Trafford v. Ashton*, 1 P. W. 415), or by its being coupled with the expression of a desire that the estate should be kept entire. *Allan v. Backhouse*, 2 V. & B. 65; aff. 1 Jac. 631. A power of appointing portions, in such manner and in such proportions as the appointor shall think fit, includes a power to direct them to be raised by sale or mortgage. *Green v. Belcher*, 1 Atk. 507.

The court will decree a sale or mortgage, although there may be no *term* to secure the portions, but they are simply charged on the land, or the trustees have only a right of entry to receive the rents and profits, or a power to distrain. *Meynell v. Massey*, 2 Ver. 1; *Green v. Belcher*, 1 Atk. 505. Under a power to mortgage for portions, the court may order a mortgage or sale (*Gerrard v. Gerrard*, 2 Ver. 458), and the court, the heir desiring it, will decree a sale, though the younger children are desirous of having their portions raised out of rents and profits. *Warburton v. Warburton*, 2 Ver. 420. To raise by *demise* was held in one case to mean not at rack rent but on fine.

Smith v. Evans, Amb. 633. When once the portions have been raised and paid to the trustees, the land is discharged though the trustees misapply the fund. *Juxon v. Brian*, Pr. Ch. 143; *Carter v. Barnardiston*, 1 P. W. 518; see *Harrison v. Cage*, 2 Ver. 85. The costs of raising portions in general fall on the estate out of which they are raised. *Michell v. Michell*, 4 Bea. 549. *Armstrong v. Armstrong*, L. R., 18 Eq. 686.

When a parent makes an advance to one of several children entitled to a portion in default of appointment, it will *prima facie*, and in the absence of any direction to the contrary, operate to the exoneration of the estate charged. *Folkes v. Western*, 9 Ves. 460; *Noel v. Ld. Walsingham*, 2 S. & S. 99; *Lee v. Head*, 1 K. & J. 620. But the parent may declare that the child advanced shall receive its full portion irrespective of the advance, or may declare that the sum advanced shall remain a charge upon the estate for his (the parent's) own benefit. *Noel v. Ld. Walsingham*, 2 S. & S. 99, 111. A release by the child to the father, advancing the portion, of the sum advanced, will not be equivalent to an assignment of it to him. *Noel v. Ld. Walsingham*, *sup.* Where, therefore, the intention is to keep on foot the sum advanced, there should be an explicit declaration to that effect or an assignment. See *Gower v. Gower*, 1 Cox, 53.

§ 3. Amount to be raised.

<i>When variable according to Number of Children</i>	646		<i>Survivorship and Accruer</i>	647
			<i>Death after Interest vested</i>	647

Not unfrequently the gross amount to be raised for portions depends upon the number of the children, that is, if one so much, if two so much more, coupled frequently with clauses of survivorship and accruer.

In *Rolt v. Rolt* (Ca. t. Tal. 189), a sum of 2,000*l.* was to be raised for every younger son, and a sum of 3,000*l.* for every younger daughter, to be paid at twenty-one, the share of a child dying to be equally divided amongst the survivors. There were four younger sons and two daughters, one of whom died under age. It was held that a sum of 14,000*l.* was to be raised, the share of the deceased daughter being divided according to the trusts of the settlement. See *Knapp v. Knapp*, L. R., 12 Eq. 238. In general, when a particular amount may be appointed, according to the number of children *born*, the power may be exercised according to the number of such children who were born, though some may be dead at the time of the appointment being made. *Ib.* And though there may be no clause of survivorship and accruer, yet if the articles or settlement direct, in express terms, that on the birth of each child an additional sum shall be raised, payable at a particular age, the whole sum will be raiseable according to the number of children born, and payable to the child or

children attaining vested interests, though some may have died under the specified age. *Hemming v. Griffith* and *Griffith v. Hemming*, 2 Giff. 403. And a child will be entitled if he attain the age of vesting, though he may die before his parents and before the share becomes payable. In *Cholmondeley v. Meyrick* (1 Ed. 77), a term was created to secure portions (subject to a power of appointment, which was not exercised), if one younger child 5,000*l.*, if two 6,000*l.*, if four 8,000*l.*, payable at twenty-one or marriage, if the father should then be dead. There was a clause of survivorship and accruer as to the shares of children dying before they were *payable*, with a proviso that the surviving child or children was or were not to have more in all than was provided for them in case the deceased children had not been born. It was held, that the children attaining twenty-one or marrying in the father's lifetime were entitled to their shares, although they afterwards predeceased their father. See *Rooke v. Rooke*, 2 Ed. 8; *Willis v. Willis*, 3 Ves. 51. An express direction, however, to raise only a particular sum in the event of there being only one child or a stated number of children living, will prevail over ambiguous expressions leading to a contrary construction. Thus, in *Clarke v. Jessop* (Dr. t. Sug. 301; see *Chamberlain v. White*, 6 B. P. C. 61), the trusts of a term were to raise not more than 2,000*l.*, to be equally divided between younger children, sons at twenty-one, daughters at eighteen or marriage; provided that if any such child should die under age and unmarried, his or her share should go to the survivors, if but one younger child such child to have 1,000*l.* and no more, which sum was then alone to be raised. There were two younger children, who both survived their parents; one died under age and unmarried. It was held that a sum of 1,000*l.* only was raiseable.

§ 4. On what Property charged.

<i>Land charged with Portions primary Fund.....</i>	647	<i>Charge on several Estates—Contribution</i>	648
<i>Charge on Property of which Testator should die seised.....</i>	648	<i>Express Charge.....</i>	648
		<i>Portions secured by Term</i>	648

Where a debt exists and real estate is charged with the payment of it, nevertheless the personal estate of the person liable to pay the debt will be the fund to be primarily resorted to. But where real estate is charged, not in satisfaction of any debt, but in favour of a particular person, the real estate must be resorted to. *Wilson v. E. Darlington*, 1 Cox, 172, 175; *Burgoyne v. Fox*, 1 Atk. 576; *Ferrers v. Ferrers*, 6 B. P. C. 97. Upon this principle, where real estate is charged with portions, and they are also secured by the bond or covenant of the settlor, the realty will nevertheless be the primary fund for payment. *Lechmere v. Charlton*, 15 Ves. 193. And where portions were secured by bond only, and the obligor charged them by his will on his real estate, that was held to be the fund for payment of

them. *Reade v. Litchfield*, 3 Ves. 475; see *Ward v. Ld. Dudley*, 2 B. C. C. 316. When the portions are secured by covenant, the terms of the covenant regulate the rights of the parties taking under it, and the liability of the covenantor. Thus, a covenant to charge a sum for portions on all the real and personal estate of which the covenantor shall die seised or possessed, and that they shall be a first charge, only binds the property of which the covenantor dies seised, and does not prejudice nor affect any *bonâ fide* dealing with it or disposition of it as against himself, as by charge, jointure or otherwise. *Sullivan v. Sullivan*, 2 Jo. & Lat. 769. Where several estates are equally charged with the payment of portions, as between the estates themselves, each is liable to contribution in proportion to its value at the time of payment. If at such time the estates belong to different owners, and one estate is in possession and the other in reversion, they will be valued accordingly; and if the estate in possession has been compelled to pay the portions, it will be entitled to contribution out of the other estate when it falls into possession. *Heveningham v. Heveningham*, 2 Ver. 355; *Wardell v. Wardell*, 4 B. C. C. 286; see *Ley v. Ley*, L. R., 6 Eq. 174. The portions must be expressly charged upon property to make it liable to them. The liability will not be extended by implication from one estate to another. Therefore a devise of property, comprising settled and other lands, subject to monies secured by the settlement, and which were charged on the settled lands, will not charge such monies on the lands devised but not settled. *Gough v. Andrews*, 1 Coll. 69.

When portions are secured by a term which comes after a limitation in tail, this order will be reversed, to prevent the term being barred by the tenant in tail. *Uvedale v. Halfpenny*, 2 P. W. 151. But unless priority has been given to the term, it may be barred by the tenant in tail. If not so barred, the portions will be raiseable. *Ramsden v. Hylton*, 2 Ves. sen. 310.

§ 5. Interest on Portions.

<i>Commences from Time Portion is</i>		<i>Interest payable yearly</i>	649
<i>payable</i>	648	<i>Out of Rents and Profits</i>	649
<i>May be appointed, if Power</i>	648	<i>Rate of Lawful Interest</i>	649

"All interest is in default of payment," i.e., of the principal. *Butler v. Duncomb*, 1 P. W. 448, 458; *Churchman v. Harvey*, Amb. 335, 342. From the time a portion ought to be raised and paid, it in its own nature ought to carry interest, though not mentioned. *E. Pomfret v. Ld. Windsor*, 2 Ves. sen. 472, 487. The question therefore usually is, at what time the portion became payable. If there be an appointment in pursuance of a power which authorizes interest, lawful interest may be directed to be raised (*Boycot v. Cotton*, 1 Atk. 552; *Hall v. Carter*, 2 Atk. 358; *Lewis v. Freke*, 2 Ves. 507), and must be raised at the time appointed. *Gough v. Andrews*, 1 Coll. 59. But

it frequently happens, that the power does not in terms authorize the appointment of interest. In such cases, where the power is—as it generally is—to appoint in such manner and in such proportions as the appointor shall think fit, he may appoint the money to be paid at any time, as at twenty-one or marriage, and interest will be allowed from such time. *Green v. Belcher*, 1 Atk. 505, 507; see *Conway v. Conway*, 3 B. C. C. 267. When there is no power of appointment, or it is not exercised, interest is payable on portions from the time they become payable, according to the general rule. See the cases *ante*, p. 644. Therefore if the portions are to be raised in the lifetime of one or both parents, interest will be payable from that time. *Codrington v. Ld. Foley*, 6 Ves. 364, 380; *Gough v. Andrews*, 1 Coll. 59, 69. And where the portions are to be paid after the decease of a person, interest is payable from that time. *Hope v. Ld. Clifden*, 6 Ves. 499, 511; see *Bacon v. Clerk*, Pr. Ch. 500 (on a will).

Interest which is given from a certain time should not be allowed to accumulate, but be paid annually. *Boycot v. Cotton*, 1 Atk. 553. If the portions are payable out of rents and profits *only*, the portions are only due when the profits can raise them, and they only carry interest from the time the profits amount to enough to satisfy the portions. *Iry v. Gilbert*, 2 P. W. 13, 20; *Bagenal v. Bagenal*, 6 B. P. C. 81. But if they are to be paid out of profits or by sale the general rule applies, and interest runs immediately from the time the portions are payable. *Roseberry v. Taylor*, 6 B. P. C. 43. Where there is a power by mortgaging a term or out of rents and profits of the estate to divide portions, the trustees of the term may apply the rents and profits, first, in payment of the interest on the portions, secondly, in reduction of the capital. *Balfour v. Cooper*, 23 Ch. D. 472. Interest will not be allowed where the parties entitled to the principal have been negligent of their rights. *Merry v. Ryres*, 1 Ed. 1; *Barrington v. O'Brien*, 1 Ba. & Be. 180. Four per cent. is the rate of interest usually allowed by the court. See *Codrington v. Ld. Foley*, 6 Ves. 364, 384, and five per cent. on land in Ireland. *Balfour v. Cooper*, 23 Ch. D. 472. Under a power to charge, any lawful interest may be directed to be raised. *Ib.*; *Lewis v. Freke*, 2 Ves. Jun. 507. This case was decided when the rate of interest to be considered lawful was fixed by law. Any interest may now be considered lawful; but it is apprehended, that, in the absence of an express power authorizing any interest, an appointor could only direct such interest to be raised as the court would consider reasonable. If there is only a power of distributing the portions and not of charging them, there is no power to fix the rate of interest. *Balfour v. Cooper*, 23 Ch. D. 472. *Comp. Lewis v. Freke*, 2 Ves. 507, and *Young v. Ld. Waterpark*, 13 Sim. 199.

§ 6. Maintenance.

<i>When raisable generally</i>	650	<i>Past Maintenance</i>	654
<i>Time fixed by Settlement</i>	650	<i>Not limited to Maintenance</i>	654
<i>Father, if able, must maintain</i>	650	<i>Child having other Provision</i>	654
<i>Unless he contract otherwise</i>	650	<i>Breaking into Capital</i>	654
<i>Discretion of Trustees</i>	651	<i>Money advanced by Trustee</i>	654
<i>Circumstances of Father</i>	651	<i>Rate of Interest</i>	654
<i>Children taken from Father</i>	652	<i>Parents and Guardians not ac-</i>	
<i>Mother not bound to maintain</i>	652	<i>countable for</i>	654
<i>Statutory Powers</i>	652, 653	<i>Infant out of Jurisdiction</i>	654
<i>Portions vested or contingent</i>	652	<i>Divorce and Matrimonial Causes Act</i>	654
<i>Apportionment of</i>	653	<i>Custody, Maintenance and Educa-</i>	
<i>Too little allowed</i>	653	<i>tion of Children</i>	654

Some of the cases referred to under this head have been decided on wills, but are for the most part equally applicable, in principle, to settlements. The subject of maintenance out of portions is closely connected with that of interest, the interest in general forming the fund for maintenance. When there is no provision for maintenance until the portion is payable, such a provision will not be implied. See *Butler v. Duncomb*, 1 P. W. 448, 454. But where it is clearly expressed, effect must be given to it. *Staniforth v. Staniforth*, 2 Ver. 460. The court will in particular cases allow it to be raised, if necessary, by sale or mortgage of the term. *Lyddon v. Lyddon*, 14 Ves. 558. But the court leans against the construction for raising portions or maintenance out of a reversionary term. *Ly. Clinton v. Ld. Seymour*, 4 Ves. 440. See *Pierpoint v. Ld. Cheney*, 1 P. W. 488; *Ravenhill v. Dansey*, 2 *ib.* 179. When the time of payment is expressly or impliedly fixed by the settlement, maintenance can only be given from that time. *Hume v. Rundell*, 2 Sim. & St. 174.

As in the case of legacies, if the father be living and able to maintain his children he must do so, though there may be a fund applicable for this purpose in the event of his inability. *Thompson v. Griffin*, Cr. & Ph. 317. The distinction which formerly prevailed between gifts to children by way of bounty (as legacies under wills) and interests derived under settlements does not now prevail, or at all events will not be carried further. *Ib.* In this case the father being of ability, the court refused to allow maintenance, though there was a power given to trustees to apply the income of a fund for maintenance, although in the prior case of *Mundy v. E. Howe* (4 B. C. C. 224), where there was the same power, maintenance was, under the circumstances of the case, allowed, notwithstanding the father *was* of ability to maintain the children. But he may contract by the marriage settlement that certain property shall be applied to this purpose; in which case, although he may be of ability to maintain the children, he will be entitled to what he has contracted for. *Meacher v. Young*, 2 M. & K. 490; *Stocken v. Stocken*, 4 M. & Cr. 95; *Thompson v. Griffin*, *sup.* In *Ransome v. Burgess* (L. R., 3 Eq. 773), Kindersley, V.-C., commenting on these cases, observed, in substance, that the result of them appeared to be, that where the trust

property was derived from a stranger, the father, if of ability, must maintain; but if it was the subject of a marriage settlement, and a matter of contract, and a *trust* was expressed for the application of the income for maintenance, the father was entitled to what was proper for such maintenance without reference to his ability, but otherwise where the language of the settlement expressed merely a *power*. *Ib.* p. 780. See *In re Kerrison's Trusts*, L. R., 12 Eq. 422.

But the trustees must exercise a discretion. They are not at liberty to pay the whole income of the trust fund to the husband during the infancy of the children of the marriage without exercising any discretion as to its application to their maintenance. *Wilson v. Turner*, 22 Ch. D. 521. In this case *Ransome v. Burgess* (L. R., 3 Eq. 773) was discussed and the passage in the judgment of Kindersley, V.-C. (*sup.*), commented upon in the judgment of Jessel, M. R. *Ib.*, p. 526. The rule would now seem to be that where there is no absolute trust to apply the income for maintenance, but a discretionary trust, the discretion of the trustees in such cases is paramount, and the father has no independent right irrespective of such discretion. Where trustees by will were authorised, if they thought fit, to apply the income of shares to which children were presumptively entitled towards their maintenance, notwithstanding the father of the children might be of *sufficient ability* to maintain them, and a suit was instituted for the administration of the estate of the testator, it was held that the court would not control the discretion of the trustees, if they thought it fit that the income should be paid to the father for the maintenance of the children. *Brophy v. Bellamy*, L. R. 8 Ch. 798. But there are cases in which the court has controlled the discretion of the trustees in the allowances to be made for children; and in opposition to the trustees, directed that the whole income should be paid to the father of the children for their future and past maintenance. *Davey v. Ward*, 7 Ch. D. 754. But it is considered that the court will be cautious in exercising control over the discretion of trustees if honestly exercised. But it is their duty to consider what is most for the benefit of the child. See *In re Lofthouse*, 29 Ch. D. 921, 932; also *In re Roper's Trusts*, 11 Ch. D. 372; *In re Gadd*, 23 Ch. D. 134; *Tempest v. Ld. Camoys*, 21 Ch. D. 571; *In re Weaver*, *ib.* 615; *Gisborne v. Gisborne*, 2 App. C. 300.

Where the father is not of ability, it is not necessary that he should be actually insolvent to induce the court to make an order for maintenance, for if he be unable to give them an education suitable to their expected fortunes, maintenance will be allowed. *Buckworth v. Buckworth*, 1 Cox, 80 (on a will); see *Ex parte Williams*, 2 Coll. 740. In one case maintenance was allowed under the circumstances, although the father had 6,000*l.* a year. *Jerroise v. Silk*, 1 G. Coop. C. 52.

Notwithstanding a trust under a will for accumulation of income for the ultimate benefit of the child or children of A., the court will in a proper case allow him part of such income for the maintenance of his family. *Havelock v. Havelock*, 17 Ch. 807.

But the father, though of ability, will not be compelled to maintain his children where there is a fund available for that purpose, and they have been taken from him by order of the court. *Wellesley v. D. Beaufort*, 2 Russ. 1, 29. The mother is not under the same liability to maintain the children as the father, and after his death she is entitled to an allowance for this purpose, even although of ability to maintain them. *Billingsley v. Critchet*, 1 B. C. C. 268. And notwithstanding she may have a separate estate. *Hodgens v. Hodgens*, 4 Cl. & F. 323; see *Ex parte Ld. Petre*, 7 Ves. 403.

When no question arises as to subsisting life interests, the court will allow maintenance to children, who have no other provision, out of the interests of the portions to which they are presumptively entitled, although there may be no express direction in the settlement to that effect. *Brewin v. Brewin*, Pr. Ch. 195; *Warr v. Warr*, *ib.* 213. Formerly by the 23 & 24 Vict. c. 145 (Lord Cranworth's Act), where property was held in trust for an infant on attaining twenty-one, or contingently on any event previously to his attaining that age, the trustees might apply towards the maintenance or education of the infant the whole or any part of the income of the property, whether there should be any other fund applicable thereto or not, or any other person was bound to provide for such maintenance or education or not, and might accumulate the residue (s. 26). The power of maintenance under this section stops short at minority and does not apply to the interval between twenty-one and twenty-five. *Re Breed's Will*, 1 Ch. D. 226. This section was held to apply whether the interest of the infant was vested or contingent upon his attaining a particular age. *Re Cotton*, *ib.* 232. But in *In re George*, 5 Ch. D. 837, it was held that s. 26 (see *Re Dickson*, *infra*) was not applicable where the infant on attaining twenty-one would not be entitled to *interest* on his legacy, but only to the principal. Under this section it was held, that where property was given to trustees in trust for an infant, with a gift over in case of his death under twenty-one, and the trustees accumulated the income of the property not required for his maintenance, in pursuance of the powers given by this section, and the infant died under twenty-one, that the accumulations of income to the time of the death of the infant belonged to the infant, and were not to be held for the benefit of the remainderman who ultimately became entitled to the property from which the accumulations arose. *In re Buckley's Trusts*, 22 Ch. D. 583. See *In re Dickson*, 29 Ch. D. 331, *post*, p. 653. This section is now repealed by the act next referred to, which contains however a somewhat similar clause.

By the 44 & 45 Vict. c. 41 (Conveyancing Act, 1881):—

“43.—(1.) Where any property is held by trustees in trust for an infant, either for life, or for any greater interest, and whether absolutely, or contingently on his attaining the age of twenty-one years, or on the occurrence of any event before his attaining that age, the trustees may, at their sole discretion, pay to the infant's parent or guardian, if any, or otherwise apply for or towards the infant's maintenance, education, or benefit, the income of that

property, or any part thereof, whether there is any other fund applicable to the same purpose, or any person bound by law to provide for the infant's maintenance or education, or not.

"(2.) The trustees shall accumulate all the residue of that income in the way of compound interest, by investing the same and the resulting income thereof from time to time on securities on which they are by the settlement, if any, or by law, authorized to invest trust money, and shall hold those accumulations for the benefit of the person who ultimately becomes entitled to the property from which the same arise; but so that the trustees may at any time, if they think fit, apply those accumulations, or any part thereof, as if the same were income arising in the then current year.

"(3.) This section applies only if and as far as a *contrary intention* is not expressed in the instrument under which the interest of the infant arises, and shall have effect subject to the terms of that instrument and to the provisions therein contained.

"(4.) This section applies whether that instrument comes into operation before or after the commencement of this act." (1st January, 1882).

This section applies only to cases where, apart from it, the intermediate income or interest would belong to the infant on the gift of the corpus becoming absolute. *In re Dickson*, 28 Ch. D. 291. In this case the prior cases of *In re Cotton* and *In re George*, ante, p. 652, were commented upon and the latter case followed. *In re Dickson* was affirmed on appeal, 29 Ch. D. 331. In the judgments in this case will be found important observations on the repealed section and that now in force. As to the effect of a discretionary power to apply a fund for the maintenance of children, see *In re Lofthouse*, 29 Ch. D. 921. Where a testator gave a fund to trustees, in trust for all the children of A. equally, who being sons should attain twenty-one, or being daughters should attain twenty-one or marry, with benefit of survivorship amongst them, and he directed his trustees to accumulate the income of the shares of the children, and to pay the same to them as and when their presumptive shares should become payable under the previous trust: it was held on this section that the will did not express a "contrary intention" within the meaning of it, and that the children being infants and unmarried, the trustees might at their discretion apply the income of the trust fund in or towards the maintenance and education of the infants. *In re Thatcher's Trusts*, 26 Ch. D. 426.

Maintenance expressly given by a settlement, until the children attain their majority or (being females) marry under age, will be apportioned and paid up to the very day of majority or marriage (*Hay v. Palmer*, 2 P. W. 501), at which periods the portions themselves are in general made payable, subject to the life interests of the parents. If through mistake a less sum has been applied than ought to have been for the maintenance and education of a child, the court will allow the parents or guardians, who have expended more, to be repaid the excess to the extent of what would have been a proper

allowance. *Stopford v. Ld. Canterbury*, 11 Sim. 82. Originally the allowance for maintenance was only prospective. *Hughes v. Hughes*, 1 B. C. C. 387. In later cases, however, the court has ordered the allowance to be in respect of *past* as well as future maintenance (*Ex parte Penleaze*, *ib.* 387, n.; *Maberly v. Turton*, 14 Ves. 499), on a special case being made, but not as a matter of course. *Ex parte Bond*, 2 M. & K. 439. Where the allowance is for past maintenance, it will not be for more than the sum *actually expended* within the limits of a proper expenditure. *Bruin v. Knott*, 1 Ph. 572; see *Parsons v. Parsons*, 13 W. R. 214; *Brown v. Smith*, 10 Ch. D. 377. The allowance will not always be limited to what is necessary for mere maintenance and education; it will, in proper cases, be extended to the keeping up of a family mansion, or the like. See *Griggs v. Gibson*, 14 W. R. 538 (on a will).

Maintenance given by the settlement is raiseable, notwithstanding another provision may be given or comes to the child, as by devise or descent. *Ravenhill v. Dansey*, 2 P. W. 179; see *Poulett v. Poulett*, 6 Madd. 167. Where an infant is entitled in expectancy to two or more funds, the annual income of any one of which would be sufficient for his maintenance and education, the court will apply the income of that fund which it is most advantageous for him to have applied for that purpose. *Lygon v. Ld. Coventry*, 14 Sim. 41; *Bruin v. Knott*, 1 Ph. 572; see *Foljambe v. Willoughby*, 2 S. & S. 165; *Martin v. Martin*, L. R., 1 Eq. 369. The court will very rarely apply part of the capital for maintenance, or sanction such application on the part of a trustee (*Walker v. Wetherell*, 6 Ves. 474); though, under special circumstances, particularly where the outlay has been for the advancement of the child, this has been done, and the court has broken into a very small capital. *Ex parte Swift*, 1 R. & My. 575; *Ex parte Chambers*, *ib.* 577 (under wills); *Ex parte Green*, 1 J. & W. 253; see *Davies v. Davies*, 2 D., M. & G. 51. So where the infant was about to go abroad under circumstances advantageous to him. *Re England*, 1 R. & My. 499; see *Ex parte Hays*, 3 De G. & S. 485; *Walsh v. Walsh*, 1 Drew. 64. Sometimes even an advance by the trustee, under circumstances very beneficial to the infant, will be allowed in the account between them. See *Worthington v. M'Creer*, 23 Bea. 81; *Prince v. Hine*, 26 Bea. 634; *Robinson v. Killey*, 30 Bea. 520. But money expended on the maintenance of infants from motives of kindness will not be allowed. *Grove v. Price*, 26 Bea. 105.

When the portion is charged on land, and the settlement does not specify any rate of interest, if the court directs maintenance to be allowed, it will be, as a rule, at the rate of 4 per cent. on the principal charged, unless where the rate of interest on mortgages is generally higher, when the higher rate will be allowed. *Inledon v. Northcote*, 3 Atk. 438. Where the settlement specifies the rate it cannot be exceeded. *Long v. Long*, 3 Ves. 286, n. As regards the application of a fund by parents or guardians for the purpose of maintaining infants, if that duty be properly performed, the court will not, as a rule, require any account as to the particular application of the fund,

nor inquire whether there is any surplus or not (*Jodrell v. Jodrell*, 14 Bea. 397, 412; *Hadow v. Hadow*, 9 Sim. 438); even where there is a direction that on the shares of the infants becoming payable the accumulations, if any, on such shares shall be paid to the children entitled. *Browne v. Paull*, 1 Sim., N. S. 92; see *Raikes v. Ward*, 1 Ha. 445.

As to orders for maintenance where an infant is residing out of the jurisdiction of the court, see *De Weever v. Rochfort*, 6 Bea. 391; *Daniel v. Newton*, 8 Bea. 485; *Volans v. Carr*, 2 De G. & S. 242; *Lockwood v. Fenton*, 1 Sm. & G. 73. The Divorce Court has power to direct in what manner damages recovered from an adulterer shall be applied, and to direct that the same, or part, shall be settled for the benefit of the children of the marriage, or as a provision for the maintenance of the wife. 20 & 21 Vict. c. 85, s. 33. This court may also, in pending suits, provide by interim orders, and (under the 22 & 23 Vict. c. 61, s. 4) in the final decree, for the custody, maintenance and education of the children of the marriage, or for their being placed under the protection of the Court of Chancery (s. 35). See *Re Curtis*, 28 L. J., Ch. 458. In cases of the wife's adultery the court may order a settlement of her property in possession or reversion for the benefit of the innocent party or children of the marriage. 20 & 21 Vict. c. 85, s. 45. Instruments executed in pursuance of an order of the court are valid notwithstanding coverture. 23 & 24 Vict. c. 144, s. 6.

CHAPTER IX.

VOLUNTARY REMAINDERS AND ULTIMATE LIMITATIONS.

<i>What Remainders the Marriage Consideration will support</i>	655	<i>Next of Kin</i>	656
<i>In general only to Husband, Wife and Issue</i>	656	<i>Ultimate Limitations</i>	657
<i>To Children of former Marriage</i> ...	656	<i>Of Real Estate</i>	657
<i>To Children of future Marriage</i> ...	656	<i>Of Personal Estate</i>	657
<i>Illegitimate Child</i>	656	<i>Word "unmarried"</i>	657, 658
<i>To one Child on Marriage of another</i>	656	<i>Legal—Personal—Representatives</i> .	659
<i>To Brothers, Nephews, Nieces, &c.</i> .	656	<i>No Next of Kin</i>	659
<i>Voluntary Remainder followed by</i>		<i>Rights of Husband and Wife, if</i>	
<i>Remainder resting on good Con-</i>		<i>Divorced</i>	659
<i>sideration</i>	656	<i>Time of ascertaining Class of Next</i>	
		<i>of Kin</i>	659
		<i>Limitation to Heir</i>	659

Voluntary Remainders.] It was formerly considered that the marriage consideration rendered valid all the estates raised by the settlement, so as to make them good against purchasers from the settlor. *Jenkins v. Keymiss* or *Kemish*, 1 Lev. 150, 237; 2 P. W. 252; *Hale v. Lamb*, 2 Ed. 292—295. This doctrine, however, was soon shaken, and it was laid down broadly that the marriage only

supported limitations to the husband and wife and their issue, and not to collaterals or strangers (*Osgood v. Strode*, 2 P. W. 245, 255; see the cases *post*, p. 657); and this is still the doctrine of the court, subject to certain exceptions, which will be presently noticed. Where, however, a widow or widower, on a second marriage, makes a provision for the children of the first as well as of the second marriage, it will be good. *Newstead v. Searles*, 1 Atk. 265; *Ithell v. Beane*, 1 Ves. sen. 216. *Gale v. Gale*, 6 Ch. D. 144. See *Price v. Jenkins*, 5 Ch. D. 619. Even a provision for an illegitimate child has been held valid. *Clarke v. Wright*, 6 H. & N. 849. But limitations to the children of a future marriage are voluntary. *Wollaston v. Tribe*, L. R., 9 Eq. 44; see *Re Cullin*, 14 Ir. Ch. Rep. 506. Cons. however the judgment of Cockburn, C.J., in *Clarke v. Wright*, 6 H. & N. 849, 873. A limitation to a second son in remainder in tail, on a settlement made on the marriage of the first son, will not make the second son a purchaser. See *Staplehill v. Bully*, Pr. Ch. 224; comp. *Reeves v. Reeves*, 9 Mod. 128, 132; *Goring v. Nash*, 3 Atk. 186, where the articles were *executory*.

In *Pulvertoft v. Pulvertoft* (18 Ves. 90; and see *Sutton v. Chetwynd*, 3 Mer. 249, 255), Lord Eldon observes, that "where limitations extended to brothers or other relations (all within the marriage consideration), those are not cases of voluntary settlement." From this and the marginal note it would at first sight appear that he intended to express an opinion in favour of limitations to collaterals being within the marriage consideration. But this could not have been the case. See *supra*, p. 873. In *Johnson v. Legard*, it was held in two courts (see 6 M. & S. 60; 3 Madd. 283), and ultimately by Lord Eldon himself, on appeal (T. & R. 281), that, apart from the effect of an act of parliament which had been obtained, the remainders, which had been limited to the brothers of the settlor, were voluntary. This case has since been followed, and the doctrine there laid down is clearly established. In *Stackpoole v. Stackpoole* (4 Dr. & War. 320, 353), Sir E. Sugden, L.C. Ir., observed, that he could not say that the authorities were not in support of it, and the current of opinion of the profession had always been in favour of it. Limitations to brothers being voluntary, those to more distant relatives would of course be so. In *Smith v. Cherrill* (L. R., 4 Eq. 390), limitations subsequent to those for the issue, and in favour of collateral relatives, including a niece who had been adopted as a child, were held to be voluntary, and void under the 13 Eliz. c. 5, against creditors.

But a voluntary remainder, followed by a remainder resting on a good consideration, will, it has been held, be supported, though the latter remainder cannot arise. In *Clayton v. Ld. Wilton* (Sug. V. & P. 716, n., 13th ed.; S. C., 3 Madd. 302, n. (a); and 6 M. & S. 67, n.), the intended husband settled an estate on himself for life, with remainder to the first and other sons of the intended marriage in tail male, and with similar remainders to the first and other sons of the settlor by any after-taken wife, remainder to the daughters of the intended marriage in tail, remainder to the settlor in fee. The wife died without issue. It was held, that the husband, who had not

married again, could not make a good title to the fee; in other words, that he could not defeat the voluntary contingent remainders to his sons by a subsequent marriage, should he marry again. The principle of this decision is, perhaps, not altogether clear, as there could be no daughters, and the sons who might afterwards be born would have been mere volunteers. Consider *Wollaston v. Tribe*, L. R., 9 Eq. 44, and cases there cited, and *Re Cullin*, 14 Ir. Ch. Rep. 506. *Clarke v. Wright*, 6 H. & N. 849, 873; *Gale v. Gale*, 6 Ch. D. 144.

Limitations or trusts for the benefit of the next of kin of the settlor are voluntary. In *Hastings v. Orde* (11 Sim. 205), the wife's property was settled on her for life, then on her husband, with remainder to their children, with ultimate remainder as she should appoint by will, in default for her next of kin. There were no children. The marriage was dissolved, and the husband released his interest. It was held that the wife was entitled to a transfer of the fund. See *Cramer v. Moore*, 3 Sm. & G. 141; *Wollaston v. Tribe*, L. R., 9 Eq. 44. But these cases cannot be relied upon. Where by a marriage settlement the wife's property was settled, after life estates in the husband and wife and in default of children, in the event of the wife surviving, on her, and in the event of the husband surviving, as the wife should by will appoint, and in default, on her next of kin, excluding the husband, it was held, that the trust in favour of the next of kin could not be revoked, and that although there was no possibility of issue, the husband and wife together were not entitled to the corpus of the settled fund. *Paul v. Paul*, 20 Ch. D. 742, overruling *Paul v. Paul*, 15 Ch. D. 580. See *In re D'Angibau*, *Andrews v. Andrews*, 15 Ch. D. 228. In *Paul v. Paul*, *sup.*, the trusts were *executed*; had they been *executory* the case would have been different. See judgment of Cotton, L.J., p. 744.

Where the ultimate limitation is of real estate, it is usually to the heirs or right heirs of the settlor. Where a lady, who was seised in fee *ex parte maternâ*, married, and the ultimate limitation was to the person who would have been entitled in case she had died intestate and without having been married, her heir *ex parte maternâ* was held entitled. *Heywood v. Heywood*, 34 Bea. 317. See *Moore v. Simkin*, W. N. 1885, p. 186, where the ultimate limitation was to the right heirs of the wife's deceased mother. The ordinary ultimate limitation of personal estate, after the determination of the life interests and default on failure of the children or issue of the marriage, is, if belonging to the husband, to him absolutely; if belonging to the wife, to her absolutely, if she survive her husband; if she predecease him, then as she shall appoint; in default of appointment, to the persons who would be her next of kin under the Statute of Distributions, if she had died intestate and without having been married, or, as it is sometimes worded, unmarried. The word unmarried in some cases has been held to mean without a husband at the time of her death (*Clarke v. Colls*, 9 H. L. C. 601; see *Pratt v. Mathew*, 8 D., M. & G. 522; *Heywood v. Heywood*, 29 Bea. 9; *Mitchell v. Colls*, Johns. 674), and the children of the marriage will be entitled as next of kin, if not

otherwise expressly provided for, the object being to exclude the husband. *In re Norman*, 3 D., M. & G. 965; *Pratt v. Mathew*, *sup.*

But this construction has not been uniform with reference to the words if a person "should die without having been married." In *Wilson v. Atkinson*, 4 D., J. & S. 455, they were in a marriage settlement as applied to a wife held to mean, having regard to the context, without having been married to her *then* intended husband. So in *In re Ball's Trusts*, 11 Ch. D. 270, and *Upton v. Brown*, 12 Ch. D. 872, they were held to have the same meaning, and were construed as intended to exclude the husband only and not a child or children, who would be entitled as next of kin. In *Emmins v. Bradford*, 13 Ch. D. 493, however, where there was a limitation in the marriage settlement of a widow, after the wife's death, to the persons who would be entitled thereto if she had died "without ever having been married," it was held, by Jessel, M.R., that those persons took who would have been entitled if she had died a spinster, although there were children of her first marriage. The word *ever* was not dwelt upon by the M.R. as making the case stronger than it would have been without it.

The construction of the words "unmarried" or "without being married" depends very much upon the context. As to this, the rule laid down in *Jenkins v. Hughes*, 8 H. L. C. 571, viz., that "one court is not bound by the construction put upon a similar instrument by another court, unless some principle of construction is laid down, even though the words may be identically the same" (see *per* Jessel, M.R. *Emmins v. Bradford*, 13 Ch. D. 493, 496) must be borne in mind. In *Dalrymple v. Hall*, 16 Ch. D. 715, property was given by will to A. for life, "but if he should die unmarried," to be equally divided between the children of B. At the date of the will A. was a bachelor, and at the time of his death he was a widower. It was held that, in the absence of context showing a contrary intention, the word "unmarried" must be construed according to its ordinary or primary meaning, as "never having been married," and therefore that the gift to the children of B. did not take effect. Under a bequest to A., if sole and unmarried, but if married to her for her separate use for life, with remainder to her children, and A. is divorced at the time of the gift taking effect, she will be absolutely entitled, although she has children. *In re Lcsingham's Trusts*, 24 Ch. D. 703. In a recent case it was held that, although the word "unmarried" is one of flexible meaning, and may mean either "never having been married," or "not having a husband" at the time when a gift is to take effect, the former is the primary or natural meaning, and, in the absence of any context showing a different intention, the word will be so construed. *In re Sergeant, Mertens v. Walley*, 26 Ch. D. 575; see *Dalrymple v. Hall*, 16 Ch. D. 715. In *Brigg v. Brigg*, W. N. 1885, p. 42, the ultimate trust was in effect for the next of kin of the wife of her own blood and family as if she had died a feme sole intestate, the next of kin, including the half-blood, were to be held entitled to the personality, and the heir to the realty. Under an ultimate limitation to the

legal representatives of the wife in a due course of administration, her next of kin will be entitled as if she had died intestate and unmarried. *Briggs v. Upton*, L. R., 7 Ch. 376. But where, by a marriage settlement, the wife's real and personal estate was assigned on trust to pay the annual income to the husband for life, remainder to the wife for life, remainder as she should appoint; and in default for her personal representatives, and the wife predeceased her husband, without having made an appointment and without issue, it was held, after the husband's death, that his executors who had taken out administration to the wife's estate were entitled to the fund. *In re Best's Settlement Trusts*, L. R., 18 Eq. 686.

If the wife has no children, and, being illegitimate, no next of kin, the husband will be entitled as her administrator. *Hawkins v. Hawkins*, 7 Sim. 173. Under trusts for the wife, after the death of the husband, absolutely, if she survive, if the husband survive, as she shall appoint, and in default of appointment for her next of kin, she will be absolutely entitled if the marriage is dissolved through the husband's misconduct. *Jessop v. Blake*, 3 Giff. 639; see *Swift v. Wenman*, L. R., 10 Eq. 15; *Fussell v. Dowding*, L. R., 14 Eq. 421.

But these cases were not followed by Jessel, M.R., in *Fitzgerald v. Chapman*, 1 Ch. D. 563. He held, upon the authority of *Evans v. Carrington*, 2 D., F. & J. 481, *ante*, p. 627, that where there are trusts giving the husband a life interest in the event of his surviving his wife (as was also the case in *Swift v. Wenman*, *sup.*, and *Fussell v. Dowding*, *sup.*), the dissolution of the marriage on her petition does not give the court power to interfere with the settlement, so as to affect the husband's interest. And in *Burton v. Sturgeon*, 2 Ch. D. 318, it was held that the husband's rights under the settlement were not forfeited by the dissolution of the marriage at the instance of the wife. When the next of kin are entitled, it is sometimes a question at what time the class is to be ascertained. Where the trust (after the husband's decease and failure of issue) was for such persons (other than the husband) as should *then* be the next of kin of the wife under the statute, and the wife predeceased the husband without issue, the next of kin living at her death, not at the husband's death, were held to be entitled. *Wheeler v. Adams*, 17 Bea. 417; see *Gundry v. Pinniger*, 14 Bea. 94. But where the trust is if the wife predecease her husband, after her death, there being no issue, for the persons who, under the Statute of Distributions, would then be entitled to the personal estate of the wife, in case she had survived her husband, and had died possessed of the same, intestate, the class is ascertained at the death of the husband, if he is the survivor. *Pinder v. Pinder*, 28 Bea. 44; see *Chalmers v. North*, *ib.* 175, which case, however, was not followed in *Druitt v. Seaward*, W. N. 1885, p. 207. Under a limitation of personal estate expressly to the *heir* of a person, the heir and not the next of kin will be entitled. *Hamilton v. Mills*, 29 Bea. 193. See the cases *tit. "WILLS," Chap. XXX.*

CHAPTER X.

OF COVENANTS IN SETTLEMENTS.

SEC. 1.—To settle future-acquired Property.

<i>Who bound by Covenant</i>	660	<i>What Property bound—continued.</i>	
<i>Covenant in general binds Cove-</i>		<i>Words "Become Entitled" .</i>	662, 663
<i>nantor only</i>	661	<i>After Coverture</i>	C64
<i>Separate Estate of Wife, when</i>		<i>Property given to Husband and</i>	
<i>not bound</i>	661	<i>Wife as Joint Tenants</i>	665
<i>All necessary Parties to assure</i>	661	<i>Value, when and how to be as-</i>	
<i>Covenant by Husband and Wife</i>	661	<i>certained</i>	665
<i>Agreement and Declaration</i> ...	662	<i>Duties of Trustees</i>	665
<i>Followed by Covenant by one only</i>	662	<i>Life Interests</i>	665
<i>When Wife bound as to sepa-</i>		<i>Restricted Covenants</i>	666
<i>rate Estate</i>	662	<i>Estate Tail</i>	666
<i>What Property bound</i>	662	<i>Property Purchased by Wife</i> .	666
<i>As to Wife's Interests—Vested</i>		<i>Statute of Limitations</i>	666
<i>—Contingent—Reversionary</i>	662	<i>Enjoyment of Property in</i>	
<i>Property falling into Possession</i>		<i>Specie</i>	666
<i>during Coverture</i>	662	<i>Conveyancing Act</i>	666

Who bound by Covenant.] In this chapter some of the principal covenants usually contained in marriage settlements will be considered.

With respect to future property it may be observed, that what purports to be an actual assignment of it can only operate as an *agreement to assign*, but as such it will be binding in equity. *Ewart v. Ewart*, 11 Ha. 276; *Ramsden v. Smith*, 2 Drew. 298, 306. A covenant or agreement to settle after-acquired property, exceeding a particular amount in value, is common in settlements. Where the covenant relates, as it usually does, to the property of the wife, the object of it is to exclude the husband's right, and make him bring into settlement property which he would otherwise take as his own. See the judgment in *Re Michell's Trusts*, 9 Ch. D. 5. It is, perhaps, unnecessary to observe that in construing covenants of this description, the particular language used must be carefully noted.

A covenant to settle after-acquired property will, in the absence of indications of a contrary intention, be read as limited to the duration of the coverture, although the words "during the said intended coverture" are omitted, and notwithstanding that the covenant relates only to property from a specified source. *In re Edwards*, L. R., 9 Ch. 97; *In re Campbell's Policies*, 6 Ch. D. 686. *Dickinson v. Dillwyn*, L. R., 8 Eq. 546, is *contra*, as to the last point. Where there is a *covenant*, it will, as a rule, be binding only on the covenantor. Thus, if the

husband alone covenants to convey or settle, it is not binding on the wife in respect of her reversionary interests not reduced into possession during the coverture (*Reid v. Kenrick*, 1 Jur., N. S. 897; *Cramer v. Moore*, 3 Sm. & G. 141; *Young v. Smith*, 11 Jur., N. S. 963); nor in respect of her separate estate (*Douglas v. Congreve*, 1 Keen, 410; see *Travers v. Travers*, 2 Bea. 179; *Thornton v. Bright*, 2 M. & C. 230, 255; *Whitgreave v. Whitgreave*, 33 Bea. 532; *Re Mainwaring's Settlement*, L. R., 2 Eq. 487, see *infra*), even where the form of the covenant is that the husband will convey or *concur* with the wife in conveying. *Ramsden v. Smith*, 2 Drew. 298; *Campbell v. Bainbridge*, L. R., 6 Eq. 269, *infra*. So even if the covenant is by the husband only, if there is a recital from which it can be collected that the wife's separate property was intended to be bound, and she executes the settlement. *Css. of Hardwicke v. Wilmot*, W. N. 1885, p. 184. Where the intended wife is one object of a power to appoint real estate, and by an agreement prior to and in consideration of the marriage, the appointor agrees to appoint to her and the husband to settle, all parties executing the agreement, it is binding on the wife and her heir at law, and a settlement will be decreed in accordance with it. *Lee v. Lee*, 4 Ch. D. 175.

A covenant by the husband alone that all necessary parties would convey was held binding on the wife surviving, in respect of her reversionary personal estate accruing, but not reduced into possession, during the coverture. *Butcher v. Butcher*, 14 Bea. 222. See *Dawes v. Tredwell*, 18 Ch. D. 354. As a general rule, however, the covenantor only is bound. It is important, therefore, to ascertain who does covenant.

When the covenant is by the husband *and wife*, property given to her separate use, and within the covenant, will be bound by it. *Willoughby v. Middleton*, 2 J. & H. 344; *Coventry v. Coventry*, 32 Bea. 612. Real and personal estate devised to the wife "for her separate use, independently of any husband," is within a covenant by the husband and wife to settle all property to which the wife then was or during the coverture she or her husband in her right should become entitled by devise, bequest, or otherwise "for any estate or interest whatsoever." *In re Allnutt*, 22 Ch. D. 275. In this case *In re Mainwaring's Settlement*, L. R., 2 Eq. 487, was distinguished. There the covenant was by the husband alone. From the judgment, however, Wood, V.-C., would seem to have been of opinion that although property might be *within* the covenant, yet if the donor of it gave it upon condition that it should not be settled, the condition would be valid. See *ib.*, p. 495. In *In re Allnutt*, *sup.*, Chitty, J., dissented from this view, and the Court of Appeal, in *Scholfield v. Spooner*, 26 Ch. D. 94, agreed with Mr. Justice Chitty. In the last cited case it was held that where a covenant has been entered into for settlement of the future property of a married woman, and a gift is afterwards made to her of such a nature as to come within the terms of the covenant, no expression of the intention of the donor that it shall not be settled will exclude it from the operation of the covenant. But the covenant may

except property otherwise settled, and effect will be given to it accordingly. Thus where the covenant by the husband and wife was that if at any time during the joint lives of them any further portion, fortune, or estate should come to or devolve upon either of them by or under any will, or otherwise, they would effectually settle the same (except such future portion, fortune, or estate as should be otherwise settled previously to the same devolving as aforesaid) upon the trusts of the settlement, it was held, that the gift of a legacy to the wife for her own sole and separate use, free from the debts, control, and engagements of her husband, was excluded from the operation of the covenant. *Kane v. Kane*, 16 Ch. D. 207. When the covenant is in the form, which is not uncommon, of an agreement and declaration "that it is hereby agreed and declared," this shows what all parties *intend* to be done, and operates as an agreement by any and every party by whom the act is to be done. See *Ramsden v. Smith*, 2 Drew. 307, 308. But if this recital is followed by a covenant by *one party only*, it is, in general, binding only on such party, the recital being qualified by the covenant. *Ib.*; *Hammond v. Hammond*, 19 Bea. 29; *Grey v. Stuart*, 2 Giff. 398; *Young v. Smith*, L. R., 1 Eq. 180; *Dawes v. Tredwell*, 18 Ch. D. 354. Where it was declared, and the husband covenanted, that property coming to or vesting in his wife, or in him in her right, at law or in equity, should be assured by him and *his wife*, it was held that the covenant bound property given to the wife's separate use, upon the ground that the wife was as much bound as the husband; while in *Ramsden v. Smith* (2 Drew. 298) the husband alone was bound. *Campbell v. Bainbridge*, L. R., 6 Eq. 269; see *Willoughby v. Middleton*, 2 J. & H. 344. Property coming to the wife after a judicial separation is not within a covenant binding both. *Creyke v. Dawes*, 30 Ch. D. 500. Covenants of this nature by the husband are valid against his assignees. *Hardey v. Green*, 12 Bea. 182.

What Property bound.] A covenant to settle all the estate or personal estate to which the wife, or the husband in her right, should at any time *become entitled* (*Otter v. Melwill*, 2 De G. & Sm. 257; *Hoare v. Hornby*, 2 Y. C. C. C. 121; *Archer v. Kelly*, 1 Dr. & Sm. 300), or even possessed of or entitled to (*Wilton v. Colvin*, 3 Drew. 617; *Re Browne's Will*, L. R., 7 Eq. 231), or which should descend or devolve to or vest in the intended wife, or husband in her right (*Churchill v. Shepherd*, 33 Bea. 107; see *Re Wyndham's Trusts*, L. R., 1 Eq. 290; *In re Pedder's Settlement Trusts*, L. R., 10 Eq. 585), applies to cases where a *title is acquired* to property, and not to property in which she has a *vested interest* at the time of the marriage, even in some cases, although subject to a subsisting life interest. *Ib.* But in *Blythe v. Granville*, 13 Sim. 190, it was held that the covenant applied to stock to which at the time of the settlement the wife was entitled, subject to her father's life interest. And see *Spring v. Pride*, 10 Jur., N. S. 646. As to the words, property which shall "come to" the wife, see *Ex parte Blake*, 16 Bea. 463, 470. The cases upon the subject were reviewed by Wickens, V.-C., in *In re Clinton's Trust*,

L. R., 13 Eq. 295. His Honour described the law upon the subject as being in a very embarrassing state, and the decisions as in fact irreconcilable. He questioned *James v. Durant*, 2 Bea. 177, and observed that *Graftley v. Humpage*, 1 Bea. 46, was only to be followed where the question was specifically the same, but approved of *Blythe v. Granville*, 13 Sim. 190, which he followed, and which was similar to the case before him, and in which he held that an interest reversionary at the time of the marriage, and which during the marriage fell into possession, was bound by the words should "become entitled," entitled meaning entitled *in possession*. See *Buller v. Hornby*, 20 W. R. 198; *Re Pearson*, 26 L. T., N. S. 393. But this construction has not been acquiesced in. There are several prior (*ante*, p. 662), and later, cases which are opposed to *In re Clinton's Trusts*, *infra*.

Where the husband's covenant was to settle property to which he then was, or should during the intended coverture become entitled, and he was at the time of his marriage in receipt of half-pay (as lieutenant in the navy), which he subsequently commuted, it was held that the commutation money was not bound by the covenant. *Churchill v. Denny*, L. R., 20 Eq. 534. In this case, Jessel, M.R., observed (*ib.* p. 536), that to become entitled, meant to acquire a title, as Vice-Chancellor Kindersley put it in *Wilton v. Colvin*: "What is meant by becoming entitled. . . . Does it not always mean *acquiring title*? When you find the words 'shall become entitled,' you are always referring to some future interest, to the acquisition of some future title." 3 Drew. 617, 624. Such a covenant would not comprise a contingent reversionary interest in personalty, to which at the time of the marriage the wife was entitled, and which, during the coverture, became vested, but did not come into possession until after the coverture had determined by the death of the wife. *In re Mitchell's Trusts*, 9 Ch. D. 5. The recital in this case referred to future property to which the wife might *become entitled* after the marriage. In *Williams v. Mercier*, 10 App. C. 1, an agreement to settle property to which the wife or husband in her right, during the coverture, *should* become entitled (except jewelry), was held not to comprise jewelry to which she was entitled at the time of the marriage. There was a reference in a subsequent part to the personal estate to which the wife "now is" entitled which favoured the construction adopted. In *In re Viant's Settlement Trusts*, L. R., 18 Eq. 436, a widow who was entitled to a life interest in a fund, and also to a moiety of the capital, subject to her own life interest, married again, and by the settlement on the second marriage her life interest was settled, and she and her intended husband covenanted to settle property to which she or he in her right should, during the coverture, *become entitled*: it was held, that the words of futurity were satisfied in respect of the husband's interest, and that the moiety of the fund was subject to the covenant. But this case must be considered as contrary to the authorities, and was not followed in the case next cited. There the covenant comprised property to which husband or wife should during the coverture become beneficially

entitled in any manner from A., and the wife was entitled to a fund derived from A. subject to the life interest of a person who outlived her; it was held that the fund was not subject to the covenant. *In re Jones' Will*, 2 Ch. D. 362.

Where the covenant by husband and wife includes property to which at the time of the marriage the wife "is or should thereafter," and during their joint lives become entitled, it will comprise a reversionary interest in personalty vested in the wife at the date of the marriage, but liable to be divested by the exercise of a power of appointment. *In re Mackenzie's Settlement*, L. R., 2 Ch. 345. But property to which the wife is entitled at the time of the marriage in default of appointment, but which is afterwards appointed to her for the same interest, is not property to which she is entitled at the time of the marriage within the meaning of such a covenant. *Sweetapple v. Horlock*, 11 Ch. D. 745; see *In re Jackson's Will*, 13 Ch. D. 189; which was similar to *In re Mackenzie's Settlement*, *supra*; see *In re Frowd's Settlement*, 10 L. T. (N. S.) 367; *In re Vizard's Trusts*, L. R., 1 Ch. 588; and *De Serre v. Clarke*, L. R., 18 Eq. 587.

Covenants of this description will also in general comprise interests which are contingent at the time of the settlement, but afterwards fall into possession. *Brooks v. Keith*, 1 Dr. & Sm. 462. So such covenants will comprise property, the right to which accrues but is contingent during the wife's lifetime, and only becomes vested after her death, the husband being the survivor. *Hughes v. Young*, 9 Jur., N. S. 376. See *Graftey v. Humpage*, 1 Bea. 46; and comp. *Re Wyndham's Trusts*, L. R., 1 Eq. 290. A covenant by husband and wife to settle property to which either in her right should during the coverture be or become entitled does not extend to a legacy contingent upon the wife surviving her father, and which, by reason of her husband predeceasing her father, does not fall into possession during the coverture. *Atcherley v. Du Moulin*, 2 K. & J. 186. Where by a post-nuptial settlement a husband covenanted to settle any property to which the wife, or he in her right, either *then was* or at any time during the coverture *should* become entitled to; it was held, that a contingent interest in a fund standing in court to the credit of a cause, which fell into possession after the termination of the coverture, was bound by the covenant. *Agar v. George*, 2 Ch. D. 706; *Dering v. Kynaston*, L. R., 6 Eq. 210, is *contra*, but was not followed. In *Cornmell v. Keith*, 3 Ch. D. 767, there was a covenant in a marriage settlement to settle property to which the wife *then was* or she or her husband in her right should during the coverture become entitled. At the date of the settlement a trust fund stood so limited that on the death of the wife without issue one moiety thereof would belong to her, subject to the life interest therein of her husband, as her share of an intestate's estate; it was held, that the wife's contingent reversionary interest in this fund was bound by the covenant. A covenant of this description will not comprise a legacy given to the wife by her father, where she predeceases him leaving issue, in which case the legacy will, by the effect of the 1 Vict. c. 26, s. 33, not lapse, but it

does not devolve during the coverture within the meaning of the covenant. *Pearce v. Graham*, 9 Jur., N. S. 568. But property accruing *after* the determination of the coverture *may* be bound, if a very clear intention to that effect can be collected from the language of the covenant. *Prebble v. Boghurst*, 1 Sw. 309; *Re Hughes' Trusts*, 4 Giff. 432; *Re Hill*, 9 Jur., N. S. 942. In *Dickinson v. Dillwyn*, L. R., 8 Eq. 546, and *Carter v. Carter*, *ib.* 551, however, the covenant was held not to comprise property bequeathed to the wife by her husband. In *Re Edwards*, *In re Lon. B. & S. C. Ry. Act*, L. R., 9 Ch. 97, it was held that a covenant in a marriage settlement to settle the wife's after-acquired property will in the absence of expressions showing a contrary intention be construed as applying only to property acquired during the coverture, although the words "during the said intended coverture" are omitted. In this case, *Dickinson v. Dillwyn*, and *Carter v. Carter*, *supra*, were approved, and *Stevens v. Van Voorst*, 17 Bea. 305, *contra* overruled. Covenants by husband and wife to settle property to which either in her right should become entitled during the coverture (except separate estate and life interests) will not apply to property vesting in the husband and wife as joint tenants. *Edye v. Addison*, 1 H. & M. 781. Nor to property acquired by the wife as a *feme sole* under the 20 & 21 Vict. c. 85, s. 25, after a judicial separation. *Dawes v. Creyke*, W. N. 1885, p. 168.

The covenant does not usually apply to property under a particular value, which is sometimes fixed at 200*l.*, sometimes at 500*l.* See 3 Dav. Pr. Conv. 202, 3rd ed. In *Re Mackenzie's Settlement* (L. R., 2 Ch. 345), it was held that the meaning of the word "value," as applied to an interest reversionary at the time of the settlement, was not its then selling value, but its value when the fund fell in; and (by Lord Cairns, L. J.) that two separate interests in the same fund under distinct titles, for instance, in the wife's own right and as next of kin, were to be added together, and if so added they amounted to the stipulated sum, it would be within the covenant. But it is otherwise where the funds are distinct and the titles different, and the covenant is to settle property of a particular value, coming *at any time*, for this means at any one time and from one and the same source. *Re Hooper*, 11 Jur., N. S. 479; *acc. Hood v. Franklin*, L. R., 16 Eq. 496. In calculating the amount, sums *advanced* to the covenantor must be taken into account. *Ib.* In *Bower v. Smith* (L. R., 11 Eq. 279), the covenant applied to property of the value of 500*l.* to which the wife might become entitled. A much larger sum was bequeathed as she should appoint. She appointed to her own separate use, by several deeds (some executed on the same day), sums of money, each less than the covenanted sum, the aggregate of the sums so appointed amounting to the sum bequeathed. It was held that none of the sums so appointed were within the covenant. As to deducting succession or other duties and costs, see *Re Mackenzie's Settlement*, *sup.*

As to the duty of trustees to see that the covenant has been duly performed, see *Ex parte Greaves*, 2 Jur., N. S. 651, 654.

Life interests or income (unless laid up as capital) are not within

covenants to settle future-acquired property (*Lewis v. Madocks*, 17 Ves. 48; see *Townshend v. Harrowby*, 4 Jur., N. S. 353; *St. Aubyn v. Humphreys*, 22 Bea. 175); nor property over which the wife has a general power of appointment. *Townshend v. Harrowby*, *sup.* Nor an estate tail. *Hilbers v. Parkinson*, 25 Ch. D. 200.

Where the property is described in the covenant in a limited sense or by a particular title, for example, as property to which the wife is entitled as tenant in tail in remainder, or the like, this description will not be enlarged so as to include or affect the same property if it comes by *another title*, as by descent. *Tayleur v. Dickenson*, 1 Russ. 521; *Ibbetson v. Grote*, 25 Bea. 17; see *Osborne v. Smith*, 4 Ir. Ch. Rep. 58; *Ex parte Stephenson*, 3 D., M. & G. 969; *Re Neal's Trusts*, 4 Jur., N. S. 6. A covenant to settle property accruing upon the death or by the disposition of any person or persons whomsoever applies to property vested in the covenantor as tenant in tail, but subject to an appointment by A. (which was not exercised), and of which property, after the death of A., the covenantor executed a disentailing deed. *Maclurcan v. Lane*, 5 Jur., N. S. 56.

A covenant to settle property coming to the wife by descent, devise, limitation, gift, or otherwise, does not extend to property *purchased* by her with her separate money. *Hughes v. Jones*, 32 L. J., Ch. 487.

As a general rule, if the covenantor has a certain time to perform his covenant, the breach of it is at the expiration of that time, and then time begins to run. See *Ex parte Evans*, 2 D., M. & G. 948. But where the covenant is to be performed immediately, it runs from the time of the execution of the settlement. *Spickernell v. Hotham*, Kay, 669.

As to covenants or contracts in consideration of marriage, for the future settlement of money or property as affected by the Married Women's Property Act, 1882, see *ante*, pp. 363, 364.

The tenants for life will be entitled to the enjoyment in specie of wasting property, for instance, chattels real, bound by the covenant, where there is no trust for conversion. *Milford v. Peile*, 17 Bea. 602. If there is a trust for conversion, but it is not to be made except at the request of the husband and wife, or the survivor, the trustees cannot convert, except on request. *Hope v. Hope*, 1 Jur., N. S. 770. In this case Kindersley, V.-C., observed, that he was not aware of any case in which the principle of *Howe v. Ld. Dartmouth*, 7 Ves. 137 (*ante*, p. 120), had been applied to a settlement, which was a contract between the parties.

By the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), in a conveyance by way of settlement made after the 1st January, 1882, there shall be implied a covenant for further assuring the subject-matter of the conveyance to the persons to whom the conveyance is made, subject as therein mentioned (s. 73).

SEC. 2.—Covenant to settle or purchase Lands.

<i>To settle Specific Property</i>	667	<i>To purchase, convey, settle, or charge</i>	
<i>Is a Lien on the Property</i>	667	—continued.	
<i>Covenant by Tenant in Tail</i> ...	667	<i>Intention to purchase</i>	668
<i>On Request</i>	667	<i>Parol Evidence of Intention</i> ...	668
<i>To settle or pay a Sum of</i>		<i>Presumption of Intention</i>	668
<i>Money</i>	667	<i>Purchase by Trustees</i>	668
<i>To purchase, convey, settle, or charge</i>	667	<i>Lands devolving on Covenantee</i>	
<i>No Lien on particular Lands</i> ...	667	<i>a Satisfaction</i>	669
<i>To charge after-acquired Es-</i>		<i>Property of specified Descrip-</i>	
<i>tate</i>	668	<i>tion</i>	669
<i>Time of Performance</i>	668	<i>Breach of Covenant—Damages</i>	669

To settle Specific Property.] A covenant to settle specific lands belonging to the covenantor is a lien upon such lands, and is not affected by his debts. *Fremoult v. Dedire*, 1 P. W. 429; see *Finch v. Ld. Winchelsea*, ib. 277. So, a covenant that the rents of an estate shall be applied in a particular way (*Legard v. Hodges*, 3 B. C. C. 531; *S. C.* 4 B. C. C. 421), or that an annuity shall be payable out of them (*Ravenshaw v. Hollier*, 7 Sim. 3), is not a mere personal covenant, but creates an actual lien on the land. For an agreement relative to any specific property binds the property itself. *Per* Ld. Thurlow, 3 B. C. C. 538. The lien prevails against a subsequent purchaser or mortgagee with notice, though he may have the legal estate. *Darvies v. Darvies*, 4 Bea. 54. But a covenant by a tenant in tail in respect of the entailed property can only be enforced against him, not against the issue in tail or remainderman. *Powell v. Powell*, Pr. Ch. 278. This was under the old law, and the 3 & 4 Will. 4, c. 74, makes no difference in this respect. When the property bound by the covenant is afterwards disposed of, the lien will, as a rule, attach upon that property which is substituted for it. Thus a covenant to settle estate A., which is afterwards exchanged for estate B. and a sum of money, binds B., and the amount of the money paid is a specialty debt under the covenant. *Powdrell v. Jones*, 2 Sm. & Giff. 335. A covenant to settle at the request of trustees attaches on the property subject to the covenant, although no request has been made. *Maclurcan v. Lane*, 5 Jur., N. S. 56. A covenant in the alternative, to settle an estate or pay a sum of money, does not create a charge on the covenantor's estate, for the covenantor has an option. *Ravenshaw v. Hollier*, 7 Sim. 3. As to damages for breach of covenant, see *post*, p. 669.

To purchase, convey, settle, or charge.] Where the covenant implies performance at a future time, as that the covenantor will purchase and settle, or convey and settle, or charge lands generally, without specifying any in particular, as a rule it will not be a lien upon the estate of the covenantor at the time of the covenant being entered into. *Mornington v. Keane*, 2 De G. & J. 292, explaining *Roundell v. Breary*, 2 Ver. 482. In *Fremoult v. Dedire* (1 P. W.

429), there were two covenants, one to settle specific lands which was held to be a lien on them, the other to purchase and settle generally, and the latter covenant was held not to be a lien on any lands in particular. A covenant to charge an after-acquired estate may, however, in some cases attach on one which the covenantor has purchased, but which has not been conveyed to him at the time of his entering into the covenant, or which even is never conveyed to him, but to a sub-purchaser from him. *Warde v. Warde*, 16 Bea. 103. But a covenant to convey lands generally will not, as a rule, bind lands to which the covenantor is equitably entitled at the time of his entering into the covenant. *Gardner v. M. of Townshend*, G. Coop. 301. It is not necessary that the covenant should be wholly performed at once. Part of the fund may be invested at one time, part at another. *Lechmere v. Ld. Carlisle*, 3 P. W. 228.

The intention to purchase in discharge of the covenant may be proved by parol evidence (*Deacon v. Smith*, 3 Atk. 323; *Lench v. Lench*, 10 Ves. 511, 517; see *Lane v. Dighton*, Amb. 409), although it was said in *Sowden v. Sowden* (1 B. C. C. 583) that parol evidence was not admissible to show that the covenantor, in purchasing, intended to perform his covenant. And where a person has covenanted to convey and settle lands (*Deacon v. Smith*, 3 Atk. 323), or to settle lands (*Tooke v. Hastings*, 2 Ver. 97), or even to pay a sum of money to trustees to be laid out in lands (*Sowden v. Sowden*, 1 B. C. C. 582), and afterwards buys an estate, though he does not settle it, a presumption will arise that he purchased with the intention of performing his covenant, and the estate will be bound accordingly. See *Mathias v. Mathias*, 3 Sm. & G. 552; *Mornington v. Keane*, 2 De G. & J. 292. But the presumption may be rebutted, as by the covenantor afterwards disposing of the lands. *Deacon v. Smith*, 3 Atk., p. 327.

But where there is no covenant to purchase and settle, the presumption will not arise as in the case where the purchase is to be made by a covenantor, or he is to pay the money to trustees, to be applied in the purchase. Thus, if the trustees are to purchase, and the husband obtains possession of the trust fund, and afterwards purchases an estate, there will not in this case be a lien upon the lands (*Lench v. Lench*, 10 Ves. 511), unless there is evidence that he bought with the intention of performing the trust and settling the estate (*Wilson v. Foreman*, 2 Dick. 593, as corrected in *Lench v. Lench*, 10 Ves. 511, 520), or unless the money can be followed and traced as having been applied in the purchase of the land. *Ib.*; see *Lewis v. Madocks*, 17 Ves. 48, 58. When trustees are bound to lay out money in the purchase of lands and they purchase lands, a presumption will arise that the purchase was in performance of the obligation. *Mathias v. Mathias*, 3 Sm. & G. 552; *Price v. Blake-more*, 6 Bca. 507; see *Trench v. Harrison*, 17 Sim. 111. If the husband advances a sum to make up the full purchase-money of an estate which is conveyed to the trustees of the settlement, it will be presumed, in the absence of evidence to the contrary, that he intended it as a benefit and advancement for the parties entitled under the

settlement. *Ousley v. Anstruther*, 10 Bea. 461. Where the covenantor does not settle the purchased lands but suffers them to descend, or devises them, to the party entitled under the covenant, they will be taken to be in satisfaction of the covenant (*Wilson v. Piggott*, 2 Ves. 356; as to copyholds, see *A.-G. v. Whorwood*, 1 Ves. sen. 534, 541), or satisfaction *pro tanto*. *Lechmere v. Ld. Carlisle*, 3 P. W. 228.

The property purchased must be of the kind and tenure mentioned in the covenant, or it will not be considered as performed. Thus, a purchase of copyholds, or the moiety of a house, or leaseholds for lives, reversions, or the like, will be no performance of a covenant to purchase freeholds or estates in fee. *Pinnell v. Hallett*, Amb. 106; *Lechmere v. Ld. Carlisle*, 3 P. W. 225. The true measure of damage occasioned by nonperformance of the covenant is the present value of an estate, of the like description and rental as that which ought to have been purchased or settled. *Ly. Suffield v. Ld. Suffield*, 3 Mer. 699. The damages recovered will, it seems, be ordered to be laid out in land, if the covenant be to purchase lands. So if it be to settle a particular estate when there are several persons who would take interests in the lands if purchased, but if in such case there is only one person who would be absolutely entitled to the land, the damages will be paid to him as money, or if dead, to his *personal* representatives. *Wade v. Paget*, 1 B. C. C. 364; for the judgment, see 1 Cox, 74.

SEC. 3.—Covenants to leave Property.

<i>To leave Money to Wife</i>	669	<i>To leave equal Shares</i>	670
<i>To leave all Estate</i>	669	<i>To pay a Sum of Money</i>	670
<i>To leave a Specific Sum</i>	670	<i>Effect of Death</i>	670

Covenants to leave a wife a sum of money, or real or personal estate, will be considered as wholly performed in equity if the husband dies intestate and the wife receives a share under the Statute of Distributions equal to the money or value of the property covenanted to be left; and performed *pro tanto* if the share is less than such money or value. *Blandy v. Widmore*, 1 P. W. 324; *Lee v. D'Aranda*, 3 Atk. 419; *Garthshore v. Chalie*, 10 Ves. 1; *Goldsmid v. Goldsmid*, 1 Sw. 211. As to the distinction between *performance* and *satisfaction* in such cases, see *Barret v. Beckford*, 1 Ves. sen. 519, and 1 P. W. 324, n. (1). Where the covenant is to leave a specific sum, and to pay an annuity to the wife after the covenantor's decease (*Couch v. Stratton*, 4 Ves. 391; *Salisbury v. Salisbury*, 6 Ha. 526), or to pay a sum of money in the lifetime of the covenantor (*Lang v. Lang*, 8 Sim. 451), it will not be considered as performed by the wife receiving an equivalent share under the statute.

A covenant to give or leave all the covenantor's estate to his children only affects real and personal estate of which he is seised or possessed at the time of his death. *Needham v. Smith*, 4 Russ. 318; see *Cochran v. Graham*, 19 Ves. 66. Comp. *Lewis v. Madocks*, 8

Ves. 150; 17 Ves. 48, where the covenant bound *all* the property of which the covenantor became possessed during the coverture. A covenant to *leave* will not deprive the covenantor of the right of unlimited expense, or of the power of giving away his property *bonâ fide*, but any disposition for the purpose of defeating the covenant will be a fraud upon it and void. *Jones v. Martin*, 6 B. P. C. 437; *Gregor v. Kemp*, 3 Sw. 404, n.; *Randall v. Willis*, 5 Ves. 262. And a disposition which is in effect testamentary of the whole property, with a reservation of a life interest to the covenantor, will be a fraud on the covenant. *Fortescue v. Hennah*, 19 Ves. 67. A covenant to leave a specific sum of money creates a specialty debt against the estate of the covenantor (*Graham v. Wickham*, 1 D., J. & S. 474), and attaches on stock or property proved to have been purchased with the money. *Liebman v. Harcourt*, 2 Mer. 513. A covenant to leave a particular proportion of property means, in general, in value, not of every item of property in specie. *Bell v. Clarke*, 25 Bea. 437. See further as to such covenants, *Davenport v. Hinchcliffe*, 1 J. & H. 713. Where there is a covenant to leave or settle equal shares on children or others, an advancement to one is part of his share, and must be taken into account in estimating the shares of the others. *Willis v. Black*, 4 Russ. 170; see *Eardley v. Owen*, 10 Bea. 572. When the husband has covenanted to pay a sum of money to the trustees of the settlement, and he becomes entitled to part of the settled trust funds or the dividends of them, the trustees are entitled to retain such part until his covenant is satisfied. *Priddy v. Rose*, 3 Mer. 86; *Burridge v. Row*, 1 Y. C. C. 183, 583.

Sometimes the person who is to be benefited by the performance of the covenant dies in the lifetime of the covenantor, thus raising the question what effect this has upon the covenant. In *Jones v. How* (7 Hare, 267), there was a covenant to leave a daughter an equal share with other children. The daughter died in her father's lifetime without issue. The covenantor made no will in performance of his covenant, and it was held that the daughter having died in his lifetime, he was not bound to do so, and there was no breach of covenant. *Qy.*, in such case, if the daughter had died leaving issue. See the judgment, *ib.*, and 1 Vict. c. 26, s. 33. In *In Re Brookman's Trusts* (L. R., 5 Ch. 182), a father covenanted that if his daughter should survive him or leave any children or issue, he would devise or settle a particular share upon the trusts of the settlement, which gave in effect interests to the daughter's children at twenty-one, subject to their parents' life interests. One of such children only attained twenty-one, and all of them died in the lifetime of their mother and of the covenantor, who died having made a will in conformity with the strict terms of the covenant, but without having made any provision by reason of the death of his grandchild. It was held, that he was not bound to do so, and had duly performed his covenant, having regard to the events which had happened.

SEC. 4.—*Covenants as to Policies of Assurances.*

<i>Must be certain</i>	671	<i>Where Policy may be sold by order</i>	
<i>Policy dropped, but revived</i>	671	<i>of Court</i>	671
<i>Payment of Premiums—Lien</i>	671	<i>Bonuses</i>	671
<i>Suicide of Assured</i>	671	<i>Proof in Bankruptcy</i>	671

The covenant, usually on the part of the husband, to effect a policy of assurance or duly to keep it on foot, is a very common one in settlements. The covenant must be certain as to the amount and other particulars, or it will not be enforced in equity. *Tottenham v. Townsend*, 5 Ir. Ch. Rep. 225. If the husband covenants to insure and his life becomes uninsurable, his estate is liable in damages. *Arthur v. Wynne*, 14 Ch. D. 603. In general the trustees of the settlement are expressly exonerated from all responsibility in consequence of the covenant not being duly performed. Trustees are not liable by reason of a life policy not being kept up by the husband, the covenantor, he being in insolvent circumstances and the trustees having no funds. *Hobday v. Peters*, 28 Bea. 603. In *Shearman v. M'Gregor* (11 Ha. 106), where a policy was allowed to drop, but was afterwards revived, the court, under the circumstances of the case, restrained an action on the covenant, the covenantor paying the costs. If the wife or a trustee of the settlement pays the premiums, the party so paying them has a lien on the policy. *Burridge v. Row*, 1 Y. C. C. C. 183. Trustees who pay the premiums are entitled to be repaid with interest. *Gill v. Downing*, L. R., 17 Eq. 316. See *Clack v. Holland*, 19 Bea. 262; *Shearman v. Br. Mut. Life Comp.*, L. R., 14 Eq. 4.

A covenant to do all things necessary to keep up the policy is not equivalent to a covenant to do no act whereby it shall become void, and is not broken by the covenantor committing suicide, whereby the policy becomes forfeited. *Dormay v. Borrodaile*, 10 Bea. 335; 5 C. B. 380. The court will authorize the policy to be sold or surrendered, and the proceeds paid into court and accumulated, if the covenantor is unable to pay the premiums. *Hill v. Trenery*, 23 Bea. 16; *Beresford v. Beresford*, *ib.* 292. The bonuses will be applicable for the same purposes as the sum assured by the policy which is settled, even without an express provision to that effect. *Courtney v. Ferrers*, 1 Sim. 137; *Parkes v. Bott*, 9 Sim. 388. But under the covenant, if it be merely to keep up a policy for a specific sum, no mention being made of bonuses, if the rules of the office permit, the covenantor has an option to have the bonuses apply by way of reduction of premiums. *Gilley v. Burley*, 22 Bea. 619; see *Lackersteen v. Lackersteen*, 6 Jur., N. S. 1111; *Hughes v. Searle*, W. N. 1885, p. 79. Where the covenantor became bankrupt, the sum required to keep a policy during his life was not provable formerly under his bankruptcy. *Re Whitmore*, 3 De G. & S. 565; *Warburg v. Tucker*, E., B. & E. 914. Under the 24 & 25 Vict. c. 134, s. 154, now repealed, the court had power to set a value upon the interest of the covenantee, which value was provable. See now Bankruptcy Acts, 1869, 32 & 33 Vict. c. 71, s. 31, and 1883, 46 & 47 Vict. c. 52, s. 37 (7).

CHAPTER XI.

CONSTRUCTION OF SETTLEMENTS.

<i>Not construed by Acts</i>	672	<i>Ambiguous Trusts or None</i>	672
<i>To effectuate Intention</i>	672	<i>Inconsistent Clauses</i>	672
<i>Words excluding Issue</i>	672	<i>"And" read "or"</i>	672
<i>Precise Language must prevail</i>	672	<i>Recital and Operative Part</i>	672

As a general rule, the *acts* of parties cannot be relied upon to construe the language of a settlement. *Baynham v. Guy's Hospital*, 3 Ves. 295. Equity will endeavour to effectuate the intention, as collected from the whole instrument, and will to this end disregard particular expressions inconsistent with such intention. *Arundell v. Arundell*, 1 M. & K. 316. Thus where, by the terms of the settlement, if the wife died in her husband's lifetime, he was to receive the rents for life of an estate to which she was only contingently entitled, provided the wife should become entitled thereto, but not otherwise: he was held entitled, though the wife died before she became entitled in possession to the property, which after her death devolved upon her heir subject to the settlement. *Wallace v. Wallace*, 2 Dr. & War. 452. And where a limitation purported to be contingent upon there being no issue of the marriage "living at the wife's death, she surviving her husband:" it was held, upon the intention as collected from the entire instrument, that the limitation did not take effect if she left issue, although she predeceased her husband. *Smith v. Doolan*, 2 J. & Lat. 747. So where there was a proviso that if the wife should die before her husband the trust fund should go to her brother and sister; this was construed to mean if she should die *without issue*. *Kentish v. Newman*, 1 P. W. 234; *Targus v. Puget*, 2 Ves. sen. 194. But, as between the husband or wife, and issue, if no interest be given to the issue, none will be implied. Thus, where the wife's personalty was given to her in the event (which happened) of her surviving her husband, her executors were held entitled to it at her death as against her children. *Pringle v. Pringle*, 22 Bea. 631. If a clause or limitation be clear and positive, it must, however absurd, prevail. But if a rational interpretation can be given consistent with the language used, the court will construe the instrument accordingly. *Laird v. Tobin*, 1 Moll. 543; *Cholmondeley v. Clinton*, 2 J. & W. 81.

It sometimes happens that no trusts are declared of property in the particular events which have happened. In such cases, of course, the court must endeavour to ascertain the intention of the parties, and effectuate it accordingly. Where there is no express provision with

respect to the destination or application of a fund, it will, in general, devolve according to law. Thus, in a case in which no trusts of funds (of the intended wife) were declared during the coverture, the husband was held to be entitled during this period. *Ball v. Montgomery*, 2 Ves. jun. 191, 196. Under a trust for the wife's separate use during the coverture, if she should die in her husband's lifetime, for him, for life, and after the death of the survivor for the issue of the marriage; the wife, who survived her husband, was held entitled for her life. *Tunstall v. Trappes*, 3 Sim. 312. This in effect was a trust by implication in the events which happened. In *Smith v. King* (1 Russ. 363), the trusts of dividends of stock were for the wife's separate use. There was no other limitation. It was held, that the wife was entitled to the capital as well as to the life interest. Where a father covenanted on his daughter's marriage to pay a sum, the interest to be paid to her for life, the principal, after her death and that of her husband, to be held for the issue of the marriage, and there was no issue, the husband being dead, the wife was held entitled to the capital. *Ward v. Dyas*, Ll. & G. t. Sug. 177; see *Langham v. Nenny*, 3 Ves. 467. In *Wilson v. Paul* (7 Sim. 620), property consisting of leaseholds, and money to be invested on the usual securities, was settled in trust for the husband (the settlor) for life, after his death, as to one moiety of the leaseholds and securities, for the wife for life, and as to the other moiety of the leaseholds and securities, after the husband's death, and the whole of the securities (not mentioning the leaseholds), after the wife's death, in trust for the children. The wife died in her husband's lifetime. It was held that there was a resulting trust as to the leaseholds for the husband.

Of two clauses clearly inconsistent with each other, the first in general prevails, though the contrary is the rule in the case of a will. See *Ulrich v. Litchfield*, 2 Atk. 375; *Wykham v. Wykham*, 18 Ves. 421; *Sherratt v. Bentley*, 2 M. & K. 149, 161. Thus, where by one clause of marriage articles it was agreed that the wife should have a life interest in a fund, and by another that the income of the fund should in all cases belong to the husband, it was held that the clauses were inconsistent, and that the husband's life interest was postponed until after the death of his wife. *Byam v. Byam*, 19 Bea. 58. But the court reluctantly rejects one of two apparently inconsistent clauses, it endeavours to reconcile them. As in wills (*post*, tit. "WILLS"), "and" will sometimes be construed "or." *Burleigh v. Pearson*, 1 Ves. sen. 281.

If the operative part of a deed be doubtfully expressed, the recital may be referred to as a key to the intention; but where the operative part is clear, it cannot be controlled by the recital. *Bailey v. Lloyd*, 5 Russ. 330, 344; see *Alexander v. Crosbie*, Ll. & G. t. Sug. 145; *Css. of Hardwicke v. Wilmot*, W. N. 1885, p. 184. But the recital may in many instances qualify the operative part, or explain the sense in which it is to be understood (*Cope v. Cope*, 15 Sim. 118); though the plain effect of the latter cannot be cut down by the former. *Holliday v. Overton*, 14 Bea. 467; see *S. C.* 15 Bea. 480. And

where a recital is introductory to a covenant, whether the recital be larger than the covenant, or the covenant than the recital, effect will be given to that language which is the largest and widest in its scope. *Maclurcan v. Lane*, 5 Jur., N. S. 56, 59.

CHAPTER XII.

REFORMING AND SETTING ASIDE SETTLEMENTS.

<i>By the Court of Chancery</i>	674	<i>By the Court of Chancery—con-</i>	
<i>Against Volunteers</i>	674	<i>tinued.</i>	
<i>When contrary to Intention</i> ...	674	<i>Rectification by Declaration</i> ...	675
<i>Delay in applying for</i>	674	<i>Wife's Adultery</i>	676
<i>Execution of Settlement under</i>		<i>By the Divorce Court</i>	676
<i>Protest</i>	674	<i>In what Cases</i>	676
<i>Evidence of Mistake</i>	674	<i>Respondent Abroad</i>	676
<i>Letters—Recitals—Parol Evi-</i>		<i>Whether Children or not</i>	676
<i>dence</i>	674	<i>Wife's Adultery</i>	677
<i>Contemporaneous</i>	675	<i>Husband's Adultery</i>	678
<i>What Mistakes may be rectified</i>	675	<i>At Instance of Guardian</i>	678
<i>Not to Prejudice of Incum-</i>		<i>Costs of Alteration</i>	678
<i>brancers</i>	675	<i>Payment of Dividends</i>	678

By the Court of Chancery.] The cases in which a marriage settlement will be set aside as against *volunteers*, at the instance of a person who has unintentionally made an irrevocable settlement in their favour, have already been considered, *ante*, p. 309. But these are not the only cases in which equity will exercise its jurisdiction. Where there has been mistake, the settlement will be reformed, although parties claiming under it may be interested, and not mere volunteers. As to incumbrancers, see *infra*. A settlement which is contrary to the intention of the parties to it will be reformed in equity. *Higginson v. Kelley*, 1 Ba. & B. 252; *Wright v. Goff*, 22 Bea. 207. But not on a bill to set it aside *in toto*. *Hartopp v. Hartopp*, 21 Bea. 259. Parties interested in reforming the settlement must not be guilty of laches in applying to the court (*Bunbury v. Lloyd*, 1 Jo. & L. 638, 654); and must not have executed it under protest that it is contrary to what has been agreed upon. *Eaton v. Bennett*, 34 Bea. 196. The evidence of mistake must be clear and unambiguous (*M. of Breadalbane v. M. of Chandos*, 2 M. & Cr. 711), and, as a rule, common to all parties. *Wright v. Goff*, 22 Bea. 207; *E. Bradford v. E. Romney*, 30 Bea. 431.

The evidence on which it is sought to rectify the settlement may consist of letters (*Barstow v. Kilvington*, 5 Ves. 593; *Torre v. Torre*, 1 Sm. & G. 518), recitals (*Payne v. Collier*, 1 Ves. jun. 170), or parol evidence. *Lackersteen v. Lackersteen*, 6 Jur., N. S. 1111; *Wilkinson v. Nelson*, 7 Jur., N. S. 480; *Tomlinson v. Leigh*, 11 Jur.,

N. S. 962; *Smith v. Iliffe*, L. R., 20 Eq. 666; *Lovesy v. Smith*, 15 Ch. D., 655. But it should be contemporaneous with or anterior to the deed. *E. Bradford v. E. Romney*, 30 Bea. 431. And the question for the court is, what was the intention of the parties at the time when the settlement was executed. *Wilkinson v. Nelson*, *sup.* Whether the court has power to rectify a settlement made out of the jurisdiction may be doubtful. *Barber v. Barber*, 29 L. J., Ch. 49. When the evidence is clear as to mistake, and the way in which it is to be rectified, the nature of the alteration to be made does not seem material. Thus a term for securing younger children's portions by mistake placed *after* the limitations in tail to the first and other sons, will be made to *precede* such limitations. *Uvedale v. Halfpenny*, 2 P. W. 151. So a hotchpot clause will be inserted where necessary to effectuate the intention. *Wilkinson v. Nelson*, 7 Jur., N. S. 480. So a limitation to *heirs* if necessary to effectuate the intention of the parties. *In re Bird's Trusts*, 3 Ch. D. 214. So the clause restraining anticipation will be struck out. *Torre v. Torre*, 1 Sm. & G. 518. And a limitation of personalty on the death of the husband and in default of children, both which events happened, to the wife, as she should by will appoint, and in default to her next of kin, was rectified by limiting the property, in the events which had happened, to herself, her executors and administrators, absolutely. *Smith v. Iliffe*, L. R., 20 Eq. 666. If the husband undertakes as agent for the wife to have a settlement prepared, he is bound to have such a contract prepared as the court would sanction, and such contract would give the wife the first life estate in her own property. *Clark v. Girdwood*, 7 Ch. D. 9. See *Corley v. Ld. Stafford*, 1 D. & J. 238. And a trust giving the husband (a solicitor) an interest in part of the wife's property will be struck out, even after his death, on the uncorroborated parol testimony of the wife, she having no independent advice and stating that the settlement was contrary to her intention and was not explained to her. It was held to make no difference that she claimed to have the benefit of a settlement made on her by her husband. *Lovesy v. Smith*, 15 Ch. D. 655. Although there may be no application to correct a settlement upon the ground of mistake, nevertheless, if it be clear that there is a mistake and what it is, the settlement will be read as corrected accordingly. Thus a trust for daughters will be supplied where it is clear from the context that they were intended to take. *Re Daniel's Settlement Trusts*, 1 Ch. D. 375. See the analogous cases on wills, tit. "WILLS," Ch. 13. As to blanks in a deed, see *Fyfe v. Arbuthnot*, 1 De G. & J. 406.

The settlement will not be reformed to the prejudice of persons who have acted upon the faith of it. Thus, a settlement which contained no clause against anticipation was not allowed to be reformed by inserting the clause where the interests of incumbrancers would thereby have been affected. *Blackie v. Clark*, 15 Bea. 595; see *Jenkins v. Quinchant*, 5 Ves. 596, n. (a), where the settlement was post-nuptial. The settlement will be reformed, no legal estates being affected, by a declaration in the decree (*Tebbutt v. Tebbutt*, 1 De G. &

Sm. 506 ; see *Hamil v. White*, 3 Jo. & L. 695), or where words have been erroneously introduced, by striking them out and indorsing the decree. *Stock v. Vining*, 25 Bea. 235. Where no blame is imputable to any person, the costs are payable out of the settled funds. *Ib.* In the preceding cases, mistake was the ground upon which the court proceeded ; and of course where there has been fraud, the court will also exercise its jurisdiction. In equity, a marriage settlement cannot be set aside or varied at the husband's instance, either on the ground of the incontinence of the wife before marriage, or of her subsequent adultery. *Evans v. Carrington*, 2 D., F. & J. 481 ; *Merryweather v. Jones*, 4 Giff. 509. Where the court has jurisdiction, after a dissolution of the marriage, to deal with the settled property, see *Swift v. Wenman*, L. R., 10 Eq. 15. And see *infra*, as to varying settlements by the Divorce Court.

Varying Settlements by the Divorce Court.] By the 22 & 23 Vict. c. 61, "The (Divorce) Court, after a final decree of nullity of marriage or dissolution of marriage, may inquire into the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and may make such orders with reference to the application of the whole or a portion of the property settled, either for the benefit of the children of the marriage, or of their respective parents, as to the court shall seem fit" (s. 5). All deeds by which property is settled on a woman in her character as wife, and in which she is interested as a wife, come within the scope of this section, and the court has power to deal with them accordingly. *Worsley v. Worsley*, L. R., 1 P. & M. 648. The petition for the divorce should contain a prayer as to the required alteration of the settlement. *Gibbings v. Gibbings*, 10 Jur., N. S. 1037. Where the respondent is abroad but has been duly served, an order varying the settlement may be made in her absence. *Lawrence v. Lawrence*, 3 S. & T. 207.

On this section it was held that the court had no jurisdiction to make an order with reference to settled property, unless there were children of the marriage living at the time of the decree for the divorce being made absolute (*Corrance v. Corrance*, L. R., 1 P. & M. 495, Pigott, B., *diss.*), and at the time of the order being made. *Graham v. Graham*, *ib.* 711 ; see *Bird v. Bird*, *ib.* 231. But by the 41 & 42 Vict. c. 19, s. 3, "The court may exercise the powers vested in it under the 22 & 23 Vict. c. 61, s. 5, notwithstanding that there are no children of the marriage." The later act is not retrospective. *Yglesias v. Yglesias*, 4 P. D. 71. The amount to be allowed to the husband, wife, or children where there are any, is in every case a matter in the discretion of the court. *March v. March*, L. R., 1 P. & M. 440.

Though the power given to the court of varying settlements is not given for the purpose of punishing the guilty party, but of making due provision for the parties, their conduct is to be taken into consideration in determining what provisions ought to be made for them

respectively. As to which the judge has an absolute judicial discretion. *Wigney v. Wigney*, 7 P. D. 177. The object of the court, in varying the provisions of a settlement, should be to prevent, as far as may be just and practicable, the innocent party being damaged, in a pecuniary sense, by the decree of dissolution. It will not deprive the father of the power of exercising parental judgment and discrimination with regard to his children, except so far as is inevitable from their remaining in the custody of their mother. *Maudslay v. Maudslay*, 2 P. D. 256. The judge ordinary has no power, under the 22 & 23 Vict. c. 61, s. 5, to vary the provisions for appointing new trustees contained in a deed of settlement executed in anticipation of the marriage, the dissolution of which it has decreed. *Hope v. Hope*, L. R., 3 P. & M. 226. In the variation of settlements, however, the court has jurisdiction to extinguish a joint power of appointment of new trustees. *Oppenheim v. Oppenheim*, 9 P. D. 60; see *Maudslay v. Maudslay*, 2 P. D. 256—262.

After a decree for dissolution of marriage by reason of the wife's adultery, the court will make no order depriving the husband of any interest which he may take under the settlement. *Thompson v. Thompson*, 2 S. & T. 649; see *Webster v. Webster*, 3 S. & T. 106. The Divorce Court has jurisdiction in decreeing a divorce at the husband's suit to order the income of the wife's fortune settled to her separate use to be paid to him as if the wife were dead. *Pratt v. Jenner, Ex parte Jenner*, L. R., 1 Ch. 493; see *Clifford v. Clifford*, 9 P. D. 76.

After a final decree in a suit for dissolution of marriage the court has authority under 22 & 23 Vict. c. 61, s. 5, to relieve an innocent party from a covenant to appoint in favour of the other party who has been guilty of a matrimonial offence. *Benyon v. Benyon*, 1 P. D. 447. If a petitioner has accepted an allowance from the respondent under a deed of separation, and subsequently has sufficient ground to claim a dissolution of his marriage, he is not precluded from applying for an increased provision out of the income of the respondent. *Id.* Where a petitioner had obtained a decree nisi for dissolution of his marriage, and before an order could be obtained to vary the post-nuptial settlement, the respondent was about to sell or otherwise dispose of some of the property. The court granted an injunction to restrain her from dealing with it. *Noakes v. Noakes*, 4 P. D. 60. Where the property was settled by the wife's father, and she had committed adultery, the court would not allow her life interest to be applied for the benefit of her husband, but exclusively for that of the children of the marriage. *Paul v. Paul*, L. R., 2 P. & M. 93. If the decree is made at the suit of the wife, an order may be made depriving the husband of benefits under the settlement. *Johnson v. Johnson*, 31 L. J., Mat. Cas. 29. In such cases the court will not impose the condition that the wife shall enjoy the property brought into settlement by her only *dum sola et casta vixerit*. *Gladstone v. Gladstone*, 1 P. D. 442. The court has power to review and alter an order for the variation of marriage settlements, but it will not do so by reason of circumstances

which have occurred since the making of the order. *Ib.* In *Ponsonby v. Ponsonby*, 9 P. D. 122, on a petition for variation of settlements the court refused to extinguish the interests of the respondent (the husband) so as to give the petitioner an absolute interest in property in which she had previously only an interest for life. The court also refused to order payment of the petitioner's costs out of the fund. In this case there had been a divorce on the ground of the cruelty and adultery of the husband. The ground of the refusal of the court chiefly was that it would not be for the benefit of the wife to interfere. Upon a petition for variation of settlements, the court has power to make an order in favour of the interest of third parties created before the filing of that petition. Until a decree has been made for dissolution of a marriage, there is no *lis pendens* with reference to the property included in the marriage settlements. *Wigney v. Wigney*, L. R., 7 P. D. 228. The Divorce Court will vary the trusts of a settlement at the instance of a guardian of the children. *Ling v. Ling*, 4 S. & T. 99. This court has no authority to alter the destination of dividends or other income due and payable *before* the date of its order. *Paul v. Paul*, L. R., 2 P. & M. 93.

The costs of obtaining an alteration in the settlement fall on the co-respondent if condemned in the costs of the suit for dissolution. *Gill v. Gill*, 3 S. & T. 359.

MERGER.

CH. 1.—MERGER OF ESTATES AND INTERESTS, p. 679.

CH. 2.—MERGER OF CHARGES ON PROPERTY, p. 681.

CHAPTER I.

MERGER OF ESTATES AND INTERESTS.

<i>Union of greater and lesser Estate</i>	679	<i>Husband and Wife</i>	679
<i>Equitable and Legal</i>	679	<i>Terms in Terms</i>	681
<i>Term and Fee</i>	679	<i>Estates Tail not in Fee</i>	681
<i>Estates in same Right</i>	679	<i>Surrender or Merger of Leases</i>	681
<i>One held as Executor</i>	679	<i>Where there are Sub-leases</i>	681

MERGER takes place where a greater and less estate meet in the same person without any intermediate estate. In such cases the less ceases to exist, being merged in the greater, as if tenant for years acquires the fee, the term is merged. 2 Bl. 177. Every estate of freehold is, for the purposes of merger, greater than any term of years. See *White v. Greenish*, 11 C. B., N. S. 209, 233. Where an equitable and a legal estate, equal and co-extensive, unite in the same person, the former merges in the latter. *Selby v. Alston*, 3 Ves. 339. If a term and the fee, one legal, the other equitable, meet in the same person, the term will attend the inheritance. *Capel v. Girdler*, 9 Ves. 509. But if the owner of a beneficial term purchases the reversion in fee, and takes the conveyance to a trustee declaring that there shall be no merger, the term will still subsist. *Belaney v. Belaney*, L. R., 2 Ch. 138; and see *Tiffin v. Tiffin*, 1 Ver. 1, ed. Raith. n. (1), where the prior cases on the subject of attendant terms are collected. The estates must, in general, be in the same right. Thus if a person has the fee in his own right, and a term as executor, there will be no merger, unless, it is said, where he takes one of the estates by *his own act*, as by purchase, Wms. Exors. 8th ed. 647; but even in this case there would be no merger in equity. See *Philips v. Philips*, 1 P. W. 41. Where B., an administrator, granted an underlease for a term held by him as administrator, and shortly afterwards the underlessee assigned the land to A. for the residue of the term, it was held that there was in equity no merger of the term. *Chambers v. Kingham*, 10 Ch. D. 743.

A term vested in the husband in his own right will not merge in an

estate of freehold vested in him as tenant by the curtesy (*Jones v. Davies*, 7 H. & N. 507); and the wife's term will not, merely by the act of marriage, merge in the husband's reversionary interest. *Ly. Platt v. Sleaf*, Cro. Jac. 275. An estate for years will merge in a reversionary term of years, though the latter is of less duration. *Hughes v. Robotham*, Cro. Eliz. 302; *Stephens v. Bridges*, 6 Madd. 66. There is an exception to the general rule in the case of estates tail in freeholds, for these do not merge in the fee, this result being prevented by the operation of the statute *De donis*. 2 Bl. Com. 177. Though a tenancy in tail changed into a determinable fee or an estate tail after possibility of issue extinct may merge. 3 Preston, Conv. 240, 3rd ed. And estates tail in copyholds will merge in the fee, as they are not within the statute (*Parker v. Turner*, 1 Ver. 458; *Dunn v. Green*, 3 P. W. 9), but not an equitable estate tail in the legal fee. *Merest v. James*, 6 Madd. 118.

Sometimes the consequences of merger are prevented by statute. Thus formerly, if a lessee, who had granted *sub-leases*, surrendered his own lease to *his* reversioner, his own estate being merged, there was no reversion on the subleases existing, and the rent as incident to such reversion ceased. *Webb v. Russell*, 3 T. R. 393. By the 4 Geo. 2, c. 28, s. 6, this consequence of merger was obviated in the instance of leases *surrendered in order to be renewed*. *Cousins v. Phillips*, 3 H. & C. 892; see *Re Ford's Estate*, L. R., 8 Eq. 309. And now by the 8 & 9 Vict. c. 106, s. 9, when the reversion expectant on a lease is surrendered or merges, the estate which for the time being confers as against the tenant under the lease the *next vested right* shall, for the purpose of preserving the incidents to and obligations upon the same reversion, be deemed the reversion expectant on such lease.

By the Judicature Act, 36 & 37 Vict. c. 66, s. 25, sub-s. 4, there shall not after the commencement of this act, be any merger by operation of law only of any estate the beneficial interest in which would not be deemed to be merged or extinguished in equity.

CHAPTER II.

MERGER OF CHARGES ON PROPERTY.

<i>Tenant in Fee or Tail entitled to, and paying off, Charge</i>	681	<i>Tenant in Fee or Tail entitled to, and paying off, Charge—continued.</i>	
<i>Charge merges in Fee or Estate Tail</i>	681	<i>Where several entitled</i>	683
<i>Unless contrary to Owner's Interest</i>	681	<i>Presumption of Exoneration</i> ..	683
<i>Tenant in Tail in Possession</i> ...	681	<i>When Charge kept alive</i>	683
<i>Contrary Intention</i>	681	<i>Tenant in Tail in Remainder</i> ..	683
<i>Evidence of Intention</i>	681, 682	<i>Infant's Estate</i>	683
<i>Release of Term securing Charge</i>	682	<i>Parol Evidence of Intention</i> ...	683
<i>Contingent Right to Charge</i> ...	682	<i>Tenant for Life entitled to and paying off Charge</i>	683
<i>Owner Lunatic</i>	682	<i>Presumed to pay for his own Benefit</i>	683
<i>Infants—Creditors</i>	682	<i>Statute of Limitations</i>	684

Tenant in Fee or in Tail entitled to and paying off Charge.] When the right to an estate of inheritance, and the right to a charge upon it, become vested in the same person absolutely, a presumption will, as a general rule, arise after his death (*Swinfen v. Swinfen*, 29 Bea. 199), that the charge has become merged and extinguished in the inheritance, whether the right to the property, or the right to the charge, first existed. Thus, where a person seised of an estate in *fee absolutely*, or as tenant in tail in possession, becomes entitled to a charge upon it, the charge will merge, unless kept alive, or unless it is to the owner's interest that it should not merge, as it will then be presumed that such was his intention, to which effect will accordingly be given. *Forbes v. Moffatt*, 18 Ves. 384; *Swabey v. Swabey*, 15 Sim. 106; *Grice v. Shaw*, 10 Ha. 76; see *Ld. Compton v. Oxenden*, 2 Ves. jun. 264; *Byam v. Sutton*, 19 Bea. 556.

But this rule, as regards tenants in tail, is applicable only to tenants in tail in possession, not in remainder, where the estate of the latter is liable to be defeated by the birth of issue of another person, and he has himself paid off the charge. *Wigsell v. Wigsell*, 2 S. & S. 364; *Horton v. Smith*, 4 K. & J. 624. But there is a difference between a tenant in tail in remainder becoming entitled under a will or otherwise, without any act on his own part, to a charge on the estate, and cases where he has entitled himself to the charge by an actual payment made by himself. See per Wood, V.-C., 4 K. & J. 628; and *Johnson v. Webster*, 4 D., M. & G. 474, post, p. 682. Of course if the owner expressly declares his intention that the charge shall be kept on foot, no question can arise. See *Bailey v. Richardson*, 9 Ha.

736; *Tyrwhitt v. Tyrwhitt*, 32 Bea. 244. The presumption arises on the death of the owner, and may be collected from the circumstances existing at his death and from his acts, and the facts affecting his position down to and at the time of his decease. *Swinfen v. Swinfen*, 29 Bea. 199; *Tyrwhitt v. Tyrwhitt*, *sup.* If the owner releases the trustees of a term securing the charge a presumption arises that he intended the charge to be satisfied. *Clifford v. Clifford*, 9 Ha. 675. When the effect of the merger would be to let in the testator's or grantor's debts (*Davis v. Barrett*, 14 Bea. 542; *Sing v. Leslie*, 2 H. & M. 68), or other incumbrances (*Forbes v. Moffatt*, 18 Ves. 384; *Richards v. Richards*, Johns. 754), this will in general be sufficient to show that no merger was intended. But where a person who was absolutely entitled to a fund on the death of A. borrowed the fund and mortgaged an estate to secure it, and then predeceased A., having bequeathed all sums due on real securities to which he was entitled, it was held that there was no merger, and that the debt passed under the bequest. *Wilkes v. Collin*, L. R., 8 Eq. 338.

So if the owner has done anything from which it is clear that he considered the charge as in existence, as if he has bequeathed it specifically (*Blundell v. Stanley*, 3 De G. & S. 433), or has devised the property *subject to the liabilities* attaching to it, the charge will be held to subsist. *Hatch v. Skelton*, 20 Bea. 453. But this is not an inflexible rule, and the devise or conveyance may show, that though it purport to be subject to the charge, the intention was that it should only be kept alive for a particular purpose. Thus if the owner of the estate is only contingently entitled to the charge, for instance, on failure of the children of A., and conveys the estate subject to it, the charge if it eventually falls into possession (A. having no children) will merge. *Johnson v. Webster*, 4 D., M. & G. 474; see *Astley v. Milles*, 1 Sim. 298. A devise by an owner in fee entitled to a charge upon it, without mentioning the charge, is some evidence of an intention to merge it. *Swinfen v. Swinfen*, 29 Bea. 199, 204. When the owner is a lunatic, the charge will merge unless it is to his interest that it should be kept alive. *Ld. Compton v. Oxenden*, 2 Ves. jun. 261. As to infants prior to the Wills Act, 1 Vict. c. 26, they could make wills of *personalty*, but not of realty, before their majority; a presumption arose, therefore, that it was to their interest to keep the charge alive, over which they would have a disposing power before they attained their majority. *Powell v. Morgan*, 2 Ver. 90; *Donisthorpe v. Porter*, 2 Ed. 162. This reason, however, is no longer applicable. 1 Vict. c. 26, s. 7; see *Dowling v. Belton*, Flan. & Kelly, 462.

As formerly real estate was not, except in certain cases, liable to a deceased owner's debts, equity held, *in favour of creditors*, that the charge was subsisting, inasmuch as that being personalty was liable to the owner's debts. *Donisthorpe v. Porter*, 2 Ed. 162. This reason, however, would no longer apply. See *ante*, tit. "ASSETS." Where children are entitled in equal shares to one gross sum charged on an estate, which comes to them as tenants in common, in fee or in

tail, the charge will *primâ facie* merge; but any so entitled may keep his share of the fund a subsisting charge. See *Smith v. Frederick*, 1 Russ. 174; *Otway Cave v. Otway*, L. R., 2 Eq. 725.

Sometimes the question arises, where the owner in fee or in tail, or a tenant for life, *pays off* incumbrances, whether they are to be considered as subsisting or not. In such cases, in general, if the owner in fee or tenant in tail in possession pays off a charge, the preceding rules for the most part apply, and a presumption arises that he does so for the benefit of the estate. *E. of Bucks v. Hobart*, 3 Sw. 186, 199. But he may, as in the case of the owner who becomes entitled to a charge otherwise than by payment, keep it alive by a declaration to that effect, or by taking an assignment of it to a trustee for his own benefit (*Gunter v. Gunter*, 23 Bea. 571); though this is not always conclusive. *Hood v. Phillips*, 3 Bea. 513; *Pitt v. Pitt*, 22 Bea. 294. But the rule does not apply to a tenant in tail in remainder who pays off a charge (*Wigsell v. Wigsell*, 2 S. & S. 364), though he afterwards becomes tenant in tail in possession (*Horton v. Smith*, 4 K. & J. 624; see *ante*, p. 681); for there is a distinction between the case of a tenant in tail in remainder becoming entitled to a charge *by payment* and *without payment*; in the former case, on the remainder becoming an estate in possession, the charge will not merge; in the latter it will, unless there is evidence of intention to the contrary. *Ib.* Neither does the rule apply where the owner, subject to an *executory devise* over, pays off a charge upon the estate, and the executory devise afterwards takes effect. *Drinkwater v. Combe*, 2 Sim. & S. 340. Nor where a charge is paid off out of the personal estate of an infant by order of the court. *Alsop v. Bell*, 24 Bea. 451. Parol evidence is admissible to show the intention of the party paying off the charge. *Astley v. Milles*, 1 Sim. 298.

Tenant for Life entitled to and paying off Charge.] A tenant for life, or person having a partial interest only, that is, an interest less than the whole inheritance, who pays off charges, is presumed to do so for his own benefit, as *primâ facie* he cannot be presumed to discharge the debt of another (*Cts. of Shrewsbury v. E. of Shrewsbury*, 1 Ves. jun. 233; *Drinkwater v. Combe*, 2 S. & S. 340, 345); and a tenant in tail restrained from alienating is in the same position in this respect as a tenant for life. *Ib.* See further as to the general principle, *Burrell v. E. of Egremont*, 7 Bea. 205; *Pitt v. Pitt*, 22 Bea. 294; *Morley v. Morley*, 5 D., M. & G. 610. And this is the rule although he may have a remainder or reversion in fee, if there are intermediate estates (*Wyndham v. E. of Egremont*, Amb. 753); and the subsequent union of the life estate and remainder will make no difference, the charge will still subsist. *Trevor v. Trevor*, 2 M. & K. 675; see *Trumper v. Trumper*, L. R., 8 Ch. 870. But this presumption does not arise where the tenant for life pays off *bond* debts, as these are not charges on the estate. *Morley v. Morley*, 5 D., M. & G. 626. If he merge the security by taking an assignment connecting

it with the legal estate of *inheritance*, this, *primâ facie*, will put an end to the charge. *St. Paul v. Ld. Dudley and Ward*, 15 Ves. 173; *Burrell v. E. of Egremont*, 7 Bea. 205. Where a tenant for life pays off a charge, the Statute of Limitations does not begin to run from the time of such payment but from his death, for until that time there is no assignable person liable to pay the charge. *Ib.*

MORTGAGES.

- CH. 1.—NATURE OF A MORTGAGE IN GENERAL, p. 686.
- CH. 2.—EQUITABLE MORTGAGES, p. 690.
- CH. 3.—WHO MAY BE MORTGAGORS AND MORTGAGEES, p. 695.
- SEC. 1.—IN GENERAL, p. 695.
- SEC. 2.—BUILDING SOCIETIES, p. 698.
- CH. 4.—OF THE SUBJECT-MATTER OF MORTGAGES, p. 702.
- SEC. 1.—FREEHOLDS, COPYHOLDS, AND LEASEHOLDS, p. 702.
- SEC. 2.—GOODS AND CHATTELS UNDER BILLS OF SALE, p. 705.
- SEC. 3.—POLICIES OF ASSURANCE, CHUSES IN ACTION, &c., p. 720.
- CH. 5.—OF THE USUAL COVENANTS AND PROVISIONS IN MORTGAGES, p. 731.
- CH. 6.—OF THE TRANSFER AND DEVOLUTION OF THE EQUITY OF REDEMPTION, p. 736.
- CH. 7.—OF THE TRANSFER AND DEVOLUTION OF THE MORTGAGE DEBT AND SECURITY, p. 743.
- CH. 8.—MORTGAGOR IN POSSESSION—MORTGAGEE IN POSSESSION—RECEIVER, p. 745.
- SEC. 1.—MORTGAGOR IN POSSESSION, p. 745.
- SEC. 2.—MORTGAGEE IN POSSESSION, p. 747.
- SEC. 3.—RECEIVER, p. 751.
- CH. 9.—MORTGAGEE'S RIGHTS AND REMEDIES, p. 753.
- CH. 10.—OF PRIORITY AND TACKING, p. 764.
- SEC. 1.—PRIORITY BY POSSESSION OF THE LEGAL ESTATE OR TITLE DEEDS, p. 764.
- SEC. 2.—TACKING, p. 770.
- SEC. 3.—PRIORITY BY REGISTRATION, p. 774.
- CH. 11.—DISCHARGE OF MORTGAGE—RECONVEYANCE, p. 777.
- CH. 12.—TRUSTEE ACTS AS AFFECTING MORTGAGES, p. 781.

CHAPTER I.

NATURE OF A MORTGAGE IN GENERAL.

<i>Definition of</i>	686	<i>Sale or Mortgage under Form of</i>	
<i>Legal—Equitable</i>	686	<i>Sale</i>	687
<i>Sub-mortgage</i>	686	<i>Mortgage and conditional Sale</i>	688
<i>Equity of Redemption</i>	686	<i>Option of Repurchase</i>	688
<i>Cannot be made irredeemable</i>	686	<i>Fraud, Undervalue, &c.</i>	688
<i>Limitation of Right as to Time or</i>		<i>Undue Influence</i>	688
<i>Persons</i>	686	<i>Reversionary Interests</i>	688
<i>No Proviso for Redemption</i>	687	<i>Rights inconsistent with Mortgage</i>	689
<i>Welsh Mortgage</i>	687	<i>Commission</i>	689
<i>No Covenant to pay Mortgage Debt</i>	687	<i>Lease</i>	689
<i>Simple Contract or Specialty</i>	687	<i>Immoral Purpose</i>	689
<i>Mortgage or conditional Sale</i>	687	<i>Agreement for Mortgage—Costs</i>	689
<i>Distinctions between</i>	687	<i>Mortgages under Conveyancing Act</i>	689

General Incidents.] A mortgage may in general terms be described as an assurance or pledge of, or charge upon, property real or personal, for an antecedent, present, or future debt or loan, as security for, and redeemable on, the repayment of it. See *Seton v. Slade*, 7 Ves. 273; also the definition of a mortgage in the Trustee Act, 1850, *post*, Chap. XII. A mortgage may be either legal or equitable, and there may be a mortgage of a mortgage, or sub-mortgage. A mortgage, where it is effected by some deed or written instrument, usually provides for the repayment of the debt on a day named, in general six months from the date of the mortgage. In default of repayment the estate of the mortgagee in the property mortgaged becomes absolute at law (2 Blac. Com. 158), but in equity the right will still subsist to redeem the estate on payment of principal and interest. This is the mortgagor's *equity* of redemption. As a very general rule, property of every description is capable of being made the subject of a mortgage. A mortgage does not alter the existing limitations of property except for the purpose of the mortgage itself, unless an express intention to resettle it is shown, and the equity of redemption continues subject to such limitations. *Wood v. Wood*, 7 Bea. 183; *Hastings v. Astley*, 30 Bea. 260.

When the transaction clearly amounts to a mortgage it cannot be made irredeemable, for it is a maxim that *once a mortgage always a mortgage* (*Howard v. Harris*, 1 Ver. 33); and the right will subsist generally although the deed may limit a time for redemption, for instance, the lifetime of the mortgagor, or may limit the right to a particular class, as the heirs male of the mortgagor (*ib.*, *Floyer v. Lavington*, 1 P. W. 268); unless, perhaps, where the transaction is

in the nature of a family settlement. *Bonham v. Newcomb*, 1 Ver. 7, 214, 232. It is immaterial that there is no proviso for redemption, or no day fixed for repayment, if the transaction is in fact a mortgage (*Joynes v. Statham*, 3 Atk. 389; *Bell v. Carter*, 17 Bea. 11); and a covenant against redemption is unreasonable. *E. I. Comp. v. Atkyns*, Comyn, 349. A Welsh mortgage is a mortgage under which the mortgagee is let into possession of the mortgaged property until the rents and profits of it repay the money borrowed (2 Blac. Com. 157), the property being redeemable at any time on payment of principal and interest due. *Yates v. Hambly*, 2 Atk. 363; see *Fenwick v. Reed*, 1 Mer. 114, 122. In early times such mortgages were common, but they are now rare. See a mortgage of tolls, &c., in the nature of a Welsh mortgage, *Jortin v. S. E. R. Co.*, 6 D., M. & G. 270; cons. *Douglas v. Culverwell*, 4 D., F. & J. 20, 27, which appears to have been a Welsh mortgage, or in the nature of one. The want of a covenant to pay the mortgage debt is in general immaterial (*Goodman v. Grierson*, 2 Ba. & Be. 278), for every mortgage implies a debt on the part of the mortgagor (*King v. King*, 3 P. W. 358); though a simple contract debt only where there is no covenant (*Yates v. Aston*, 4 Q. B. 182; *Courtney v. Taylor*, 6 M. & Gr. 851; *Adey v. Arnold*, 2 D., M. & G. 432; *Isaacson v. Harwood*, *Brook v. Harwood*, L. R., 3 Ch. 225), unless there is such an acknowledgment of the debt in the mortgage deed that a covenant to pay will be implied (*Marryat v. Marryat*) 28 Bea. 224); for "whatever words are used by a party to a deed, if he intends that they shall operate as a covenant, he will be held liable." Per Lord Cairns, L. J., L. R., 3 Ch. 228; see *Saunders v. Milsome*, L. R., 2 Eq. 573. A mortgage is distinguishable from a conditional sale or sales with the option of repurchase at a future time, in which case there is no right of redemption (*Perry v. Meddowcroft*, 4 Bea. 197), only a right of repurchase, which must be strictly exercised. *Barrell v. Sabine*, 1 Ver. 268. If the transaction is to be treated as a mortgage, the rights must be mutual and reciprocal, and the mortgagee must have all the remedies a mortgagee is entitled to (*Goodman v. Grierson*, 2 Ba. & Be. 274; and see *Lincoln v. Wright*, 4 D. & J. 16; *Alderson v. White*, 2 D. & J. 97); and there must be an existing mortgage debt. *Williams v. Owen*, 5 M. & Cr. 303.

The question in cases of this description always is, whether the transaction is a *bonâ fide* sale with a contract of repurchase, or a mortgage under the form of a sale. *Ib.*; see *Shaw v. Jeffery*, 13 Moo. P. C. 432. And it is a circumstance to be considered by whom the expenses of the transaction are to be paid, as in mortgages they are paid by the mortgagor, but on a purchase those of the conveyance by the purchaser. *Williams v. Owen*, *sup.*, p. 308; and comp. *Alderson v. White*, 2 De G. & J. 97. Receipts of money by the mortgagee as interest (*Cripps v. Jee*, 4 B. C. C. 471), or a memorandum signed by him or his agent recognizing the transaction as a mortgage (*Whitfield v. Parfitt*, 15 Jur. 852), will be evidence to show that it is one. But where the transaction is in fact a purchase, a

reference in the will of the purchaser to the subject-matter of the purchase as being *redeemable* will not make it a mortgage. *Alderson v. White*, *sup.* Where it is a conditional sale, with an option of repurchase, the money must be paid strictly in pursuance of the agreement. *Davis v. Thomas*, 1 R. & My. 506. A mortgagor may sell his equity of redemption to the mortgagee coupled with a right of repurchase. *Gossip v. Wright*, 9 Jur., N. S. 592. Where, on an advance of money, there was an agreement to repay it, and if not repaid the borrower was to assign certain property to the lender, and the money was not repaid, it was held that, under the agreement, the relation of vendor and purchaser, and not that of mortgagor and mortgagee, was constituted. *Tapply v. Sheather*, 8 Jur., N. S. 1163; cons. *Re Edwards*, 11 Ir. Ch. Rep. 367. Where there is an agreement between two persons, one paying, and the other receiving, money and property is transferred, if in effect the property is redeemable on payment of the money it is a mortgage. It makes no difference that it purports to be an absolute sale, and that a receipt is given accordingly. *Ex parte Odell*, 10 Ch. D. 76. See *Cochrane v. Matthews*, *ib.* 80, n. Parol evidence is admissible notwithstanding the Statute of Frauds, to show that the transaction was intended to be a mortgage not a sale. *Lincoln v. Wright*, 4 D. & G. 16.

If an unfair advantage be taken to obtain a conveyance at an undervalue from a person who is desirous of mortgaging, not of selling, the sale will be set aside and the transaction treated as a mortgage. *Douglas v. Culverwell*, 3 Giff. 251; see *Denton v. Donner*, 23 Bea. 285. If the execution of a mortgage by the mortgagor has been procured by the fraud of his solicitor, and no money of the mortgagee has been paid to the mortgagor, the mortgage confers no title on the mortgagee, although innocent, and although he has handed over the money to the solicitor. *Wall v. Cockerell*, 10 H. L. C. 229; see *Eyre v. Burmester*, *ib.* 90; *Adsetts v. Hives*, 33 Bea. 52. Neither can a mortgagee derive any benefit from a security given to him by the mortgagor as surety for another, which is obtained by misrepresentations of the mortgagee to the mortgagor. *Lake v. Brutton*, 8 D., M. & G. 440. On the other hand, a mortgagee, who has been deceived by means of the fraud of the mortgagor and others in suppressing a settlement has his remedy against *all* who are *parties* to the fraud. *Clark v. Hoskins*, 37 L. J., Ch. 561. A mortgage which has been obtained through the undue influence of the mortgagee, in consequence of his standing in some fiduciary relation to the mortgagor, will be dealt with or set aside, like a purchase under similar circumstances, on equitable terms. See *Savery v. King*, 5 H. L. C. 627; *Cowdry v. Day*, 1 Giff. 316. The rules affecting sales of reversionary interests were formerly equally applicable to mortgages, and it was incumbent upon a mortgagee in many cases to prove value. *Emmet v. Tottenham*, 10 Jur., N. S. 1090; see *Webster v. Cook*, L. R., 2 Ch. 542. Now, by the 31 & 32 Vict. c. 4, no purchase made *bond fide* of any reversionary interest in real or personal estate shall be set aside *merely* on the ground of *undervalue* (s. 1). *Purchase* includes any

contract or conveyance by which any beneficial interest may be acquired (s. 2), consequently mortgages. The act does not apply to *suits depending* on 1st January, 1868 (s. 3), on which day the act came into operation. The act was passed for the purpose of abolishing the equitable doctrine which set aside the sale of a reversion simply on the ground that the sum paid was not, in the opinion of the judges, an adequate value for the thing sold. *Per* Jessel, M.R., *Benyon v. Cook*, L. R., 10 Ch. 389, 392. In this case money was borrowed on a reversion at the rate of 60 per cent. When the reversion fell in, a decree for redemption was made with interest at 5 per cent. See *Nevill v. Snelling*, 15 Ch. D. 679; *Tyler v. Yates*, L. R., 6 Ch. 665; *Aylesford (E.) v. Morris*, L. R., 8 Ch. 484. A mortgagee cannot reserve an advantage not strictly belonging to the contract of mortgage, *e.g.*, a right to commission on a sale of the mortgaged property (*Broad v. Selfe*, 9 Jur., N. S. 885; see *Barrett v. Hartley*, L. R., 2 Eq. p. 795); or a right to receive the rents with a commission (*Chambers v. Goldwin*, 9 Ves. 271; *Langstaff v. Fenwick*, 10 Ves. 405; *Leith v. Irvine*, 1 M. & K. 277; *Eyre v. Hughes*, 2 Ch. D. 148); or, generally, any other right not arising out of the mortgage itself. See *Jennings v. Ward*, 2 Ver. 520; *Gubbins v. Creed*, 2 Sch. & L. 217. But a mortgagee of property in the West Indies may stipulate that the consignments shall be made to him. *Bunbury v. Winter*, 1 J. & W. 261; see *Cox v. Champneys*, Jac. 576; *Leith v. Irvine*, 1 M. & K. 288. In *General Credit, &c., Co. v. Glegg*, 22 Ch. D. 549, the debt was to be repaid by instalments. If default was made, there was also to be paid a "commission" of 1l. per cent. for every month or part of a month from the due date to the date of payment of any instalment; and this was held valid. *Comp. In re Williams*, 25 Ch. D. 656, on the Bills of Sale Act, 1882, s. 7, *post*. A lease by a mortgagor to a mortgagee for 999 years will be set aside at the instance of the mortgagor (*Webb v. Rorke*, 2 Sch. & L. 661); and, if not disputed by him, and there is a *puisne* mortgagee, and the lease is subsequent to the *puisne* mortgage, the rights of the subsequent mortgagee cannot be affected by the lease. *Gregg v. Arrott*, Ll. & G. t. Sug. 246. When a mortgagee advances his money in order to avail himself of the mortgage for an immoral purpose, the mortgage will not be enforced in equity. *Willyams v. Bullmore*, 33 L. J., Ch. 461.

A mere agreement for a mortgage, no money being or having been lent, cannot be enforced in equity. *Rogers v. Challis*, 27 Bea. 175. Where parties are in treaty for a mortgage (which is not subsequently carried out), and the intended mortgagor agrees to pay the mortgagee's reasonable costs, this will not include the costs of withdrawing money from a banker, and remitting it to London for payment. *Re Blakesley*, 32 Bea. 379. In the absence of any express contract the solicitor of the intended mortgagee has no claim against the intended mortgagor for the costs of investigating the title, where the treaty goes off, even through the default of the mortgagor (*Wilkinson v. Grant*, 18 C. B. 319), unless the arrangement for the mortgage is

under the sanction of the court, and goes off without any default on the part of the intended mortgagee. *Craggs v. Gray*, 35 Bea. 166.

As to statutory mortgages and transfers under the Conveyancing Act, 1881, 44 & 45 Vict. c. 41, see that act, ss. 26—29.

CHAPTER II.

EQUITABLE MORTGAGES.

<i>What—How made</i>	690	<i>Deposit with Solicitor for Costs</i> 692, 693
<i>Charge—Agreement</i>	690	<i>Right prevails over Judgment</i>
<i>Deposit of Deeds</i>	690	<i>Sub-mortgage</i>
<i>Without Memorandum</i>	690	<i>Rights of Depositary</i>
<i>Policies, Shares, &c.</i>	691	<i>Depositor who acquires greater Interest</i>
<i>Deeds left for Preparation of Legal Mortgage</i>	691	<i>When extended to future Advances</i>
<i>Parol Evidence as to</i>	691	<i>Legal and Equitable Mortgagee of Leaseholds</i>
<i>Fiatures are included</i>	691	<i>Deposit is not an Assignment</i>
<i>Agreement to deposit is not</i>	691	<i>Power of Attorney</i>
<i>In whose Favour operates</i>	692	<i>With whom made</i>
<i>Deposit of some of the Deeds</i>	692	<i>Deposit with Firms</i>
<i>Priority under</i>	692	<i>Evidence of Dealings with</i>
<i>Intention to Deposit</i>	692	<i>Equitable Assignment of Money</i>
<i>Effect and Operation of</i>	692	<i>Agreement or Order charging Debtor's specific Funds</i>
<i>In general binds all Property comprised in Deeds</i>	692	<i>Revocation of Order</i>
<i>Gives Right to Foreclosure, Sale, or Legal Mortgage</i>	692	<i>Stamping as a Bill</i>
<i>Prior voluntary Conveyance</i>	692	<i>Assignment of Future Debt</i>

AN equitable mortgage of real or personal property may be made by an express equitable mortgage, for instance, a mortgage subject to a prior legal mortgage, or by a charge upon the property, or by an agreement on a loan to execute a legal mortgage of specific property (*Ex parte Heathcoate*, 2 M., D. & D. 711; *Carew v. Arundell*, 8 Jur., N. S. 71; see *Eyre v. M'Dowell*, 9 H. L. Cas. 619); though it would seem doubtful whether a mere agreement to give a mortgage for an antecedent debt can be enforced where there is no express stipulation that the intended mortgagee shall forbear to sue. See *Crofts v. Feuge*, 4 Ir. Ch. 316; *Woodroffe v. Johnston*, *ib.* 319. But in *Ashton v. Corrigan*, L. R., 13 Eq. 76, such an agreement was enforced although it was to contain an immediate power of sale. See also *Herman v. Hodges*, L. R., 16 Eq. 18. Where the agreement is to execute a mortgage with all usual covenants, and it is under seal, the mortgage debt becomes a specialty debt. *Saunders v. Milsome*, L. R., 2 Eq. 573; see *ante*, p. 687. An equitable mortgage may also be created by the deposit of title deeds (*Russel v. Russel*, 1 B. C. C. 269; *Fenwick v. Potts*, 8 D., M. & G. 506), or copies of court rolls of copyhold property (*Whitbread v. Jordan*, 1 Y. & C., Ex. 303; *Pryce v. Bury*, 2 Drew. 11), even without a memorandum or anything being said. *Ex parte Langston*, 17 Ves. 230; see *Ede v. Knowles*, 2 Y. C. C. 172. But the mere possession of deeds, without evidence of the con-

tract upon which the possession originated, or, at least, of the manner in which that possession originated, so that a contract may be inferred, will not be enough to create an equitable security. *Dixon v. Muckleston*, L. R., 8 Ch. 155, 162. See *Chapman v. Chapman*, 13 Bea. 308. Where, however, there is no memorandum, a mortgagee will not be allowed, in bankruptcy, his costs out of the produce of the sale of the mortgaged property; but letters written after the deposit are sufficient to entitle him to costs. *Ex parte Bisdee*, 1 M., D. & D. 333; *Ex parte Reynolds*, 2 Mon. & A. 104.

Where deeds are deposited with bankers subject to a condition, for instance, that they should lend a specified sum for a given time, the money must be lent or placed to the credit of the depositor at once, or the bankers will have no lien. *Burton v. Gray*, L. R., 8 Ch. 932.

A deposit of a policy of assurance (*Ferris v. Mullins*, 2 Sm. & G. 378), or shares or certificates of shares in companies (*Ex parte Stewart*, 11 Jur., N. S. 25), creates an equitable mortgage. So, if deeds are left in order that a legal mortgage may be prepared from them, it would seem that, where the money has already been advanced, this creates an equitable mortgage. *Ex parte Bruce*, 1 Rose, 374; *Hockley v. Bantock*, 1 Russ. 141. See, however, *contra*, *Ex parte Bullecl*, 2 Cox, 243; *Norris v. Wilkinson*, 12 Ves. 192. Where there is a written memorandum at the time of the deposit, it will control any inference which would otherwise be drawn from the mere deposit. *Ex parte Coombe*, 17 Ves. 369. Parol evidence, however, may be received in connection with the deposit. *Ede v. Knowles*, 2 Y. C. C. 172; see *Ferris v. Mullins*, 2 Sm. & G. 378. If the deeds relate to realty or chattels real, fixtures annexed, including tenants' fixtures, will be included, though not specifically mentioned (*Williams v. Evans*, 23 Bea. 239), and whether erected before or after the deposit. *Ex parte Price*, 2 M., D. & D. 518; *Ex parte Cotton*, *ib.* 725.

A parol agreement to deposit deeds, without an actual deposit, is not an equitable mortgage (*Ex parte Coombe*, 4 Madd. 249; *Ex parte Perry*, 3 M., D. & D. 252); though it has been held that if securities are in the hands of a third person an agreement to assign them will create an equitable mortgage. *Ex parte Heathcoate*, 2 M., D. & D. 711. And an agreement to deposit a conveyance, not then executed, gives a lien upon it when executed. *Ex parte Orrett*, 3 Mon. & A. 153. See, however, *Ex parte Perry*, 3 M., D. & D. 252, in which Bruce, V.-C., observed that it was only a case of actual deposit that excluded the operation of the Statute of Frauds; and see *Ex parte Coombe*, *sup.* In *Hopper v. Conyers* (L. R., 2 Eq. 549), a solicitor borrowed money of his bankers on the security of a deposit of the title deeds of property mortgaged to a client, and applied the money in the purchase of an estate. When the mortgage was paid off he repaid the bankers, and induced his client to execute a re-assignment of the mortgage, assuring him untruly that his money had been invested; it was held that the client had a lien upon the estate so purchased by the solicitor.

A deposit of deeds with a person to secure advances by him and to secure money advanced by another, does not in general operate as an equitable mortgage in favour of the latter (*Ex parte Whitbread*, 19 Ves. 209), though it may be shown that the depositary is in fact a trustee for another. *Ib.* But an order by the mortgagor, to an equitable mortgagee by deposit, on his debt being satisfied, to hand over the deeds to A., another creditor of the mortgagor, creates an equitable mortgage in A.'s favour. *Daw v. Terrell*, 33 Bea. 218.

A deposit of some of the deeds may create an equitable mortgage. *Ex parte Arkwright*, 3 M., D. & D. 129; *Lacon v. Allen*, 3 Drew. 579. And on a deposit of some of the deeds with one person, and of others with another, the first depositary has in general the better equity, where there has been no gross negligence on his part in calling for all the deeds. *Roberts v. Croft*, 2 D. & J. 1; see *post*, Chap. X., sec. 1. Where deeds relating to one estate are deposited with A., and then a legal mortgage of this and another estate is executed to B. without notice, and deeds are delivered to him purporting to be the deeds of both properties, he has no equity to have the deeds delivered up to him which were deposited with A. *Barnard v. Bywater*, 17 W. R. 71; see *Joyce v. De Moleyns*, 2 J. & La. 374; *Stackhouse v. Ly. Jersey*, 1 J. & H. 721; and *post*, Chap. X. When deeds are intended to be, but are not, deposited, but are specified in the memorandum of deposit, this will be a good equitable mortgage. *Ex parte Leathes*, 3 Dea. & C. 112; see, however, *Ex parte Halifax*, 2 M., D. & D. 544. But if in a mortgage to A. there is a recital of the deposit of deeds with B. as a security, which is contrary to the fact, a subsequent deposit of the deeds with B. will not give him priority over A. *Frazer v. Jones*, 5 Ha. 481; on app. 12 Jur. 443.

Primâ facie all the property comprised in the deeds is bound (*Ashton v. Dalton*, 2 Coll. 565); but the enumeration of part of the property only in the memorandum will restrict the operation of the deposit to such part. *Ex parte Hunt*, 1 M., D. & D. 139; *Wylde v. Radford*, 9 Jur., N. S. 1169. But the operative part of the deed or memorandum will not, in every case, be limited by the recital. See *Ex parte Glyn*, 1 M., D. & D. 29. A deposit of deeds creates only an equitable mortgage of the property comprised in them, although the depositary is assured or induced to believe by the depositor that they comprise other property. *Jones v. Williams*, 24 Bea. 47. If the deeds deposited relate to real property, an equitable interest in the land itself will be created, notwithstanding the 4th section of the Statute of Frauds. As to a right to foreclose, see *post*, Chap. IX. The mere deposit gives a right to interest, but only at 4 per cent. *Re Kerr's Policy*, L. R., 8 Eq. 331. The deposit of deeds comprising interests in land is valid under the 27 Eliz. c. 4 (*ante*, p. 295), against a prior volunteer. *Lister v. Turner*, 5 Ha. 281. A deposit of deeds with a solicitor for past costs is valid, but was not so, formerly, for future costs. *Jones v. Tripp*, Jac. 322; *Ex parte Lainy*, 2 M. & A. 381. Now, by the 33 & 34 Vict. c. 28, s. 16, "an attorney or solicitor may take security from his client for his future fees, charges and

disbursements to be ascertained by taxation or otherwise." But costs are not *future advances* within the meaning of a mortgage extending to future advances. *Shaw v. Neale*, 6 H. L. C. 581.

The equity of a depositary of deeds relating to real estate prevails over the legal title of a judgment creditor under an *elegit*. *Whitworth v. Gaugain*, 1 Ph. 728; see *Anderson v. Kemshead*, 16 Bea. 329. A person who is himself a mortgagee may, by a deposit of the mortgage deeds, create a valid equitable mortgage. *Ex parte Tuffnell*, 1 M. & A. 620; *Ex parte Smith*, 2 M., D. & D. 587. But an equitable mortgagee by deposit cannot by voluntary gift transfer the charge by delivery of the deeds. *Shillito v. Hobson*, 30 Ch. D. 396. As a rule, the interest conferred on the depositary is co-extensive only with that of the depositor; and where the deeds are subject to a trust, it prevails against a depositary, though without notice of it. *Manningford v. Toleman*, 1 Coll. 670; *Stackhouse v. Ly. Jersey*, 1 J. & H. 721; *Parker v. Clarke*, 30 Bea. 54; *Joyce v. De Moleyns*, 2 J. & La. 374; *Baillie v. M'Kewan*, 35 Bea. 177. And if a depositor has no interest he can confer none (*Jackson v. Butler*, 2 Atk. 306); nor can he, by concealing notice of an incumbrance from his assignee, place the latter in the same position as if there had been no notice. *Ford v. White*, 16 Bea. 120, 125. If the depositor subsequently acquires a larger interest the lien will extend to it, as where he purchases the equity of redemption and deposits the conveyance of it, and then pays off the mortgage, his entire interest is bound. *Ex parte Tuffnell*, 1 M. & A. 620; *Ex parte Bisdee*, 1 M., D. & D. 333; comp. *Pryce v. Bury*, 2 Drew. 11; aff. 18 Jur. 967; and see *Doe v. Pott*, 2 Doug. 710.

A security by deposit of deeds for a sum advanced, whether under a written or verbal agreement, may be extended by parol to cover subsequent advances (*Ex parte Langston*, 17 Ves. 227; *Ex parte Nettleship*, 2 M., D. & D. 124; see *James v. Rice*, Kay, 231; on app. 18 Jur. 818); though otherwise where the mortgage is a legal one. *Ex parte Hooper*, 1 Mer. 7. A mortgagee who is legal assignee of a lease is liable for the rent and upon the covenants (*Williams v. Bosanquet*, 1 Br. & B. 238); but an equitable mortgagee is not (*Moore v. Choat*, 8 Sim. 508; overruling *Flight v. Bentley*, 7 Sim. 149; see *Cox v. Bishop*, 8 D., M. & G. 815), and cannot be compelled to take a legal assignment. *Moore v. Greg*, 2 Ph. 717. A deposit of a lease is not, it would seem, within a proviso making it void on an assignment of it. *Bowser v. Colby*, 1 Ha. 109. A power of attorney by a debtor to a creditor to pay himself out of the rents and profits of the debtor's lands is irrevocable, and creates an equitable mortgage. *Spooner v. Sandilands*, 1 Y. C. C. 390; *Abbott v. Stratten*, 3 J. & L. 603. As a general rule, the deposit ought to be with the person advancing the money. *Ex parte Coming*, 9 Ves. 115. A secretary to a bank, however, may himself be in possession of, and hold his own securities, as agent for the bank for advances made to him. *Ferris v. Mullins*, 2 Sm. & G. 378. Where the deposit is made with a firm, and it is intended that it should enure to the

benefit of the *future members* of the firm, it should be so expressed in the memorandum of deposit, or proved by parol evidence (*Ex parte Kensington*, 2 V. & B. 79); or by evidence of dealings with the new firm, from which a new agreement with them may be inferred. *Ex parte Oakes*, 2 M., D. & D. 234; see *Ex parte Smith*, *ib.* 314.

An equitable assignment of money is, to a certain extent, analogous to an equitable mortgage. An agreement between debtor and creditor that the debt shall be paid out of a specific fund coming to the debtor, or an order given by a debtor to his creditor upon a third person owing money to or holding a fund of the debtor to pay such fund to the creditor, creates a valid equitable charge upon it. *Rodick v. Gandell*, 1 D., M. & G. 763; see *Yeates v. Groves*, 1 Ves. jun. 281; *Lepard v. Vernon*, 2 V. & B. 51; *Ex parte Imbert*, 1 D. & J. 152; *Jones v. Farrell*, *ib.* 208; *Gurnell v. Gardner*, 9 Jur., N. S. 1220. It is unnecessary that such third person or agent should contract or consent to hold for the creditor. See *Ex parte South*, 3 Sw. 393; *Burn v. Carvalho*, 4 M. & Cr. 702. The order, if not given or communicated to the creditor, may be revoked at any time. *Scott v. Porcher*, 3 Mer. 652; *Morrell v. Wootten*, 16 Bea. 197. There must, however, be an express agreement or direction that a specific fund or sum shall be liable. See *Ex parte Carruthers*, 3 De G. & Sm. 570; *Malcolm v. Scott*, 3 Ha. 39; *In re Irving*, 7 Ch. D. 419. An order by a creditor to his debtor to pay a sum of money to a third person is not an equitable assignment unless it specifies the fund or debt out of which the payment is to be made. *Percival v. Dunn*, 29 Ch. D. 128. An order to pay part of a fund, to be valid must be stamped as a bill of exchange. *Ex parte Shellard, Re Adams*, L. R., 17 Eq. 109. See 33 & 34 Vict. c. 97, s. 48 (1), in which "bill of exchange" includes "orders for payment of any sum of money out of any particular fund." *Diplock v. Hammond*, 5 D., M. & G. 320; comp. *Hamilton v. Spottiswoode*, 4 Ex. 200. An assignment of a future debt is an assignment of a chose in action within the Judicature Act, 1873, s. 25, sub-s. 6. *Brice v. Bannister*, 3 Q. B. D. 569. Where the authority is by way of an agreement required to be in writing by the Statute of Frauds, *e.g.*, to pay rent, it must be in writing, and such as to satisfy the Statute. *Ex parte Hall*, 10 Ch. D. 615. See further, as to equitable assignments, *Frith v. Forbes*, 4 D., F. & J. 409, and *Brown, Shipley & Co. v. Kouth*, 29 Ch. D. 848.

CHAPTER III.

WHO MAY BE MORTGAGORS AND MORTGAGEES.

SEC. 1.—*In general.*

<i>Absolute Owner</i>	695	<i>Married Women</i>	696
<i>Tenant in Tail</i>	695	<i>Infants</i>	696
<i>Extent of Estate created by</i>	695	<i>Executors—Administrators</i>	696, 697
<i>Disentailing Deed not enrolled</i>	695	<i>Joint Mortgagees or Trustees</i>	697
<i>Subsequent Bankruptcy of</i>	695	<i>Trustees in Bankruptcy</i>	698
<i>Trustees</i>	696	<i>Receipt where Mortgage Debt pay- able to Trustees</i>	698
<i>Lunatics</i>	696		

THE absolute owner of property can of course mortgage it.

As to a tenant in tail, by the 3 & 4 Will. 4, c. 74, if a tenant in tail mortgages *to the extent of the estate thereby created*, it is an absolute bar to all persons as against whom it is authorized to be made, notwithstanding any intention to the contrary expressed or implied in the deed: provided, that if the estate created by such disposition shall be only an estate *pour autre vie*, or for years absolute or determinable, or if, by a disposition under this act by a tenant in tail of lands, an interest, charge, lien or incumbrance shall be created without a term of years absolute or determinable, or any greater estate, for securing or raising the same, then such disposition shall in equity be a bar only so far as may be necessary to give full effect to the mortgage, or to such other limited purpose, or to such interest, lien, charge or incumbrance, notwithstanding any intention to the contrary expressed or implied in the deed (s. 21). Thus if a tenant in tail mortgages *in fee* by a deed duly enrolled, the equity of redemption will be discharged from the estate tail, notwithstanding a contrary intention may be expressed. If the deed is not enrolled the issue in tail and remaindermen will not be bound, but in such cases a voidable estate by a tenant in tail, in favour of a purchaser, will be confirmed by a subsequent disposition of such tenant in tail *under the act*, but not against a purchaser without notice (s. 38). Prior to the act, if a tenant in tail who had mortgaged or charged by a deed inoperative to bar his estate tail, afterwards suffered a recovery, it operated to make good the prior mortgage or charge. *Capel's Case*, 1 Rep. 60; *Tourle v. Rand*, 2 B. C. C. p. 652. And a voidable estate created in favour of a purchaser by an actual tenant in tail, who afterwards became bankrupt, or by a tenant in tail entitled to a base fee who became bankrupt, was confirmed (formerly) by the disposition of the commissioner under the then Bankrupt Act, if there was no protector, or

being such with his consent, or on there ceasing to be a protector; but not against a purchaser without notice (s. 62). This is one of the sections which is to be included in the Bankruptcy Acts of 1869 and 1883, *ante*, p. 216.

Trustees of realty may mortgage under an express power, or even under a power of sale, where the power is not to convert out and out (see *Devaynes v. Robinson*, 24 Bea. 86), but merely to sell for raising a particular charge. *Stroughill v. Anstey*, 1 D., M. & G. 635, 645. Whether under a power to mortgage the trustee can give a valid power of sale to the mortgagee is doubtful. In *Clarke v. Panopticon* (4 Drew. 26) it was held that he could not. But see *Russell v. Plaice*, 18 Bea. 21; *Bridges v. Longman*, 24 Bea. 27; *Leigh v. Lloyd*, 2 D., J. & S. 330. Where a sale is prohibited a mortgage cannot be made. *Bennett v. Wyndham*, 23 Bea. 521. See, as to a mortgage by deposit by trustees of a chapel, *Darke v. Williamson*, 25 Bea. 622; and a mortgage by them to some of their own body, *Att.-Gen. v. Hardy*, 1 Sim., N. S. 338.

Mortgages by lunatics, like other contracts by them, are, of course, not binding as a general rule; but where money is lent to a lunatic, the mortgagee *not being aware* of his lunacy, and the transaction is *bonâ fide*, the mortgagee taking no advantage, the mortgage will be good. *Campbell v. Hooper*, 3 Sm. & G. 153; comp. *Jacobs v. Richards*, 18 Bea. 300, and see *Dane v. Ly. Kirkwall*, 8 C. & P. 679; *Molton v. Camroux*, 4 Ex. 17; *Beavan v. M'Donnell*, 9 Ex. 309; 10 Ex. 184; *Elliott v. Ince*, 7 D., M. & G. 475. By the 16 & 17 Vict. c. 70, if a person has been found a lunatic, the Lord Chancellor or Lords Justices may order that his estate or interest in land or stock may be mortgaged for the purposes mentioned in the act (ss. 116 *et seq.*) See *Re Stables*, 10 Jur., N. S. 245.

As to mortgages by husband and wife of the wife's property, see *ante*, tit. "HUSBAND AND WIFE," Chap. VIII. When the property is settled to the wife's separate use, she has, as already mentioned, for the most part, the same power over it as if she were a *feme sole*. See *ante*, tit. "HUSBAND AND WIFE." When a married woman executes a mortgage there is no obligation on the mortgagee to inquire whether a settlement was made on her marriage. *Lloyd's Banking Co. v. Jones*, 29 Ch. D. 221.

As to infants and their power to contract, see *ante*, p. 69. Where an infant (concealing the fact of his infancy) mortgaged his reversionary interest, and afterwards when of age effected a second mortgage to a mortgagee without notice, the latter was held to have the better title. *Inman v. Inman*, L. R., 15 Eq. 260.

An executor may mortgage by legal or equitable mortgage, with power of sale (*Russell v. Plaice*, 18 Bea. 21), the legal or equitable assets of his testator coming to his hands as executor, and the mortgagee need not look to the application of the money advanced. *M'Leod v. Drummond*, 17 Ves. 154; see *Hartland v. Murrell*, 27 Bea. 204. An administrator has no power to mortgage leaseholds of the intestate under leases not containing repairing covenants, in order to raise

money for repairing the property. And such a mortgage will be set aside as against a mortgagee who has notice of the purpose for which the money is raised. *Ricketts v. Lewis*, 20 Ch. D. 745. The mortgagee will have priority over the creditors of the testator, unless the transaction itself affords conclusive evidence of knowledge by the mortgagee that the money was not to be applied in discharge of the testator's debts (*Barrow v. Griffith*, 11 Jur., N. S. 6; see *Ball v. Harris*, 4 M. & C. 268; *Collingwood v. Russell*, 10 Jur., N. S. 1062; *Child v. Thorley*, 16 Ch. D. 151); for there must be no fraud and no collusion with the mortgagee, or the transaction will be void as against the parties interested in the assets. *Wilson v. Moore*, 1 M. & K. 337; *Rice v. Gordon*, 11 Bea. 265. It is not sufficient to impeach a mortgage that an advance was first made, followed by the mortgage. *Miles v. Durnford*, 2 D., M. & G. 641. An executor cannot mortgage his testator's assets for his own debt (see *M'Leod v. Drummond*, 17 Ves. 153; *Eland v. Eland*, 4 M. & Cr. 427; *Pannell v. Hurley*, 2 Coll. 241); but he may mortgage his own specific legacy. *Taylor v. Hawkins*, 8 Ves. 209; see *Haynes v. Forshaw*, 11 Ha. 93; *Brettle v. Burdett*, 2 D., J. & S. 244.

Where the owner of a freehold public house mortgaged it to brewers to secure what should be due to them from him, "his executors, administrators, or assigns," but the covenant for payment and proviso for redemption were limited to money due from him, it was held nevertheless that the security was available for what was due also from the devisee for life of the mortgagor to the mortgagees. *In re Watts*, 22 Ch. D. 5.

Where several jointly advance money, the survivors or survivor are entitled at law, but in equity the representatives of a deceased mortgagee are entitled to his proportion. See *Morley v. Bird*, 3 Ves. 629, 631. Where, therefore, the mortgagees are trustees, there is usually a declaration that the money belongs to them on a joint account in equity as well as at law, and that the receipt of the survivor or his representatives shall be a sufficient discharge. See *Hind v. Poole*, 1 K. & J. 383; *Mutson v. Dennis*, 4 D., J. & S. 345. Where both mortgagees are living, the money must be paid to both, or if to one, under a special authority from the other. *Ib.* By the 44 & 45 Vict. c. 41 (Conveyancing Act, 1881), s. 61 (1), where in a mortgage, or transfer of mortgage made after the commencement of this Act, 1 Jan. 1882 (3), the sum advanced or owing is expressed to be to more than one out of money belonging to them on a joint account, or a mortgage, or transfer is made to more persons than one, jointly, and not in shares, the mortgage money shall be deemed to be and remain money belonging to those persons on a joint account, and the receipt in writing of the survivors or last survivor of them, or of the personal representatives of the last survivor, shall be a complete discharge; (2) as far as a contrary intention is not expressed.

With reference to the general duties of trustees in advancing money on mortgage, see tit. "TRUSTEES," *post*. It has been said that where trustees lend on mortgage they should not advance more than two-

thirds of the estimated value on freehold land, and not more than one-half on house property (*Stickney v. Sewell*, 1 M. & C. 8; *Norris v. Wright*, 14 Bea. 291, 307); and it is doubtful whether trustees can properly lend on a second mortgage without obtaining the legal estate. *Norris v. Wright*, *sup.* "According to a very convenient practice, it is usual, when a mortgage is made to trustees, to keep the trusts off the face of the mortgage deed, and to introduce a recital that the persons who are in fact trustees, are entitled to the mortgage money on a joint account, and it is admitted that in such a case the court has always refused to make any inquiry into the trusts." *Per Pearson, J., Re Harman, &c. R. Co.*, 24 Ch. D. p. 725.

By the 32 & 33 Vict. c. 71, s. 27 (1) (Bankruptcy Act, 1869), the trustee could, and by the 46 & 47 Vict. c. 52 (Bankruptcy Act, 1883), s. 57 (5), can with the permission of the committee of inspection mortgage or pledge any part of the property of the bankrupt for the purpose of raising money for the payment of his debts.

By the 22 & 23 Vict. c. 35, s. 23, the receipts of any person to whom any mortgage money shall be payable upon any express or implied trust shall effectually discharge the person paying from seeing to the application or being answerable for the misapplication or non-application of it. See the larger power under the 23 & 24 Vict. c. 145, s. 29 (now repealed), and under the Conveyancing Act, 1881, s. 36, *post*, tit. "TRUSTEES," Chap. V.

Sec. 2.—Building Societies.

<i>Former Act—Objects of Act</i>	698	<i>Except Stocks and Copyholds</i>	700
<i>Borrowing Powers</i>	699	<i>Infant heir of Mortgagor</i>	701
<i>Present Act</i>	699	<i>Termination of Society</i>	701
<i>Terminating Society</i>	700	<i>Transfer to other Society</i>	701
<i>Permanent Society</i>	700	<i>Minors Members</i>	701
<i>Body Corporate</i>	700	<i>Joint Shares</i>	701
<i>Objects of Act</i>	700	<i>Non-liability to Stamp Duties</i>	701
<i>Liability limited</i>	700	<i>Endorsed Receipt re-vests Pro-</i>	
<i>Borrowing Powers</i>	700	<i>perty</i>	701
<i>Registration of Rules</i>	700	<i>Winding-up</i>	701
<i>Certificate of Registrar</i>	700	<i>Disputes between Society and Mem-</i>	
<i>Rights, &c., vest without Con-</i>		<i>bers</i>	701
<i>veyance</i>	700	<i>Agreements for Arbitration</i>	701

Building societies prior to 1874 were regulated by the 6 & 7 Will. 4, c. 32, and are now by the 37 & 38 Vict. c. 42 hereafter referred to. The chief object of these acts is to enable members of the societies to raise money by means of the subscription of their members for the purpose of erecting or purchasing houses or other real or leasehold estate, such money to be secured by mortgage to the society. See 6 & 7 Will. 4, c. 32, s. 1. As this act is still in force as regards certain societies not incorporated under the later one, some of the more important provisions of and decisions on the former will be stated before the leading provisions of the later act are referred to. Rules may be

made as to the forms of conveyance or mortgages, &c., to be contained in a schedule to the rules, which are to be certified and deposited in pursuance of the Friendly Society Acts, 10 Geo. 4, c. 56, and 4 & 5 Will. 4, c. 40, ss. 3, 4. A receipt (specified in a schedule) indorsed on the mortgage is to be sufficient to discharge the mortgage without reconveyance (s. 5). S. 42 of the Act of 1874, *post*, p. 701, is to the same effect. And by the 10 Geo. 4, c. 56, s. 21, the property of the society may be vested in the treasurer or trustees of it, and usually is in the latter. After the death or removal of any treasurer or trustee the property vests in the succeeding treasurer or trustee in trust for the society. Where a mortgagor is seised to any particular uses the receipt endorsed re-limits the estate to the same uses. In *Plowden v. Hyde*, 2 D., M. & G. 684, Lord Cranworth, L.J., observed, p. 696, that the equity of redemption attaches on the estate of the mortgagor with all the same rights, restrictions, and qualifications to which his legal estate had been previously subject. With respect to the operation of the receipt clause where there are several mortgages, see *Pease v. Jackson*, L. R., 3 Ch. 576, *post*, Chap. X. sec. 2.

The directors of such societies cannot borrow by way of mortgage for the purpose of purchasing land. *Re Kent Benefit Building Society*, 1 Dr. & Sm. 417. But a rule, duly certified, empowering the trustees of a benefit building society to borrow a limited amount of money for the purposes of the society is not illegal under the Building Societies Act (*Laing v. Reed*, L. R., 5 Ch. 4), although the certificate of the barrister appointed to certify rules under the act is not conclusive as to its legality. *Ib.* Where the mortgage is not authorized by the rules of the society, it must be sanctioned by each individual member. *Re Kent, &c. Society*, *sup.* A rule giving power of borrowing "as occasion may require" to a society formed under the 6 & 7 Will. 4, c. 32, is legal. *Murray v. Scott*, *Agnew and Brimelow v. Murray*, 9 App. C. 519, overruling the dictum *contra* in *Laing v. Reed*, L. R., 5 Ch. p. 8, also *Hill's Case*, *Jones's Case*, L. R., 9 Eq. 605; *Re National, &c. Society*, L. R., 5 Ch. 309. In *Murray v. Scott*, *sup.*, the same case, *nom. Re Guardian, &c., Soc.*, 23 Ch. D. 440, was overruled. In the judgments in the House of Lords will be found important observations as to societies formed under the Act of 6 & 7 Will. 4, c. 32, with reference to the borrowing powers of directors and the rights and liabilities of creditors and shareholders.

The 37 & 38 Vict. c. 42 (taking effect from 2 Nov. 1874), repeals the former Act of 6 & 7 Will. 4, c. 32, except as to any subsisting society certified under it until it shall have obtained a certificate of incorporation under the last act. The repeal is not to affect the past operation of that act, s. 7, Act 1874. By s. 8 there is a provision as to incorporation, but this is repealed by the 38 & 39 Vict. c. 9, which, after providing that the repeal shall not affect any certificate of incorporation, &c., before this act; s. 1 enacts that after the passing of it (22 April, 1875) every society, the rules of which have been certified under the 6 & 7 Will. 4, c. 32, may obtain a certificate of incorporation under the Act of 1874, s. 2.

The other material sections of the Act of 1874, are in substance as follows:—

“A terminating society means terminating at a fixed date, or when a specified result is attained; a permanent society has not any such fixed date or specified result at which it shall terminate” (s. 5.)

“Every society now subsisting or hereafter established, shall, upon receiving a certificate of incorporation, become a body corporate by its registered name, having perpetual succession, and a common seal” (s. 9).

“Any number of persons may establish a society under this Act, either terminating or permanent, for the purpose of raising by the subscriptions of the members a fund for making advances to members upon mortgage of freehold, copyhold, or leasehold estate, with power to hold land and right of foreclosure, and to raise funds by the issue of shares paid in full or by subscriptions, and with or without accumulating interest, and to repay such funds. Land to which any society may become absolutely entitled by foreclosure, or extinguishment of the right of redemption, is to be sold or converted into money” (s. 13).

“The liability of members is to be limited to the amount of their shares” (s. 14).

By s. 15, “(1.) Any society may receive deposits or loans, at interest, from members or other persons, or from corporate bodies, joint stock companies, &c.

(2.) In a permanent society the total amount so received shall not exceed two thirds of the amount secured to the society by mortgages.

(3.) In a terminating society the total amount so received may either be a sum not exceeding such two thirds as afore-said, or a sum not exceeding twelve months' subscriptions on the shares.

(4.) Deposits or loans to a society, made before the Act in accordance with its certified rules, are valid, but no further deposits or loans shall be received except within the limits provided by this section.

(5.) Deposit books, or acknowledgments, or securities given for a deposit or loan, shall have thereon the 14th and 15th sections of the Act.”

Sections 16, 34, 35, and 36, relate to arbitration in case of disputes and are referred to *post*, p. 700.

The rules are to be registered (s. 17); may be altered (s. 18); may describe forms of conveyance, mortgage, or other necessary instrument (s. 19); certificates of registrar to be evidence of incorporation or registration (s. 20); rules to be binding on members (s. 21); name may be changed (s. 22); sections 23—26 relate to officers and trustees. Rights of action, and other rights and estates and interests in real and personal estate belonging to any society certified under the Act of 6 & 7 Will. 4, c. 42, are on the incorporation of the society to vest in the society without any conveyance except stocks in the public funds, and copyhold or customary hereditaments (s. 27, and 40 & 41 Vict. c. 63,

ss. 3, 4). Where a society is entitled to copyholds the lord is to admit if required by the society, not more than three as tenants, on payment of the usual fines payable by a single tenant, or may admit the society on payment of a special fine (37 & 38 Vict. c. 42, s. 28).

Payments of sums not exceeding 50*l.* when a member or depositor dies intestate on proof of his death to the person purporting and by statutory declaration declared to be his next of kin, shall be valid, and as regards the society binding on the actual next of kin (s. 29). Where a mortgagor to a society dies, leaving an infant heir, the society may, after sale, pay to the administrator of the deceased, any surplus money not exceeding 150*l.* (s. 30). Provision is made for the determination of the society (s. 32). Societies may unite with others or transfer their engagements to another society (s. 33). Minors may be elected members (s. 38). Shares may be held by two or more (s. 39). Various enumerated instruments or "any other instrument or document whatever required or authorised to be given, issued, signed, made, or produced in pursuance of this Act" or rules, shall not be liable to stamp duty (s. 41). A receipt endorsed upon or annexed to a mortgage shall be a sufficient discharge without reconveyance (s. 42).

As to the liabilities of members on its being wound-up. See *Re Doncaster, &c., Society*, L. R., 3 Eq. 158; *Brownlie v. Russell*, 8 App. C. 235; *Mutual, &c., B. S.*, 29 Ch. D. 182, aff. W. N. 1885, p. 172.

It has been mentioned that certain rules in the Act of 1874 relate to references of disputes between societies and their members to arbitration, *ante*, p. 700. Prior to this Act it had been held in *Mulkern v. Lord*, 4 App. Ca. 182, that a provision that disputes between the society and its members should be referred to arbitration, did not apply to an action against the trustees of the society who had taken possession, for an account which might include the title to redemption or a judgment of foreclosure.

By section 16 of the Act of 1874 it was provided that the rules of the society should set forth (*inter alia*) "Whether disputes between the society and any of its members or any person claiming by or through any member or under the rules, shall be settled by reference to the court, or to the registrar, or to arbitration" (sub-s. 9). And sections 34, 35, and 36, provided for the determination of disputes by arbitrators or by the registrar, and that the court might order compliance with their decisions, which were to be final, and for the determination of disputes by the court in certain cases. On these sections it was held that where the rules provided for a reference of matters in dispute between the society and a member to the Registrar of Friendly Societies the jurisdiction of the court was ousted, and that a society was entitled to have disputes with members as to accounts referred to arbitration. *Wright v. Monarch Investment Building Society*, 5 Ch. D. 726; *Hack v. London Provident Building Society*, 23 Ch. D. 103. These cases were approved of and followed by the House of Lords in *Mun. Perm. Invest. Build. Soc. v. Kent*, 9 App. C. 260, the Earl of Selborne, L.C., *diss.* This decision was followed by the 47 & 48

Viet. c. 41, by which "The word 'disputes' in the Building Societies Acts, or in the rules of any society thereunder, shall, unless otherwise expressly provided, be deemed to refer only to disputes between the society and a member as such, and not to any dispute as to the construction of any mortgage deed or contract, other than the rules of the society, and shall not interfere with any remedy in the ordinary course of law." There is a saving as to pending matters and matters as to which the jurisdiction of any court shall have been adjudged to be excluded (s. 2).

CHAPTER IV.

OF THE SUBJECT-MATTER OF MORTGAGES.

SEC. 1.—*Freeholds, Copyholds and Leaseholds.*

<i>Freeholds</i>	702	<i>Deeds retained until Payment</i>	703
<i>Copyholds</i>	702	<i>Mortgagee must produce</i>	703
<i>Renewable Leaseholds</i>	702	<i>Accretions</i>	703
<i>Leaseholds</i>	702	<i>Fixtures</i>	704
<i>Property to be correctly described</i> .	703	<i>Fixtures in Mortgages of Realty</i> ...	704
<i>Grant of Deeds</i>	703	<i>Provisions in Conveyancing Acts</i> ...	705

A MORTGAGE of freeholds is usually made by a conveyance in fee, for the mortgagee, having the whole legal estate, can then more conveniently exercise his power of sale.

A mortgage of copyholds is made by a surrender (which is entered on the court rolls) to the use of the mortgagee, conditioned to be void on payment of the mortgage debt and interest. The mortgagee is seldom admitted in the first instance, as a fine would be payable. A surrender to such uses as the mortgagee shall appoint is one that the lord may refuse to accept. *Flack v. Downing Coll.*, 13 C. B. 945. But, if accepted, the lord is bound by it. *Eddleston v. Collins*, 3 D., M. & G. 1. Until the admittance of the mortgagee the mortgagor is tenant on the court rolls. See *Kenebel v. Scrafton*, 8 Ves. 30. The admittance of the mortgagee, when taken, relates back to the surrender against all persons but the lord. *Holdfast v. Clapham*, 1 T. R. 600.

In a mortgage of renewable leaseholds, there is usually a covenant by the mortgagor to procure a renewal, otherwise he is not bound to do so. *Lacon v. Mertens*, 3 Atk. 4. But in such a case the mortgagee may renew, and hold the new lease as a security for the original debt and interest, and expenses of renewal and interest. *Ib.*

Where ordinary leaseholds are mortgaged, the mortgage is often by demise of the mortgagor's term, less the last few days or last day, in

order that the mortgagee may not be subject to the rent and covenants of the lease. In such cases there is in general, and ought to be, to make the mortgagor a trustee within the Trustee Act (*post*, Chap. XII.), a declaration of trust of the reversionary day or days left in the mortgagor in favour of the mortgagee and his vendee. If a mortgagor of leaseholds fraudulently incurs a forfeiture, and induces the landlord to take advantage of it, and afterwards grant him a new lease, the new lease will in equity be subject to the mortgage. *Hughes v. Howard*, 25 Bea. 575.

The mortgage should state accurately what is intended to be comprised in it. It will not in general be extended to property other than that expressly referred to, by such words as "all other the lands." *Rooke v. Ld. Kensington*, 2 K. & J. 753. A mortgage or charge of all the mortgagor's interest will comprise a *remainder*. *Pryce v. Bury*, 2 Drew. 11; affirmed 23 L. J., Ch. 676. But where a mortgagor was possessed of a freehold interest in one moiety of a house, and a leasehold interest in the other moiety, subject to a covenant not to assign without licence, by deed, reciting that he was seised in fee of the house, granted in general terms, all his estate and interest therein, it was held, that only the freehold interest passed. *Francis v. Minton*, L. R., 2 C. P. 543. See *Re Boulter*, 4 Ch. D. 241.

A first mortgagee rarely parts with his money until the deeds of the property are handed to him. Hence it has become the usual, or at all events not unfrequent, practice not to make any specific grant of the title deeds in the mortgage. Where they are not delivered over, and there is no grant of them, a mortgagee of the *legal fee* is nevertheless entitled to them (*Harrington v. Price*, 3 B. & Ad. 170; cons. *Davies v. Vernon*, 6 Q. B. 443); but not where the mortgage is for a term. See *ib.*; *Jenner v. Morris*, L. R., 1 Ch. 603. It will be seen hereafter (Chap. X., Sec. 1), that gross negligence or fraud, in not obtaining possession of the title deeds, is a ground for postponing a mortgagee even with the legal estate. Where the mortgagee has obtained the deeds, he may retain them until payment or actual tender of all that is due to him; and payment into court is insufficient. *Postlethwaite v. Blythe*, 2 Sw. 256. And formerly he was not bound to allow any inspection of them. *Crisp v. Platel*, 8 Bea. 62; *Damer v. E. Portarlington*, 15 Sim. 380; *Howard v. Robinson*, 4 Drew. 522. But it was held, that the mortgage deed itself might be ordered to be produced for inspection. *Patch v. Ward*, L. R., 1 Eq. 436; see *Re Mark's Trust Deed*, L. R., 1 Ch. 429. But cons. *Chichester v. Marq. of Donegall*, L. R., 5 Ch. p. 502. Now, however, by the Conveyancing Act, 1881, 44 & 45 Vict. c. 41, s. 16 (1), a mortgagor is entitled at his own cost, and on payment of the mortgagee's costs and expenses, to inspect and make copies, &c., of the documents of title in the custody or power of the mortgagee. (2) This section applies only to mortgages made after the commencement of the act (1st January, 1882), and shall have effect notwithstanding any stipulation to the contrary.

It is a general rule, that whatever new advantages accrue to the property during the time that it is in mortgage enure to the benefit

of the mortgagee. Thus, if the mortgage be of a manor, copyholds of the manor, subsequently acquired by the lord, become subject to the mortgage. *Doe d. Gibbons v. Pott*, 2 Doug. 710. So on a mortgage of leaseholds, if a fresh lease of the property be obtained by the mortgagor, who has induced the lessor to forfeit the original lease, the new lease will be subject to the original mortgage. *Hughes v. Howard*, 25 Bea. 575; and see *ante*, p. 703. A mine or quarry opened by the owner of the inheritance while he is still in actual possession, even though after the date of the mortgage, will enure for the benefit of the mortgagee. *Elias v. Snowdon Slate Co.*, 4 App. C. 454. So if leasehold property is mortgaged the mortgagee is entitled to the goodwill of the premises. *Chisum v. Dewes*, 5 Russ. 29; *Pile v. Pile*, 3 Ch. D. 36.

A mortgage of realty or chattels real will comprise fixtures, including trade fixtures attached or annexed thereto, even after the mortgage. *Cullwick v. Swindell*, L. R., 3 Eq. 249; *Climie v. Wood*, L. R., 3 Ex. 257. And there is no difference in this respect between a mortgage in fee by a freeholder and a mortgage by way of assignment of a term by a leaseholder. *Meux v. Jacobs*, L. R., 7 H. L. 481; *Ex parte Barclay*, 5 D., M. & G. 403; see *Cort v. Sagar*, 3 H. & N. 370; *Fisher v. Dixon*, 12 Cl. & F. 312; *Ex parte Astbury, Re Richards*, L. R., 4 Ch. 630, and the movable parts of fixtures. *Longbottom v. Berry*, L. R., 5 Q. B. 123; *Sheffield, &c. Soc. v. Harrison*, 15 Q. B. D. 358. In what cases registration of the instrument as a bill of sale is necessary, see *post*, sec. 2. But this general effect of a mortgage will sometimes be qualified; thus, where there were fixtures on different parts of distinct properties mortgaged, a foundry and a dwelling-house, and those in the house only were expressly enumerated in the mortgage, those in the foundry were held not to pass. *Hare v. Horton*, 5 B. & Ad. 715. But the general rule will prevail, and all fixtures in a house or place will pass, although some only are expressly specified. *Mather v. Fraser*, 2 K. & J. 536. Ordinary house and trade fixtures are excluded from the operation of the reputed ownership clauses of the Bankrupt Acts (see the Act, 32 & 33 Vict. c. 71, s. 15 (5), and Act of 1883, s. 44 (3)), not being goods and chattels within the meaning of these clauses. *Ex parte Barclay, sup.* And this is the rule even when fixtures only are comprised in the mortgage, if annexed to the freehold; *secus*, if movable. *Whitmore v. Empson*, 23 Bea. 313; comp. *Ex parte Barclay, sup.* A mortgage of realty or leaseholds and fixtures fixed to the land does not require registration under the Bills of Sale Act, *post*. *Mather v. Fraser, sup.* *Secus*, a mortgage of trade or tenant's fixtures only. *Ib.* As to trade machinery, if assigned with freehold or leasehold property, see the Act of 1878, s. 4, *post*.

As to what fixtures are comprised under particular words in mortgages, see *Haley v. Hammersley*, 3 D., F. & J. 587; *Metropolitan Counties, &c. v. Brown*, 26 Bea. 454; and comp. *Ex parte Astbury, re Richards*, L. R., 4 Ch. 630.

The Conveyancing Act, 1881, contains various provisions as to the

execution of purchase (including mortgage) deeds, the production and safe custody of them, and other matters which are common to purchases and mortgages. These will be found noticed *post*, in tit. "VENDORS AND PURCHASERS."

SEC. 2.—*Chattels Personal—Bill of Sale.*

<i>Acts of 1854 and 1866</i>	706	<i>Form of</i>	713
<i>Bills of Sale under</i>	706	<i>Must not vary from Act</i>	713
<i>Registration</i>	706	<i>Insurance—Bonus</i>	713
<i>Re-registration</i>	706	<i>Payment on Demand</i>	713
<i>Act of 1878</i>	706	<i>Collateral Agreement</i>	713, 714
<i>Bill of Sale—Meaning of</i>	706	<i>Statement of Consideration</i>	714
<i>Personal Chattels</i>	707	<i>Substantial Accuracy</i>	714
<i>Apparent Possession</i>	707	<i>Two Bills—Same sum</i>	714
<i>Trade Machinery</i>	707	<i>Part returned or retained</i>	714
<i>Factory Workshop</i>	708	<i>Commission—Expenses</i>	714
<i>Powers of Distress</i>	708	<i>Description of Goods</i>	715
<i>Fixtures or Growing Crops</i> ...	708	<i>Fixtures</i>	715
<i>Unregistered Bill of Sale</i>	708	<i>Must belong to Mortgagor</i>	715
<i>Substitutional Bills of Sale</i> ...	708	<i>Future Goods</i>	715
<i>Registration—Re-registration</i> ...	709	<i>Power to enter and take</i>	716
<i>Rectification of Register</i>	709	<i>Description of Persons, &c.</i>	716
<i>Entry of Satisfaction</i>	709	<i>Affidavit</i>	716
<i>Order and Disposition</i>	709	<i>Names—Places</i>	716
<i>Act of 1882</i>	710	<i>Attestation</i>	716
<i>Commencement</i>	710	<i>True Copy</i>	716
<i>Construction of "Bill of Sale"</i>	710	<i>Seizure—Transfer—Re-registra-</i>	
<i>Schedule of Property</i>	710	<i>tion, &c.</i>	716
<i>After-acquired Property</i>	710	<i>Not producing receipt</i>	717
<i>Growing Crops—Fixtures</i>	710	<i>Transfer of Bill</i>	717
<i>Conditions affecting seizure</i> ...	710	<i>Priority—Tacking</i>	717
<i>Attestation and Registration</i> ...	711	<i>Re-registration of void B. S.</i> ...	717
<i>Local Registration</i>	711	<i>When Acts of Bankruptcy</i>	717
<i>Under 30l. void</i>	711	<i>For pre-existing Debt</i>	717, 718
<i>Chattels not removeable for five</i>		<i>Where present Advance also</i> ...	718
<i>days</i>	711	<i>Renewal of prior B. S.</i>	718
<i>Form of</i>	711	<i>Forbearance to seize</i>	718
<i>Construction of the Acts</i>	712	<i>Bankruptcy—Reputed Ownership</i> ...	718
<i>What are Bills of Sale</i>	712	<i>Bankruptcy Acts</i>	718
<i>Post-nuptial Settlements</i>	712	<i>Trade Debts</i>	718
<i>Warrants—Hypothecation</i>	712	<i>s. 20, Act of 1878</i>	718
<i>Agreement for</i>	712	<i>Effect of its Repeal</i>	718
<i>Growing Crops</i>	712	<i>B. S. as security not protected</i>	719
<i>Building Materials</i>	712	<i>B. S. as absolute transfer is</i> ...	719
<i>Goods—Price by Instalments</i> ...	712	<i>Real and apparent Possession</i> ...	719
<i>Vendor in Possession</i>	713	<i>Hiring Furniture—Hotels</i>	719
<i>Possession taken</i>	713	<i>Possession taken before Regis-</i>	
<i>Unregistered Bill</i>	713	<i>tration</i>	720

Mortgages of chattels, usually termed bills of sale, were in 1854 made subject to various statutory provisions, by an act (followed by an amending act) presently noticed. These acts were repealed by an act passed in 1878, amended by a recent act of 1882. These two are the acts now in force. As the act of 1854 may still in some cases be operative, its provisions will be very shortly stated, and then the

clauses of the acts now in force, as fully as this very important branch of the law of mortgage requires.

Under a bill of sale, it is in general part of the contract that the mortgagor shall retain possession until default in payment of the loan, and this being consistent with the terms of the mortgage, it will not be fraudulent (see *Twyne's Case*, 3 Rep. 80 b) under the 13 Eliz. c. 5 (*Martindale v. Booth*, 3 B. & Ad. 498), even though its object is to defeat an expected execution. *Darvill v. Terry*, 6 H. & N. 807. Until default, the possession of the mortgagor cannot be interfered with. *Fenn v. Bittleston*, 7 Exch. 152; *Brierly v. Kendall*, 17 Q. B. 937.

Acts of 1854 and 1866.] By the 17 & 18 Vict. c. 36 (hereafter referred to as the Act of 1854), a bill of sale, absolute or conditional, subject or not to any trust, which empowered the grantee to take possession of any property comprised therein, was required to be registered within twenty-one days after the making thereof, otherwise, if possession was retained, was void against assignees in bankruptcy, or under any assignment for the benefit of creditors, and against persons taking the property by process of law. An affidavit of the time of giving it, and a description of the residence and occupation of the person making it, and of every attesting witness, was necessary. The expressions "bills of sale," "personal chattels," and "apparent possession," were to have certain meanings. These are to a great extent the same in the later and repealing act of 1878, presently referred to. Re-registration every five years was necessary. 29 & 30 Vict. c. 96, s. 4. These acts are now repealed.

Act of 1878.] The substance of the acts now in force with respect to bills of sale will now be stated, and afterwards the principal decisions upon them. The 41 & 42 Vict. c. 31, hereafter referred to as the Act of 1878, repeals the prior acts. Provided that (except as in the repealing act expressly mentioned with respect to construction and renewal of registration), the repealed acts shall be in force as to bills of sale executed before the Act of 1878 (s. 23).

The Act of 1878 came into operation the 1st January, 1879 (s. 2).

It applies to every bill of sale executed on or after that day (whether absolute, or subject or not to any trust) whereby the grantee has power, either with or without notice, and either immediately or at any future time, to seize or take possession of any personal chattels comprised in or made subject to such bill of sale (s. 3).

The following words and expressions shall have the meanings in this section assigned to them respectively, unless there be something in the subject or context repugnant to such construction; (the words in this section are the same as in the Act of 1854 except the words in italics),

"Bill of sale" includes bills of sale, assignments, transfers, declarations of trust without transfer, *inventories of goods with receipt thereto attached, or receipts for purchase moneys of goods*, and other assurances of personal chattels, and also

powers of attorney, authorities, or licenses to take possession of personal chattels as security for any debt, *and also any agreement, whether intended or not to be followed by the execution of any other instrument, by which a right in equity to any personal chattels, or to any charge or security thereon, shall be conferred*, but not the following documents; assignments for the benefit of creditors, marriage settlements, transfers or assignments of any ship or vessel or any share thereof, transfers of goods in the ordinary course of business of any trade or calling, bills of sale of goods in foreign parts or at sea, bills of lading, India warrants, warehouse-keepers certificates, warrants or orders for the delivery of goods, or any other documents used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by indorsement or by delivery, the possessor of such document to transfer or receive goods thereby represented:

“Personal chattels” shall mean goods, furniture, and other articles capable of complete transfer by delivery, and (*when separately assigned or charged*) fixtures and growing crops, but shall not include chattel interests in real estate, *nor fixtures (except trade machinery as hereinafter defined), when assigned together with a freehold or leasehold interest in any land or building to which they are affixed, nor growing crops when assigned together with any interest in the land on which they grow*, nor shares in the securities of any government, or in the capital or property of incorporated or joint stock companies, nor choses in action, nor any stock or produce upon any farm or lands which by virtue of any covenant or agreement or of the custom of the country ought not to be removed from any farm where the same are at the time of making or giving of such bill of sale; and see *post*, p. 711; Sec. 17 of the amending act.

Personal chattels shall be deemed to be in the “apparent possession” of the person making or giving a bill of sale, so long as they remain or are in or upon any house, mill, warehouse, building, works, yard, land, or other premises occupied by him, or are used and enjoyed by him in any place whatsoever, notwithstanding that formal possession thereof may have been taken by or given to any other person (s. 4).

See as to this section the last paragraph of s. 3 of the amending act, *post*, p. 710.

Trade machinery shall be deemed to be *personal chattels*, and any mode of disposition of trade machinery by the owner thereof which would be a bill of sale as to any other personal chattels shall be deemed to be a bill of sale within the meaning of this act. “Trade machinery” means the machinery used in or attached to any factory or workshop;

1st. Exclusive of the fixed motive-powers, such as the water-wheels and steam engines, and the steam-boilers, donkey engines, and other fixed appurtenances of the said motive-powers; and,

2nd. Exclusive of the fixed power machinery, such as the shafts, wheels, drums, and their fixed appurtenances, which transmit the action of the motive-powers to the other machinery, fixed and loose; and,

3rd. Exclusive of the pipes for steam, gas, and water in the factory or workshop.

The machinery or effects excluded by this section from the definition of trade machinery shall not be deemed to be personal chattels within the meaning of this act.

“Factory or workshop” means any premises on which any manual labour is exercised by way of trade, or for purposes of gain, in or incidental to the following purposes or any of them; that is to say: (a.) In or incidental to the making any article; or (b.) the altering, &c.; or (c.) adapting it for sale (s. 5).

Every instrument (not a mining lease) giving a power of distress by way of security for any present, future, or contingent debt, and whereby any rent is made payable as a mode of providing for the payment of interest on such debt, or otherwise for the purpose of such security only, shall be deemed to be a bill of sale of any personal chattels which may be seized or taken under such power of distress. This section is not to extend to any mortgage of hereditaments which the mortgagee, being in possession, shall have demised to the mortgagor as his tenant at a fair and reasonable rent (s. 6).

Fixtures or growing crops not to be deemed separately assigned when the land passes by the same instrument. The *same rule of construction* shall be applied to all deeds or instruments, including fixtures or growing crops, *executed before the commencement of this act* and then subsisting and in force, in all questions arising under any bankruptcy, liquidation, assignment for the benefit of creditors, or execution of any process of any court, which shall take place or be issued after the commencement of this act (s. 7).

Every bill of sale was to be duly attested and registered within seven days after the making thereof, stating the consideration, otherwise was void as against trustees in bankruptcy or liquidation, or under any assignment for the benefit of creditors, and sheriffs' officers and others seizing in the execution of any process so far as regarded the chattels comprised in such bill of sale which after the expiration of such seven days were in the possession or apparent possession of the person making such bill of sale (s. 8). But this section is repealed by s. 15 of the Act of 1882, *post*, p. 711.

Where a subsequent bill of sale is executed within or on the expiration of seven days after the execution of a prior unregistered bill of sale, comprising all or any part of the personal chattels comprised in the first, and as security for the same debt, it shall, to the extent to which it is a security for the same debt, and comprises the same per-

sonal chattels, be absolutely void, unless *bonâ fide* given for the purpose of correcting some material error in the prior bill of sale (s. 9).

A bill of sale was to be attested :

- (1.) By a solicitor of the Supreme Court, the attestation stating that before the execution the effect thereof had been explained to the grantor by the attesting solicitor. But this is repealed by s. 10 of the Act of 1882, *post*, p. 711 :
- (2.) Such bill and every schedule thereto, and a true copy of them, and of every attestation of execution, with an affidavit of the time of such bill being made, and of its due execution and attestation, and a description of the residence and occupation of the person making or giving the same (or in case the same is made or given by any person under or in the execution of any process, then a description of the residence and occupation of the person against whom such process issued), and of every attesting witness to such bill, shall be filed with the registrar within *seven* clear days ("*twenty-one days*" in the Act of 1854,) after the making or giving of such bill, in like manner as a warrant of attorney :
- (3.) Any defeasance or condition, or declaration of trust not contained in the body of the bill, shall be deemed to be part of the bill, and shall be written on the same paper or parchment therewith before the registration, and shall be truly set forth in the copy filed therewith and as part thereof, otherwise the registration shall be void.

In case two or more bills of sale are given, comprising in whole or in part any of the same chattels, they shall have *priority* in the order of the date of their registration respectively as regards such chattels.

A transfer or assignment of a registered bill of sale need not be registered (s. 10).

The registration of a bill of sale, whether executed before or after the commencement of this act, must be renewed once at least every five years, and if a period of five years elapses from the registration or renewed registration of a bill of sale without a renewal or further renewal (as the case may be), the registration shall become void.

The renewal of a registration shall be effected by filing with the registrar an affidavit in a prescribed form stating the date of the bill of sale and of the last registration thereof, and the names, residences, and occupations of the parties thereto as stated therein, and that the bill of sale is still a subsisting security.

A renewal of registration shall not become necessary by reason only of a transfer or assignment of a bill of sale. The remaining sections, except 14, 15, 16, 20 and 23, provide for the due registration of bills of sale and matters connected therewith. The register may be rectified (s. 14). Satisfaction may be entered (s. 15). Copies of bills of sale may be had (s. 16).

Chattels comprised in a registered bill shall not be deemed to be

in the possession, order, or disposition of the grantor of the bill of sale within the meaning of the Bankruptcy Act, 1869 (s. 20). (This section is repealed by s. 15 of the Act of 1882.)

Renewals of registration of bills before the act are to be made like renewals of registration under the act (s. 23).

Act of 1882.] The 45 & 46 Vict. c. 43, is very important, the provisions of the amended act being varied in several particulars.

The act came into operation the 1st Nov., 1882 (s. 2).

This act is, so far as is consistent, to be construed as one with the principal Act of 1878; but, unless the context otherwise requires, the Act of 1882 shall not apply to any bill of sale duly registered before the commencement of it so long as the registration thereof is not avoided by non-renewal or otherwise.

The expression "bill of sale," and other expressions in this act, have the same meaning as in the principal act, except as to bills of sale or other documents mentioned in *section four* of the principal act, which may be given otherwise than by way of security for the payment of money, to which last-mentioned bills of sale and other documents this act shall not apply (s. 3).

Every bill of sale shall have annexed thereto or written thereon a schedule containing an inventory of the personal chattels comprised therein; and save as hereinafter mentioned, shall have effect only in respect of such chattels; and shall be void, except as against the grantor, in respect of any personal chattels not so specifically described (s. 4).

Save as hereinafter mentioned, a bill of sale shall be void, except as against the grantor, in respect of after acquired property (s. 5). But not in respect of any of the following things; (that is to say),

- (1.) Any *growing crops separately assigned* or charged where such crops were actually growing at the time when the bill of sale was executed.
- (2.) Any fixtures separately assigned or charged, and any plant, or trade machinery where such fixtures, plant, or trade machinery are used in, attached to, or brought upon any land, farm, factory, workshop, shop, house, warehouse, or other place *in substitution* for any of the like fixtures, plant, or trade machinery specifically described in the schedule to such bill of sale (s. 6).

Personal chattels assigned under a bill of sale shall not be liable to be seized by the grantee for any other than the following causes:—

- (1.) If the grantor shall make default in payment of the money thereby secured at the time therein provided for payment, or in the performance of any covenant or agreement contained in the bill of sale and necessary for maintaining the security; (2.) or shall become a bankrupt, or suffer the said goods or any of them to be distrained for rent, rates, or taxes; (3.) or shall fraudulently either remove or suffer the said goods, or any of them, to be removed from the premises; (4.) or shall not, without reasonable excuse, upon demand

in writing by the grantee, produce to him his last receipts for rent, rates, and taxes; (5.) if execution shall have been levied against the goods of the grantor under any judgment at law.

The grantor may within five days from the seizure of any chattels on account of any of the above-mentioned causes, apply to the High Court, or to a judge in chambers, and such court or judge, if satisfied that by payment of money or otherwise the said cause of seizure no longer exists, may restrain the grantee from removing or selling the said chattels, or may make such other order as may seem just (s. 7).

Every bill of sale shall be duly attested, and registered within seven clear days after the execution thereof, or if executed out of England within seven clear days after the time at which it would in the ordinary course of post arrive in England if posted immediately after the execution thereof; and shall truly set forth the consideration for which it was given; otherwise such bill of sale shall be void in respect of the personal chattels comprised therein (s. 8).

A bill of sale made or given by way of *security for the payment of money* by the grantor thereof *shall be void* unless made in accordance with the *form* in the schedule to this act annexed (s. 9).

The execution of every bill of sale by the grantor shall be attested by one or more credible witness or witnesses, not being a party or parties thereto. This section also repeals sub-s. 1 of sec. 10 of the Act of 1878, *ante*, p. 709 (s. 10).

Local registration of the contents of bills of sale where the grantor resides, or the chattels are, outside the London bankruptcy district is to be made in the county courts (s. 11).

Bills of sale for sums under £30 are to be void (s. 12).

Chattels seized are not to be removed or sold until after five days from seizure (s. 13).

Bills of sale are not to protect chattels against poor and parochial rates (s. 14).

The 8th and 20th sections of the principal act, and also all other enactments therein *inconsistent with this act*, are repealed, but this repeal shall not affect the validity of anything done or suffered under the principal act before the commencement of this act (s. 15).

The inspection of registered bills of sale provided for (s. 16).

“Nothing in this Act shall apply to any debentures issued by any mortgage, loan, or other incorporated company, and secured upon the capital stock or goods, chattels, and effects of such company” (s. 17). See *Attenborough's Case*, 28 Ch. D. 682, *post*, p. 712.

The Act is not to extend to Scotland or Ireland (s. 18).

The form of bill of sale in schedule, see section 9, *ante*, is—

An Indenture made between A.B. & C.D., whereby in consideration of £ , A.B. assigns unto C.D., his executors, &c., the several chattels and things specifically described in the schedule hereto annexed by way of security for the payment of the sum of £ , and interest thereon at the rate of £ per cent. per annum, by equal payments of £ on the day of [or whatever else may be the stipulated times or time of payment]. Then follows a covenan

for payment of principal and interest, also for insurance, payment of rent, or otherwise, which the parties may agree to: Provided that the chattels assigned shall not be liable to seizure or to be taken possession of by the said C.D. for any cause other than those specified in section 7 of the Act of 1882. This form is most important. See (s. 9), *ante*, p. 711.

Construction of the Acts.] “The main, and indeed almost the whole object of the acts is that it shall be known to debtors and others of the public who purchase chattels, that although they are in the apparent possession of A., yet, that by going to the proper office, one can find out that the real owner is B.” Per Grove, J., *Chapman v. Knight*, 5 C. P. D., p. 315. The acts in general specify what are or are not to be considered bills of sale, that is, what mortgages of personal chattels are bills of sale requiring registration. See in particular, Act of 1878, s. 4, Act of 1882, s. 17. It was held on the Act of 1854, on words similar to those in the Act of 1878, that post-nuptial agreements or settlements were within the act. *Fowler v. Foster*, 5 Jur. N. S. 99. So bills of sale given by joint stock companies require registration. *Attenborough's Case*, 28 Ch. D. 682. A wharfinger's warrant indorsed over to a lender with an accompanying memorandum of terms of security including a power of sale, does not require registration. *Attenborough's Case*, 28 Ch. D. 682. Documents included in the term bills of sale, must be limited to those whereby the holder has power to take personal chattels comprised therein. *Ex parte Close*, 14 Q. B. D. 386. In this case, Cave, J., observed, p. 393: “The Bills of Sale Acts do not include letters of hypothecation accompanying a deposit of goods by merchants or factors, or pawn-tickets given by pawnbrokers, or in fact any case where the object and effect of the transaction are immediately to transfer the possession from the grantor to the grantee.” See *Ex parte North W. Bank*, L. R., 15 Eq. 69. An agreement for a bill of sale, if relied on as an equitable assignment of the property, required to be registered under the Act of 1854. *Ex parte Mackay*. *Ex parte Brown*, L. R., 8 Ch. 643; *Ex parte Conning*, *Re Steele*, L. R., 16 Eq. 414. But a parol agreement to give a bill of sale does not require registration under the Act of 1878, and a bill of sale given in pursuance of such an agreement is not void by reason of the non-registration of the agreement. *Ex parte Hauxwell*, 23 Ch. D. 626.

A bill of sale of growing crops did not require registration under the Act of 1854. *Ex parte Payne*, 11 Ch. D. 539; see *Brantom v. Griffiths*, 2 C. P. D. 212. See now *ante*, p. 708. An agreement, by a clause in an ordinary building contract, that all building and other materials brought by the builder upon the land shall become the property of the landowner, is not a bill of sale within the Act of 1878. *Brown v. Bateman*, L. R., 2 C. P. 272; *Blake v. Izard*, 16 W. R. 108; *Ex parte Newitt*, 16 Ch. D. 522; see *Reeve v. Whitmore*, 4 De G. J. & S. 1; *Holroyd v. Marshall*, 10 H. L. C. 191; *Reeves v. Barlow*, 12 Q. B. D. 436. Furniture agreed to be let to A., to be

paid for by instalments, does not become his property until the instalments are paid, and the agreement is not a bill of sale. *Ex parte Crawcour*, 9 Ch. D. 419. An inventory of goods with receipt for purchase-money attached, the vendor remaining in apparent possession of the goods, is a bill of sale within the Act of 1854, and required registration. *Ex parte Cooper*, 10 Ch. D. 313. In this case the court distinguished *Allsopp v. Day*, 7 H. & N. 457, and disapproved of *Byerley v. Prevost*, L. R., 6 C. P. 144. Under the repealed act registration was unnecessary where possession was taken before the time allowed for registration. *Marples v. Hartley*, 7 Jur. N. S. 446; *Banbury v. White*, 2 H. & C. 300; see *Ex parte Fletcher*, 5 Ch. D. 809. The rule is still the same. *Attenborough's Case*, 28 Ch. D. 682. It has been held that taking goods in execution avoided altogether an unregistered bill of sale of the same goods. *Richards v. James*, L. R., 2 Q. B. 285. But this was questioned in *Ex parte Fourdrinier*, 21 Ch. D. 510, where an opinion was expressed, that subject to the execution the bill of sale might be good. See now the Act of 1882, *post*, by which an unregistered bill of sale is made void (s. 8). The effect of section 8, since repealed, of the Act of 1878, in avoiding an unregistered bill of sale as against an execution creditor of the grantor, is to avoid it only to the extent necessary to satisfy the execution. *Ex parte Blaiberg*, 23 Ch. D. 254; comp. *Richards v. James*, L. R., 2 Q. B. 285, on the Act of 1854, see now the Act of 1882.

Form of.] As regards the form of the bill of sale, there was no imperative statutory provision prior to the Act of 1882. By this act, however, the bill must be in the form mentioned in the schedule thereto, *ante*, p. 711. On this act it has been held that a bill of sale which is in its terms so complicated as to substantially vary from this form is void. *Melville v. Stringer*, 13 Q. B. D. 392. The sum secured should be made payable on a specified day, and a bill of sale making it payable on demand is contrary to such form, *semble*. *Ib.* A bill of sale not made in accordance with the form given in the schedule is void, notwithstanding a proviso that the chattels assigned should not be liable to seizure for any other cause than those specified in the act. *Davis v. Burton*, L. R., 11 Q. B. D. 537. The usual covenant for insurance does not contravene the act. *Hammond v. Hocking*, 12 Q. B. D. 291. Where there is a provision for a bonus in addition to the sum actually paid by the grantee, or a power to seize in events other than those mentioned in sect. 7, the bill of sale will be void. *In re Williams*, 25 Ch. D. 656. A bill of sale which contains an agreement by the grantor to pay the sum advanced upon demand, and gives power to the grantee to seize and sell the goods on default in payment, is void by sect. 9. *Hetherington v. Groome*, 13 Q. B. D. 789. The bill of sale was also void on the ground that it gave power to sell on default in payment on demand without waiting for five clear days as required by sect. 13. *Ib.*, Bowen, L.J., *dub.* See *Sibley v. Higgs*, 15 Q. B. D. 619. A verbal agreement by the grantee not to register the bill of

sale, in consequence of which he charges a larger bonus for the advance than he would otherwise have done, is a mere collateral agreement, and not part of the consideration for the bill of sale, and unnecessary to be stated in it. Such an agreement is not a "defeasance or condition" to which the deed is subject within the meaning of sect. 10 of the act of 1878. *Ex parte Popplewell*, 21 Ch. D., C. A. 73. See *Ex parte National, &c., Bank*, 15 Ch. D. 42. Comp. *In re Williams, ante*, p. 713.

Statement of Consideration.] The consideration for a bill of sale is sufficiently stated, so as to satisfy the requirements of sect. 8 of the Act of 1878, if it is stated with substantial accuracy—if the true legal or business effect of what actually took place is stated. Strict literal accuracy of statement is not necessary. *Ex parte Johnson*, 26 Ch. D. 338. See *Credit Co. v. Pott*, 6 Q. B. D. 295. A second bill of sale in substitution of a first in consequence of some irregular clauses in it, may state the consideration as "now paid." *Ex parte Allam*, 14 Q. B. D. 43. Money due may be stated to be money lent within sect. 8 of the Act of 1878. *The Credit Co. v. Pott*, 6 Q. B. D. 295; *Ex parte Bolland*, 21 Ch. D. 543. The consideration for a bill of sale was stated to be a sum "now paid" by the grantee to the grantor. In fact part of the money was applied in paying other persons with the grantor's assent. This was held not to render the statement of the consideration inaccurate. *Hamlyn v. Betteley*, 5 C. P. D. 327. The later case of *In re Cann*, 13 Q. B. D. 327, is to the same effect. So where part of the consideration money which was *bonâ fide* paid, was returned to the mortgagee. *Davis v. Usher*, 12 Q. B. D. 490. So, if part of the consideration is retained by the grantee to pay the solicitor's costs. *Ex parte Challinor*, 16 Ch. D. 260; and see *Ex parte Nat. Merc. Bank*, 15 Ch. D. 42. But these cases must be treated as binding authorities only in so far as they decide that, if part of the sum stated in a bill of sale as the consideration is, by the grantor's direction, given at the time of the execution of the deed, applied in satisfying a then existing debt due by him, the money so applied may be properly stated in the deed to be money then paid to him. *Ex parte Firth*, 19 Ch. D. 419. See *Ex parte Carter*, 12 Ch. D. 908. The judgments of James, L.J., in *Ex parte Challinor, sup.*; and of Cotton, L.J., in *Ex parte Bolland*, 21 Ch. D. 543, 552, may aid in reconciling the decisions. In *Ex parte Rolph*, 19 Ch. D. 98, a sum was expressed to be paid "at or before the execution" of the deed, but more than half of it was retained by the mortgagee for payment of rent of the mortgagor not then due, and the bill of sale was held to be void, as against the trustee in bankruptcy.

Where the consideration is stated to be a particular sum, but in fact part is not paid, but deducted for commission and expenses, the consideration is not truly stated within sect. 8, and the bill of sale is void. *Hamilton v. Chainé*, 7 Q. B. D. 319; *Ex parte Charing Cross, &c., Bank*, 16 Ch. D. 35; and *Ex parte Firth*, 19 Ch. D. 419, are to the same effect.

Description of Goods.] A specific description of goods in a bill of sale means an inventory of them. *Roberts v. Roberts*, 13 Q. B. D. 794. *Levy v. Polack*, W. N. 1885, p. 76, is *contra*, but overruled by *Crosser v. Maxwell & Co.*, *ib.* 95. With respect to questions arising on the subject of fixtures, prior to the Acts of 1878 and 1882 there was some difficulty. By the Act of 1854 personal chattels comprised "fixtures." There was, however, a conflict of judicial opinion as to what instruments, comprising fixtures or trade fixtures, &c., required registration. See *Mather v. Fraser*, 2 K. & J. 534, *sup.*; *Longbottom v. Berry*, L. R., 5 Q. B. 123, *ante*, p. 704. But the cases of *Begbie v. Fenwick*, L. R., 8 Ch. 1075 (n), and *Ex parte Daglish*, *ib.* 1072, were not in accordance with the prior cases. See also *Hawtry v. Butlin*, L. R., 8 Q. B. 290, and *comp. Ex parte Barclay*, L. R., 9 Ch. 576; *Ex parte Brown*, 9 Ch. D. 389. In the judgment in *Ex parte Moore*, &c. *Bank. Co.*, 14 Ch. D. 379, much light is thrown upon the subject of mortgages of fixtures before the Acts of 1878 and 1882. From a consideration of these acts it will be seen that most cases of mortgages comprising or affecting fixtures are now provided for. Loose articles of trade are not fixtures or fittings. *Dowling v. Stewart*, W. N. 1885, p. 98. Trade fixtures brought on premises by a tenant of the mortgagor after the mortgage cannot be taken by the mortgagee. *Sanders v. Davis*, 15 Q. B. D. 218. See *Watkins v. Land Co.*, W. N. 1885, p. 211.

Although a grant of goods not in existence is void unless there is some act of ratification when they are acquired (*Lunn v. Thornton*, 1 C. B. 379), a mortgage will attach on specific future property which it is agreed shall be bound by it, *e.g.* machinery in addition to or in substitution for the machinery mortgaged (*Holyroyd v. Marshall*, 10 H. L. C. 191; *Leatham v. Amor*, 47 L. J. (Q. B.) 581), or the future cargo of a ship (*Curtis v. Auber*, 1 J. & W. 526; see *Douglas v. Russell*, 1 M. & K. 488; *Langton v. Horton*, 1 Ha. 549; *Lazarus v. Andrade*, 5 C. P. D. 318), or the future crops on a farm. *Clements v. Matthews*, 11 Q. B. D. 808. In *Collyer v. Isaacs*, 19 Ch. D. 342, it was held that an assignment of after-acquired chattels, although absolute in form, amounts merely to a contract to assign, for the breach of which the assignor incurs a liability provable in bankruptcy under the Act of 1869, and from which the bankrupt is released by the order of discharge. *Ib.*; see *Thompson v. Cohen*, L. R., 7 Q. B. 527; *Cole v. Kernot*, *ib.* 534 (n). A charge of "all present and future personalty" operates to charge all the personal property belonging to the debtor at the date of the instrument, but not after-acquired property. *Belding v. Read*, 3 H. & C. 955; *In re Count D'Epineuil*, 20 Ch. D. 758. The grant of after-acquired property does not invalidate the grant of existing property. *Roberts v. Roberts*, 13 Q. B. D. 794; see *Crosser v. Maxwell & Co.*, W. N. 1885, p. 95. The Judicature Acts have not abolished the distinction between legal and equitable interests; the grant of future-acquired chattels confers only an equitable interest; and if when they come into existence, but before the grantee takes possession, the legal estate and interest therein, without notice of the grantee's existing equitable interest, becomes vested in another, he is

entitled to them. *Joseph v. Lyons*, 15 Q. B. D. 280; *Hallas v. Robinson*, *ib.* 288. A mere license to a mortgagee to enter and take future property generally, does not specifically attach upon such property, or operate as an assignment of it, though the mortgagee under his power may enter and take it. *Reeve v. Whitmore*, 9 Jur., N. S. 1214; *Chidell v. Galsworthy*, 6 C. B., N. S. 471.

Description of Persons, &c.] With reference to the description of persons, residence, &c., it is sufficient that they should be found in the introductory part of the affidavit of the attesting witness. *Blaiberg v. Parke*, L. R., 10 Q. B. D. 90. The description of the grantor as an "accountant," he being a clerk in the accountant's department of a railway company, is insufficient. *Larchin v. The North-Western Deposit Bank*, 10 Ex. 64. Where the description "gentleman" is sufficient. See *Smith v. Cheese*, 1 C. P. D. 60. A description of the grantor by his real name J. Wood, but who had assumed the name of J. A. Wood, and had become known to his creditors by that name, is sufficient. *Ex parte M'Hattie*, 10 Ch. D. 398. Where the residence of the attesting witness was stated as "Acton, in the city of London," instead of Middlesex, it was sufficient, for the words "in the city of London" might be rejected. *Blount v. Harris*, 4 Q. B. D. 603. See Act of 1878, *ante*, s. 10, p. 711. The description that the grantor "was until lately" a commercial traveller is insufficient. *Castle v. Downton*, 5 C. P. D. 56. The residence must be that at the time of swearing the affidavit, and not of executing the bill of sale. *Button v. O'Neill*, 4 C. P. D. 354, disapproving of *Lon. & West. Co. v. Chace*, 12 C. B., N. S. 730; 31 L. J. (C. P.) 314. A variance between the numbers of the houses is a fatal misdescription. *Murray v. Mackenzie*, L. R., 10 C. P. 625. An affidavit which contains a description of the residence and occupation of only one of the attesting witnesses is not sufficient. *Pickard v. Marriage*, 1 Ex. D. 364. The description of the residence of the grantor is not rendered incorrect so as to avoid the bill of sale, by the fact that between the execution of the bill of sale and the date of the affidavit the grantor had left his residence, as described in the affidavit, for America. *In re Hewer*, 21 Ch. D. 871; comp. *Button v. O'Neill*, 4 C. P. D. 354. The execution by the grantor of a bill of sale attested and registered under the Act of 1878, may be attested by the solicitor of the grantee. *Penwarden v. Roberts*, 9 Q. B. D. 137. See now Act of 1882, s. 10. A bill of sale, although not explained to the grantor and attested by a solicitor in compliance with ss. 8 and 10, when s. 8 was in force, is not void as between the grantor and grantee. *Davis v. Goodman*, 5 C. P. D. 128. A "true copy" of a bill of sale must not necessarily be an exact copy, so long as any errors or omissions in the copy filed are merely clerical and not misleading. *In re Hewer*, 21 Ch. D. 871.

Seizure—Transfer—Tacking, &c.—Re-Registration.] As to possession, or apparent possession, of the goods under s. 8 (now repealed) of the Act of 1878. See *Seal v. Claridge*, 7 Q. B. D. 516; *Ex parte*

Saffery, 16 Ch. D. 668. Where the grantor of a bill of sale is in default in making payment, a promise by the grantee without consideration to wait before taking the goods is inoperative to prevent the grantee seizing. *Williams v. Stern*, 5 Q. B. D. 409, questioning *Albert v. Grosvenor Invest. Co.*, L. R., 3 Q. B. 123. If after seizure the grantor offers to pay, but the grantee declines to receive what is due, the court may under s. 7 of the Act of 1882 order that the goods shall not be sold if the amount is paid. *Ex parte Cotton*, 11 Q. B. D. 301. It has been held under the Act of 1878 that the grantor of a registered bill of sale who retains possession of the chattels comprised in it may in the ordinary course of business sell such chattels. *Nat. Merc. Bank v. Hampson*, 5 Q. B. D. 177; *Taylor v. McKeand*, 5 C. P. D. 358; but not otherwise; *Payne v. Fern*, 6 Q. B. D. 620. If the mortgagee is entitled to seize if payment is not made on demand he cannot seize on the day of the demand. *Ex parte Trevor*, 1 Ch. D. 297. Where the grantor does not, upon demand, produce a receipt for rent which had only become due a few days, and of which the landlord had not yet required payment: this is a "reasonable excuse" within s. 7 of the Act of 1882. *Ex parte Cotton*, 11 Q. B. D. 301. A transfer of a bill of sale is valid under the Act of 1878 without fresh registration as a security for what is due at the time of the transfer. *Horne v. Hughes*, 6 Q. B. D. 676; see *Chapman v. Knight*, 5 C. P. D. 308. A bill of sale attested and registered under the Act of 1878, takes priority over one that is earlier but unregistered, as to any chattels which may be comprised in both. *Conelly v. Steer*, L. R., 7 Q. B. D. 520; *Lyons v. Tucker*, *ib.* 523. The doctrine of consolidation of mortgages does not apply to bills of sale so as to enable the grantee by a registered bill of sale of goods to tack a prior mortgage of other property of the grantor. *Chesworth v. Hunt*, 5 C. P. D. 266. The provision as to re-registration is equally imperative when the grantee, before the period for renewal, assigns his interest under the bill of sale to a third person. *Karet v. Kosher Meat Association*, 2 Q. B. D. 361. A bill of sale, void for want of renewal of registration at the commencement of the Act of 1878, cannot be renewed under s. 14 of that Act. *Askew v. Lewis*, 10 Q. B. D. 477. The affidavit made on the re-registration of a bill of sale must state the residence of the grantee as it was stated in the bill of sale, even though it was there erroneously stated. *Ex parte Webster*, 22 Ch. D. 136.

What Bills of Sale are acts of bankruptcy.] It is sometimes a question whether a mortgage of all the mortgagor's chattels is an act of bankruptcy or not, *i.e.* whether it is a fraudulent conveyance within the meaning of the bankruptcy acts, in which the language is identical in this respect. See the two last acts, 32 & 33 Vict. c. 71, 1869, s. 6, and 46 & 47 Vict. c. 52 (1882), s. 4 (1, *b*). On this point it has been held that a *bonâ fide* mortgage of all a person's chattels was not an act of bankruptcy where the consideration was a fair equivalent given at the time. *Mercer v. Peterson*, L. R., 3 Ex. 105. Where the assignment is of substantially all the property, it is bad if made to

secure a pre-existing debt *only*. If there is a further advance it must be substantial. *Ex parte King*, 2 Ch. D. 256; see *Ex parte Fisher*, L. R., 7 Ch. 636; *Ex parte Barton*, 13 Ch. D. 102; *Ex parte Kilner*, *ib.*, 245. In such cases the test whether the execution of the deed is an act of bankruptcy is, "Was the fresh advance made by the lender with the intention of enabling the borrower to continue his business, and had he reasonable grounds for believing that the advance would enable the borrower to do so." If so, the deed is not an act of bankruptcy. *Ex parte Johnson*, 26 Ch. D. 338; and see *Ex parte Chaplin*, *ib.* 319; *Ex parte Ellis*, 2 Ch. D. 798; *Ex parte Games*, 12 Ch. D. 314; *Ex parte Dann*, 17 Ch. D. 26; *Ex parte Mauxwell*, 23 Ch. D. 626. The forbearance to seize the property comprised in a bill of sale is not, as against the trustee in bankruptcy of the grantor, good consideration for the giving of a new bill of sale in lieu of the first. *Ex parte Cooper*, 10 Ch. D. 313; *Ex parte Payne*, 11 Ch. D. 539.

Bankruptcy—Reputed Ownership—Consent of Owner.] The preceding decisions show in what cases a bill of sale constitutes an act of bankruptcy. The following cases turn on the question assuming that it is valid, what is the effect of the chattels remaining in the possession of the mortgagor. By the Bankruptcy Act, 1883, 46 & 47 Vict. c. 52, the property divisible amongst creditors comprises (*inter alia*), all goods being, at the commencement of the bankruptcy, in the possession, order, or disposition of the bankrupt, *in his trade or business*, by the consent and permission of the true owner, under such circumstances that he is the reputed owner thereof; provided that things in action other than debts due or growing due to the bankrupt in the course of his *trade or business*, shall not be deemed goods within the meaning of this section (s. 44) (iii). This section is very much the same as the 32 & 33 Vict. c. 71, the Bankruptcy Act of 1869 (s. 15) (5), now repealed, except that the words in the latter are "goods in his possession *being a trader*." This difference makes a difference in the construction. See *In re Jenkinson*, 15 Q. B. D. 441; *In re Pryce*, 4 Ch. D. 644, 685. As to what are choses in action, see *Ex parte Union Bank of Manchester*, L. R., 12 Eq. 354; *Col. Bank v. Whinney*, 30 Ch. D. 261, *post*, p. 720. With reference to this question the Bills of Sale Act of 1854 gave no greater protection to bills of sale than they possessed before, and did not prevent the application of the reputed ownership clause. *Stansfeld v. Cubitt*, 2 D. & J. 222; *Badger v. Shaw*, 2 E. & E. 472. By s. 20 of the Act of 1878, chattels comprised in a duly registered bill of sale were not to be deemed within the reputed ownership clause. This section was repealed by s. 15 of the Act of 1882. But by s. 3 of the same act it was provided that it should be construed with the Act of 1878, but unless the context otherwise required, it should not apply to any bill of sale duly registered before its commencement, &c., *ante*, p. 710. It has been held on these sections that the grantee of a bill of sale, registered under the Act of

1878 before the coming into operation of the Act of 1882, is so long as the registration is subsisting, entitled to the protection afforded by s. 20 against the "order and disposition" of the grantor, even when an act of bankruptcy is committed by the grantor after the coming into operation of the Act of 1882. *Ex parte Izard*, 23 Ch. D. 409. It has also been held that the Act of 1882 repeals the 20th section of the Act of 1878, in respect of bills of sale given by way of *security*, but not in respect of bills of sale given by way of *absolute transfer*, and therefore chattels comprised in a registered bill of sale given by way of absolute transfer are not in the order and disposition of the grantor within the Bankruptcy Act. *Swift v. Pannell*, 24 Ch. D. 210. It follows that a bill of sale given by way of *security* and not protected by the Act of 1878, is within the order and disposition clause, for it was only protected from the operation of that clause by the now repealed section (20) of the Act of 1878. The effect would seem to be that unless in cases coming within the operation of and protected by this Act, and cases of *absolute transfer*, the decisions on the Act of 1854 are still authorities. See *Badger v. Shaw*, *sup.*, but subject to this, that the goods must be of the description mentioned in the Bankruptcy Acts, *ante*, p. 707. In order to exclude the operation of the reputed ownership clause in bankruptcy, a real possession, even though it be friendly, is sufficient. But, to satisfy the Bills of Sale Act, the possession must be apparent as well as real. *Ex parte National Guardian Assurance Co.*, 10 Ch. D. 408. And see further, as to the distinction between possession and apparent possession, *Ancona v. Ancona*, 1 Ex. D. 285, 291; *Ex parte Jay*, L. R., 9 Ch. 697. If the grantee under an *unregistered* bill of sale has, before the bankruptcy of the grantor, acquired possession of the goods so as to exclude the apparent possession of the grantor, it is immaterial whether the possession has been obtained by means of a transaction which, taken *per se*, would have amounted to a fraudulent preference. *Ex parte Symmons*, 14 Ch. D. 693. See *Darby v. Smith*, 8 T. R. 82.

The custom for hotel-keepers to hire the furniture of their hotels is so notorious, that the court will take judicial notice of it. And the custom extends, not only to furniture in the strictest sense of the word, but to all the articles which are necessary for the furnishing of an hotel, and it excludes the reputation of ownership by the hotel-keeper whether the particular articles are or are not in fact hired by him if they are within the scope of the custom. *Crawcour v. Salter*, 18 Ch. D. 30; *Ex parte Turquand*, 14 Q. B. D. 636. But this does not apply to an ordinary householder who hires furniture on a three years hiring and purchase agreement. *Ex parte Brooks*, 23 Ch. D. 261.

When a trader is in possession at his place of business of articles not in their nature connected with his business, much stronger evidence will be required to prove the reputed ownership than in the case of articles connected with the business. *Ex parte Lovering*, 24 Ch. D. 31. The reputed ownership clause applies to goods in the hands of a factor, unless the relation of principal and factor is notorious. *Semble*, *In re Fawcus*; *Ex parte Buck*, 3 Ch. D. 795.

See as to the Factors Act, *post*, p. 730. As to withdrawal of consent by a mortgagee to goods being in the order and disposition of the mortgagor. See *Ex parte Phillips*. *Ex parte Alexander*, 4 Ch. D. 496, on the Act of 1854. During the period of seven days between the making and registration of a bill of sale, the order and disposition clause did not apply, so that as against the trustee in bankruptcy, who by the receiver has before the expiration of the seven days taken possession of such goods, the mortgagee is entitled. *In re Hewer*, 21 Ch. D. 871. This was on ss. 10, 20, of the Act of 1878, but s. 20 is now repealed, *ante*, p. 710, in respect of bills of sale given by way of security, *ante*, p. 719.

SEC. 3.—*Choses in Action, Policies of Assurance, Shares, &c.*

<i>Choses in Action—Policies of Assurance</i>	720	<i>Fund in Court</i>	727
<i>Suicide of Assured</i>	721	<i>Stop Order</i>	727
<i>To whom Policy effected by Mortgage belongs</i>	721	<i>Notice to Trustee before Payment into Court</i>	728
<i>Assignee of, takes subject to Equities affecting it</i>	722	<i>Distringas</i>	728
<i>Shares in Companies, &c.</i>	722	<i>Mortgage of Stock</i>	728
<i>Notice of Mortgage, when necessary</i>	722	<i>Mortgage of Ships</i>	728
1. <i>To Prevent subsequent Mortgagee gaining Priority</i>	723	<i>Expectancies</i>	729
2. <i>To Prevent Office or Debtor paying Assignor</i>	723	<i>Interest under Wills</i>	729
3. <i>To Prevent Operation of Bankruptcy</i>	723, 724	<i>As Next of Kin or Heir</i>	729
<i>Knowledge but no Notice</i>	724	8 & 9 Vict. c. 106	729
<i>To whom—By whom</i>	725	<i>Pensions</i>	729
<i>In case of Companies</i>	725	<i>Not in general Assignable</i>	729
<i>To Solicitor</i>	725	<i>Unless given as Compensation</i> ..	730
<i>Agents—Trustees</i>	725, 726	<i>Profits of Fellowships, &c.</i>	730
<i>Constructive Notice</i>	726	<i>Salary of Judge</i>	730
<i>Mortgagee and cestui que trust</i> ..	727	<i>Ecclesiastical Benefices</i>	730
<i>Rules do not apply to Real Estate</i> ..	727	<i>Profits of Partnership</i>	730
		<i>Mortgages or Pledges by Factors</i> ...	730

In the preceding section the subject of mortgages of “personal chattels capable of complete transfer by delivery,” see Bills of Sale Act, 1878, s. 4, and which required registration, has been discussed. In this section mortgages of personal property, not coming within the description of personal chattels as defined by that act, will be considered.

Choses in Action—Policies of Assurance.] Formerly mortgages of life policies were usually made by an assignment of the policy, with power to the mortgagee to give receipts in the name of the mortgagor. The insurer must have an insurable interest under the 14 Geo. 3, c. 48. See *Worthington v. Curtis*, 1 Ch. D. 419. By the 30 & 31 Vict. c. 144, an assignee of a life policy may sue in his own

name (s. 1). But notice of the assignment must be given to the office (s. 3). Mere notice of an equitable assignment by deposit of the policy, is not sufficient to entitle the equitable mortgagee to be paid on the death of the mortgagor, without the assent of his legal personal representatives. *Crossley v. City of Glasgow, &c. Co.*, 4 Ch. D. 421. If a first incumbrancer of a policy has not given such notice as prescribed by the Act, and a second incumbrancer with notice of the prior charge gives the statutory notice, the latter does not thereby obtain priority. *Newman v. Newman*, 28 Ch. D. 674, correcting *Broune v. Savage*, Sug. V. & P., 14 ed. 379.

Policies of assurance are choses in action. *Ex parte Ibbetson*, 8 Ch. D. 519. They will be valid in the hands of an assignee for value, notwithstanding the suicide of the assured, if, as now is often, if not usually, the case, there is a clause to that effect in the policy. *Moore v. Woolsey*, 4 E. & B. 243. This condition is for the benefit of the assured; and where the policy is mortgaged with other property, and the mortgagor commits suicide, the office must pay the sum assured, and has no claim upon the other property mortgaged, either for repayment or contribution. *Solicitors, &c. Society v. Lamb*, 2 D., J. & S. 251. This principle equally applies where the office itself is the mortgagee, and to the extent of the sum assured, and if the debt is satisfied by it, the office cannot resort to other property comprised in the mortgage. *White v. British Empire Co.*, L. R., 7 Eq. 394. An equitable mortgage of a policy by deposit is a "legal assignment" within the terms of a condition giving validity to an assignment, in case of suicide. *Dufaur v. Professional Life Assurance Office*, 25 Bea. 599; *Jones v. Consolidated Investment Assurance Co.*, 26 Bea. 256. But an agreement in writing to execute on request a mortgage of a policy of assurance deposited at the time of the agreement as security for a loan, is not an "assignment" within the Act, and notice to the Assurance Company of such an agreement does not give any priority over a prior equitable mortgagee who has given no notice but has possession of the policy. *Spencer v. Clarke*, 9 Ch. D. 137.

Frequently the insurance is effected at the time of the loan and in the name of the lender upon the life of the borrower. In such cases, in the absence of contract, the policy will belong to the former (*Humphrey v. Arabin*, Ll. & G. t. Pl. 318; *Bruce v. Garden*, L. R., 5 Ch. 32; see *Foster v. Roberts*, 29 Bea. 467; *Bell v. Ahearne*, 12 Ir. Eq. R. 576), unless the debtor pays the premiums or is charged with them in account with his knowledge (see *Bruce v. Garden*, *sup.*); in which case the policy will belong to him or his representatives after satisfying the debt. *Morland v. Isaac*, 20 Bea. 389; *Courtenay v. Wright*, 2 Giff. 337; *Drysdale v. Piggott*, 8 D., M. & G. 546; *Freme v. Brade*, 2 De G. & J. 582. In *Leslie v. French*, 23 Ch. D. 552, Fry, J., in his judgment, which Pearson, J. adopted, *ib.* p. 559, observed that when a person, not the sole beneficial owner, pays the premiums to keep up a policy of life insurance, he is entitled to a lien on the policy or its proceeds in the following cases: (1.) By contract

with the beneficial owner: (2.) By reason of the right of trustees to an indemnity out of their trust property for money expended by them in its preservation: (3.) By subrogation to their right of some person who, at the request of trustees, has done so: (4.) By reason of the right of a mortgagee to add to his charge any money paid by him to preserve the property. In no other cases can a lien on a policy for premiums paid be acquired either by a stranger or by a part owner of the policy. See *In re Tharp*, 2 Sm. & Giff. 578, n.; *Swan v. Swan*, 8 Price, 518; and *Hamilton v. Denny*, 1 B. & B. 199. Life assurance is not a contract of indemnity, but a contract to pay a sum certain in the event of death. Therefore, though the debt may have been discharged, yet, as between the office and the mortgagee, the latter is entitled to the sum assured. *Dalby v. In. and Lon. Ass. Co.*, 15 C. B. 365.

Choses in action, like policies, are frequently made the subject of mortgages, and though usually made by deed, this is not essential; a letter or writing is sufficient. *Chowne v. Baylis*, 31 Bea. 351. It is not easy to define choses in action. See J. Wms. Pers. Prop., 12th ed., p. 4 *et seq.* and the judgments in *Colonial Bank v. Whinney*, 30 Ch. D. 261. For some of the principal kinds of choses in action, see *ante*, p. 348. As a very general rule, the assignee of a chose in action takes it subject to all the equities to which it was liable in the hands of the assignor. *Priddy v. Rose*, 3 Mer. 86; *Mangles v. Dixon*, 3 H. L. C. 702; *Re Natal Investment Co.*, L. R., 3 Ch. 355; comp. *Dickson v. Swansea Rail. Co.*, L. R., 4 Q. B. 48. See *Athenæum, &c. Soc. v. Pooley*, 3 D. & J. 294; *Woodhams v. Ang. Aust., &c. Co.*, 2 D. J. & S. 162; *Ex parte Chorley*, L. R., 11 Eq. 157. But an office which has accepted notice of an assignment, cannot set up against the assignee, its equities against the assignor. *In re Hercules Co.*, L. R., 19 Eq. 302.

As to the effect of Bankruptcy, see *post*, p. 724.

[*Shares in Companies, &c.*] A mortgage of shares in companies is usually effected by a deposit of them or transfer by deed. It is not usual for a mortgagee to have his name put on the register of shareholders, as he will in that case be liable as a shareholder. *Weiker-sheim's Case*, L. R., 8 Ch. 831. A mortgage of railway debentures does not create a charge upon the lands of the company or right to a receiver. *Gardner v. L. C. & D. R. Co.*, L. R., 2 Ch. 201.

As to shares being choses in action and the effect of Bankruptcy, see *post*, p. 724.

A mortgagee deposittee of shares has no implied authority, without previous demand of repayment, to sell or sub-mortgage them and fill in the name in a transfer deed of the purchaser or sub-mortgagee. *France v. Clark*, 26 Ch. D. 257.

[*Notice.*] In mortgages of policies, shares in companies, &c., notice should be given by the mortgagee to the insurance or other company or society; and where debts or other choses in action are mortgaged,

notice must be given to the debtor or trustees of the fund, as the case may be, or it must be proved *aliunde* that he had notice. *Lloyd v. Banks*, L. R., 3 Ch. 488.

First. This is necessary in order to prevent a subsequent mortgagee from gaining priority by giving notice. For notice of the assignment of a chose in action gives priority, and is equivalent to the possession of personalty capable of actual delivery. *Dearle v. Hall*, 3 Russ. 1; *Loveridge v. Cooper*, *ib.* 30; see *Meux v. Bell*, 1 Ha. 73; *Ex parte Boulton*, 1 De G. & J. 163; *Morris v. Cannan*, 8 Jur., N. S. 653. The rule applies where the second assignee has taken his assignment from the legal personal representative of a *cestui que trust*, and not from the *cestui que trust* himself. *In re Freshfield's Trust*, 11 Ch. D. 198. But this principle does not apply to equitable assignments of shares in joint stock companies. *Société Générale, &c. v. Tramways Union*, 14 Q. B. D. 424; *Cons. Colonial Bank v. Whinney*, 30 Ch. D. 261. In cases of mortgages of policies or shares, it would seem that the actual possession of the policy or certificates is immaterial as affecting the priority gained by notice. *Foster v. Cockerell*, 3 Cl. & F. 456; see *Re Bissell's Trusts*, 2 K. & J. 328. Where there is a deposit of a policy with the intention of creating a *lien* upon it only, and not of passing any interest in the money secured by it, there is or may be a distinction between such a case and an ordinary deposit. *Broadbent v. Varley*, 12 C. B., N. S. 214; see *Gibson v. Overbury*, 7 M. & W. 555. But a deposit would, as a rule, be held to pass the interest in the money secured by it, and notice must be given. *Green v. Ingham*, L. R., 2 C. P. 525. Notice, however, is not necessary merely as between an insurance company and an assignee of a policy of the company, where there has been no payment by, or surrender to, the company. *Dufaur v. Professional Life Assurance Office*, 25 Bea. 599. As to the necessity of notice being given by a trustee in bankruptcy. See *infra*.

Secondly. Notice is necessary to prevent the office, debtor, or trustee, &c., from paying the sum assured, debt, &c., to the mortgagor or his representatives (*Jones v. Gibbons*, 9 Ves. 410). See *Allen v. Lord Southampton*, 16 Ch. D. 178: and in the case of a policy to prevent the office from accepting a surrender. See *Fortescue v. Barnett*, 3 M. & K. 36.

Thirdly. Notice is necessary to prevent the vesting in certain cases, of the mortgaged property in the trustee in bankruptcy. If the mortgagor becomes bankrupt, questions may arise between the trustee in bankruptcy and mortgagee, and sometimes the question turns upon this, viz., whether the subject-matter of the mortgage is a chose in action or not, and whether the mortgaged property is within the order and disposition clause. As a general rule as between the trustee in bankruptcy and assignees for value, the same rules prevail as between assignees *inter se*. He who first gives notice where notice is required, or obtains a stop order, *post*, p. 727, when that is necessary, gains priority. *Palmer v. Locke*, 18 Ch. D. 381, on the act of 1869. See *In Re Atkinson*, 2 D., M. & G. 140; *In re Barr's Trusts*, 4 K. & J. 219;

Lloyd v. Banks, L. R., 3 Ch. 488 ; *Re Russell's Policy Trusts*, L. R., 15 Eq. 26. It has indeed been held on the Bankruptcy Act of 1849 (s. 141), where there were negative words, as they were sometimes called, that is, words *prohibiting* any alienation by the bankrupt after his bankruptcy, that assignees in bankruptcy who gave no notice were entitled as against an assignee who, without notice of the bankruptcy, took an assignment from the bankrupt of a reversionary trust fund, and gave notice to the trustees of it. *In re Bright's Settlement*, 13 Ch. D. 413. But these words are not in the later acts, and if the mortgagor becomes bankrupt, questions may arise between the trustee in bankruptcy and mortgagee. By the Bankruptcy Act, 1883, 46 & 47 Vict. c. 52, s. 50, where any part of the property of the bankrupt consists of stock, shares in ships, shares or any other property transferable in the books of any company, office, or person, the trustee may exercise the right to transfer the property to the same extent as the bankrupt might have exercised if he had not become bankrupt. (3.) When the property of the bankrupt consists of things in action, they shall be deemed to have been duly assigned to the trustee. (5.)

It has been stated that as to choses in action, now, only debts due to the bankrupt in the course of his trade are within the reputed ownership clause, *ante*, p. 718. As regards shares in companies, it was held under the Bankruptcy Act of 1869, where the reputed ownership clause was similar to that in the recent act (*sup.*), that they were not choses in action, and that the trustee in bankruptcy was entitled as against a mortgagee by deposit who had not given notice to the company. *Ex parte Union Bank of Manchester*, L. R., 12 Eq. 354. The rule is the same under the recent act. *Col. Bank v. Whinney*, 30 Ch. D. 261, Fry, L.J., *diss.* As regards ordinary choses in action, *e.g.*, debentures of a joint stock company, the title of a mortgagee who has not given notice until after the bankruptcy, is good against the trustee. *In re Pryce*, 4 Ch. D. 685. The words "debts due to the bankrupt in the course of his trade," include only debts connected with it. *Ib.* As regards property which from its character is within this order and disposition clause, if it is in the order and disposition of the bankrupt at the time of the bankruptcy, the title of the trustee, although he has not given notice, is good as against the mortgagee who has not given notice, or not until after the bankruptcy. *Bartlett v. Bartlett*, 1 De G. & J. 127 ; *Ex parte Lucas*, 3 De G. & J. 113 ; *Re Rawbone*, 3 K. & J. 476 ; *Ex parte Caldwell*, L. R., 13 Eq. 188. Otherwise it has been held if he has given notice or has obtained a stop order. *Re Russell's Policy Trusts*, L. R., 15 Eq. 26 ; *Stuart v. Cockerell*, L. R., 8 Eq. 607. Comp. *In re Webb*, 36 L. J. Ch. 341 ; *In re Lichener*, 35 Bea. 317. See *Palmer v. Locke*, 18 Ch. D. 381.

Notice when required should accurately refer to the property mortgaged. *Woodburn v. Grant*, 22 Bea. 483. It is prudent, though not strictly necessary, to give a written notice. *North B. I. Co. v. Hallett*, 7 Jur., N. S. 1263 ; *Ex parte Agra Bank*, L. R., 3 Ch. 555 ; *Saffron Walden, &c., Soc. v. Rayner*, 14 Ch. D. 406. Whether knowledge by a trustee, company, &c., derived not from a notice, but *aliunde* and

casually, is equivalent to notice, would seem to be not very clear upon the authorities. In *Edwards v. Martin*, L. R., 1 Eq. 121, and *Re Brown's Trusts*, L. R., 5 Eq. 88, it appears to have been considered that knowledge of the assignment derived casually and not from notice was not equivalent to it in a question of priority. But in the later case of *Lloyd v. Banks* (3 Ch. 488), it was held, that knowledge derived casually, was sufficient. See also *Ex parte Stewart*, 11 Jur., N. S. 25; *Ex parte Agra Bank*, L. R., 3 Ch. 555.

Notice must be given to the party liable, that is, the debtor, insurance company, trustee of the fund, &c., as the case may be. *Ex parte M'Turk*, 2 Dea. 58. And in the case of companies, notice to the secretary or other authorized officer or agent (*Ex parte Hennessy*, 2 Dr. & War. 555, 563; *Thompson v. Tomkins*, 2 Dr. & S. 8); or to the directors, is sufficient (*Ex parte Stewart*, 11 Jur., N. S. 25; *Ex parte Agra Bank*, L. R., 3 Ch. 555); but notice to a shareholder is not. *Martin v. Sedgwick*, 9 Bea. 333. If the company is being wound up, notice to the official liquidator is sufficient. *Re Breech Loading Co.*, L. R., 5 Eq. 284. If notice be given to the proper person, he cannot disregard it without making himself personally liable to the mortgagee. *Andrews v. Bousfield*, 10 Bea. 511; see *Stephens v. Venables*, 30 Bea. 627. In general, notice to a solicitor of a party is the same as notice to the latter, where the solicitor is actually expressly or impliedly, *Saff. Wald. Ben. Soc. v. Rayner*, 14 Ch. D. 406, 410, authorised to receive notice. *Richards v. Gledstanes*, 3 Giff. 298. *Comp. Saff. Wal. Ben. Soc. v. Rayner, sup.*, and *Re Durand's Trusts*, 8 W. R. 33, in which cases it was held that the solicitor was not authorised to accept notice. See also *Arden v. Arden*, W. N. 1885, p. 61, and *Atterbury v. Wallis*, 8 D., M. & G. 454; and cons. *Sharpe v. Foy*, L. R., 4 Ch. 35; *Rolland v. Hart*, L. R., 6 Ch. 678. Notice to a solicitor concerned for a particular person is not notice in a different transaction in which he is concerned for a different party. *Lloyd v. Attwood*, 3 De G. & J. 614. And the mere fact that a mortgagee allows the mortgagor, who is himself a solicitor, to prepare the mortgage, will not be sufficient to affect the former with notice of an incumbrance known to the latter. *Espin v. Pemberton*, *ib.* 547.

As to notice to agents generally, and to agents who are assignors, see *Re Hennessy*, 2 Dr. & War. 555; and to agents or others who have themselves advanced money, see *Webster v. Webster*, 31 Bea. 393; *Somerset v. Cox*, 33 Bea. 634.

Notice to one of several trustees is sufficient *during his lifetime* (*Willes v. Greenhill*, 4 D., F. & J. 147), though inquiries should be made of *all*. See *Smith v. Smith*, 2 Cr. & M. 231. If only one trustee has had notice, and he dies or ceases to be trustee, a subsequent incumbrancer will gain priority by giving notice to a surviving or other trustee prior to any notice to him by the first incumbrancer. See *Timson v. Ramsbottom*, 2 Ke. 35; *Meux v. Bell*, 1 Ha. 73. Notice to trustees before they have *actually received* the trust fund is nugatory. *Buller v. Plunkett*, 1 J. & H. 441; see *Somerset v. Cox*

33 Bea. 634. And although bankers or agents may have actually received a fund intended and directed to be paid to a person, on something being done, his right is only inchoate up to the time that it is done, and notice by an incumbrancer before that time does not give priority, but the first notice after that time does. *Johnstone v. Cox*, 16 Ch. D. 571. Although, if the only thing to be done by the person to whom the fund is payable is to give a receipt for it, notice before such receipt is given, will give priority. *Addison v. Cox*, L. R., 8 Ch. 76. Where a fund is in the hands of a banker for distribution on a particular day, notice given after banking hours on the previous evening gives no priority over a notice given before business hours on the morning of that day, but the charges on the fund have priority according to their date. *Calisher v. Forbes*, L. R., 7 Ch. 109. A trustee, purchaser or mortgagee of the interest of his *cestui que trust*, should give notice to one of his co-trustees. *Timson v. Ramsbottom*, 2 Ke. 35; see *Ex parte Smart*, 2 Mon. & A. 60; *Com. Pub. Works v. Harby*, 23 Bea. 508. If a trustee assigns to a co-trustee that is sufficient notice (*Browne v. Savage*, 4 Drew. 635); *aliter*, if he assign to a stranger. *Ib.*; see *Willes v. Greenhill*, 4 D., F. & J. 147. When a fund is subject to the trusts of a settlement, and is under the control of the trustees of it, and is then assigned to other trustees of another settlement in trust for a particular person, who mortgages, notice should be given to the first trustees who have the fund in their hands. *Bridge v. Beadon*, L. R., 3 Eq. 664; see *Holt v. Dewell*, 4 Ha. 447. A trustee who receives notice of an assignment is not, in the absence of inquiry, bound to inform the person giving him the notice that he himself has a prior assignment. *Ex parte Wilkes*, 4 Ch. D. 101. Trustees who concur in a technical breach of trust by consenting to an unauthorised change of securities, but who take an assignment of the trust funds as an indemnity, have a better equity than assignees for value of the original trust funds, who have given no notice binding on the trustees. *Phipps v. Lovegrove*, *Prosser v. Phipps*, L. R., 16 Eq. 80. New trustees of trust funds in settlement are not bound to inquire of the old trustees whether they have received notice of any incumbrance; and it has never been the practice of the court on appointing new trustees of funds to make such an inquiry. *Semble, ib.* Assignees of an equitable interest desiring to be perfectly safe should obtain a *distringas*, or have their deed indorsed on the original deed, or obtain a transfer of the funds in court. *Ib.*, p. 90.

As to notice by the assignee of freight, see *Feltham v. Clark*, 1 De G. & S. 307; *Gardner v. Lachlan*, 4 M. & C. 129. As against the assignor or his representatives (*Re Lowe's Settlement*, 30 Bea. 95); or as against subsequent incumbrancers *having notice* of the prior charge (*Warburton v. Hill*, Kay, 470), notice is unnecessary.

It may be observed, that an assignee of a debt is not bound to give notice of its non-payment to the assignor. *Glyn v. Hood*, 1 D., F. & J. 334. Where two assignments are contained in one deed, notice of one is not constructive notice of the other. *Re Bright*, 21 Bea. 430. See further as to constructive notice, *post*, tit. "VENDOR AND PUR-

CHASER." A mortgagee who gives notice has priority over a *cestui que trust* claiming under a declaration of trust, of which no notice has been given. *Martin v. Sedgwick*, 9 Bea: 333; comp. *Newton v. Newton*, L. R., 6 Eq. 140. As to the equities between a *cestui que trust* and mortgagee of shares in a company, see *Murray v. Pinkett*, 12 Cl. & Fin. 764.

These rules as to notice do not extend to interests in real estate as such (*Wiltshire v. Rabbits*, 14 Sim. 76; see as to this case, 1 Giff. 376; *Wilmot v. Pike*, 5 Ha. 14); neither do they to stock or money, which in equity is real estate (*Re Carew*, 16 W. R. 1077); though notice is necessary of mortgages of the proceeds of land directed to be sold or mortgaged (*Foster v. Cockerell*, 3 Cl. & F. 456; *Consol. &c. Co. v. Riley*, 1 Giff. 371; see *Lee v. Howlett*, 2 K. & J. 531), or of portions directed to be raised by means of a term, or generally of any charge which can only reach the person entitled in the shape of money. *Re Hughes*, 2 H. & M. 89; see *Barnes v. Pinkney*, 36 L. J., Ch. 815; *Phipps v. Lovegrove*, L. R., 16 Eq. 80. The deposit of a colonial land order does not require notice to be given to the company issuing it. *Ex parte Barnett*, De G. 194; see *Rooper v. Harrison*, 2 K. & J. 86.

Fund in Court—Stop Order.] Where the subject-matter of the mortgage is a fund in court, a stop order, that the fund shall not be transferred without notice to the mortgagee, is usually obtained and entered at the office of the accountant-general. This is equivalent to notice to the trustees of a fund. The stop order gives priority. *Greening v. Beckford*, 5 Sim. 195; *Swayne v. Swayne*, 11 Bea. 463; *Pinnock v. Bailey*, 23 Ch. D. 497. It also prevented the fund from passing to the assignees of the mortgagor in the event of his bankruptcy, as being in his order and disposition. *Bartlett v. Bartlett*, 1 De G. & J. 127; see *ante*, pp. 718, 724. Cons. *Palmer v. Locke*, 18 Ch. D. 381. Mere notice to the accountant-general is not equivalent to a stop order. *Warburton v. Hill*, Kay, 470. The lien of a solicitor on a fund recovered by him (23 & 24 Vict. c. 127, s. 28) prevails over the stop order of an assignee of the client. *Haymes v. Cooper*, 33 Bea. 431. Where a stop order has been obtained by A., and the fund is carried over to the account of the mortgagor and his mortgagees as well, a stop order obtained by B., after such carrying over, does not give B. priority over A. *Lister v. Tidd*, L. R., 4 Eq. 462. It is not necessary, as a preliminary to obtaining a stop order on a fund standing in court to the credit of the Chancery Division, by a person who has a judgment in an action in another division of the High Court, that he should obtain a charging order in that division. *Hopewell v. Barnes*, 1 Ch. D. 630.

When part of a trust fund is in court and part in the hands of the trustees, the assignee in order to complete his title must, as regards the fund in court, obtain a stop order, and, as regards the fund in the hands of the trustees, give notice to the trustees. *Mutual Life Assurance Society v. Langley*, 26 Ch. D. 686. The stop order by a second assignee, without notice that there is a prior assignee, gives priority

over the latter, he not having a stop order. *Ib.* *Secus* where the second assignee has notice of the prior assignment. *In re A. D. Holmes*, 29 Ch. D. 786.

Notice to the trustees of a fund *before* it is paid into court gives priority over a subsequent incumbrancer of it after it is paid in, though the latter alone obtains a stop order. *Livesey v. Harding*, 23 Bea. 141; see *Brearcliff v. Dorrington*, 4 De G. & S. 122; *Pinnock v. Bailey*, 23 Ch. D. 497. A stop order only operates in respect of a charge existing at the time of the order. *MacLeod v. Buchanan*, 33 Bea. 234.

Where a reversionary interest in government stock is mortgaged, it is usual to obtain a *distringas*, which in practice entitles the mortgagee to eight days' notice from the bank of any application to transfer it, within which time an injunction to prevent the transfer must be obtained and served. *Re Cross*, 1 Dr. & Sm. 580. If the last surviving trustee of stock be dead, notice by *distringas* gives priority. See *Etty v. Bridges*, 2 Y. C. C. 486.

Mortgage of Stock.] What is usually termed a stock mortgage is effected by the mortgagee selling out his stock, the price of it being paid to the mortgagor, who in general covenants to replace it. In such cases, though the funds may fall, the mortgagee is only entitled to have the stock replaced. *Blyth v. Carpenter*, L. R., 2 Eq. 501. In a mortgage of the stock itself, when it is transferred to the mortgagee, he cannot deal with it, as by selling when high and repurchasing when low, so as to make a profit of it for himself. *Langton v. Waite*, L. R., 4 Ch. 402; and see the judgment of Selwyn, L.J., and observations (*ib.* 404) on that of the Vice-Chancellor in the court below, L. R., 6 Eq. 165.

Mortgages of Ships.] The forms of a mortgage and transfer of mortgage of a ship, or share in a ship, are given by the Merchant Shipping Act, 1854, 17 & 18 Vict. c. 104. The owners of the ship itself must be registered (ss. 30 *et seq.*). The property in each ship is divided into sixty-four shares, with not more than sixty-four registered owners (43 & 44 Vict. c. 18, s. 2); but this is not to affect the beneficial title of any number of persons claiming under or through any registered owner or joint owner (*ib.*). The mortgage by any owner or part owner must also be registered (17 & 18 Vict. c. 104, ss. 66, 67), and must be in the prescribed form. *Liverpool B. Bank v. Turner*, 2 D., F. & J. 502. See 18 & 19 Vict. c. 91, s. 11. Priority depends on the date of *registration*, not on that of the mortgage (17 & 18 Vict. c. 104, ss. 67—69). A mortgagee of a ship has a right to the earnings only from the time he takes possession (*Gardner v. Cazenove*, 1 H. & N. 423; *Willis v. Pulmer*, 7 C. B., N. S. 340); up to that time all contracts by a mortgagor which do not impair the right of the mortgagee are valid. *Collins v. Lamport*, 11 Jur., N. S. 1. But a mortgagee may exercise his right to the possession and earnings of the ship when he thinks fit so to do. *Brown v. Tanner*, L. R., 3

Ch. 597; *Wilson v. Wilson*, L. R., 14 Eq. 32; *Liverpool, &c. Co. v. Wilson*, L. R., 7 Ch. 507; see *Keith v. Burrows*, 2 App. C. 636. When the mortgagee in possession employs the ship as a prudent owner would do in the ordinary course of business, it is at the risk of the mortgagor; if otherwise, at his own risk. *Marriott v. Anchor Rev. Int. Co.*, 2 Giff. 457; affirmed 7 Jur., N. S. 713; see *Europ. Co. v. R. Mail Co.*, 4 K. & J. 676; *De Mattos v. Gibson*, 1 J. & H. 79. A transfer of a ship absolute in terms may be shown to be a mortgage only. *Ward v. Beck*, 13 C. B., N. S. 668. Every mortgagee may sell the ship or share in respect of which he is registered (Act of 1854, *sup.*, s. 71). The bankruptcy of the mortgagor does not affect the mortgage (s. 72). See *ante*, p. 724. The mortgage is discharged by an entry which is made in the register on production of the mortgage deed with the receipt for the mortgage money duly indorsed thereon (s. 68), which entry is conclusive. *Bell v. Blyth*, L. R., 4 Ch. 136. By the 25 & 26 Vict. c. 63, s. 3, equities may be enforced against owners and mortgagees of ships. See *Liverpool, &c. Bank v. Turner*, 29 L. J., Ch. 827; *Samuel v. Jones*, 7 L. T., N. S. 760; *Ward v. Beck*, *sup.* The deposit of a registered mortgage of a ship creates a valid charge as against the assignees of the depositor. *Lacon v. Liffen*, 4 Giff. 75. The Admiralty Court has jurisdiction over claims arising out of mortgages duly registered under the Act of 1854, 24 & 25 Vict. c. 10, s. 11.

Expectancies.] Even prior to the statute presently noticed, it was held that expectancies, for instance, interests under the will (*Beckley v. Newland*, 2 P. W. 182; *Bennett v. Cooper*, 9 Bea. 252), or as presumptive next of kin (*Hinde v. Blake*, 3 Bea. 234; *Meek v. Kettlewell*, 1 Ph. 342), or heir at law (*Hobson v. Trevor*, 2 P. W. 191; *Wethered v. Wethered*, 2 Sim. 183) of a living person, were capable of being dealt with or made the subject of an assignment in equity for a good consideration, but not the interest of an heir apparent or presumptive. *Carleton v. Leighton*, 3 Mer. 667. By the 8 & 9 Vict. c. 106, however, contingent, executory, and future interests and possibilities coupled with an interest, in *hereditaments* of any tenure, also rights of entry, immediate and future, vested and contingent, may be disposed of by deed; but no disposition by force only of this act will defeat or enlarge an estate tail (s. 6).

As to mortgages of reversionary interests, see *ante*, p. 688.

Pensions, &c.] The assignment of the pay, half-pay or pensions of public servants is in general invalid. The pay (*Barwick v. Reade*, 1 H. Bl. 627), or half-pay (*Flarty v. Odum*, 3 T. R. 681), of an officer cannot be assigned.

It has been held, that a pension given by the late East India Company may be assigned. *Heald v. Hay*, 3 Giff. 467; *Carew v. Cooper*, 4 Giff. 619; but see this case on appeal, 10 Jur., N. S. 429. So any other pension for *past* services only. *Davis v. D. of Marlborough*, 1 Sw. 74. The *commission* of an officer cannot be *pledged* or *mortgaged*

(*Collyer v. Fallon*, T. & R. 459); but, if sold, an equitable assignment may be made of the purchase-money in the agent's hands. *Collyer v. Fallon*, *sup.*; see *Somerset v. Cox*, 33 Bea. 634, and the cases *ante*, p. 726. It seems, a pension given as compensation for the loss of a place in the customs is assignable (*Tunstall v. Boothby*, 10 Sim. 542; comp. *Wells v. Foster*, 8 M. & W. 149), and the profits of a college fellowship (*Feistel v. King's College, Cambridge*, 10 Bea. 491), or emoluments of a canon of a cathedral where there is no cure of souls, are assignable. *Greenfell v. Dean, &c. of Windsor*, 2 Bea. 544. An interest in the Customs Annuity and Benevolent Fund, 56 Geo. 3, c. 73 (Local), is assignable by way of mortgage. *Re Maclean's Trusts*, L. R., 19 Eq. 274. But a perpetual pension granted by the country as a mark of national gratitude for public services and for the support of a dignity cannot be assigned. *Davis v. D. of Marlborough*, 1 Sw. 74. The salary of a judge which is essential to the due support of his position is not in general assignable. See *Arbuthnot v. Norton*, 5 Moo. P. C. 219, 230. But this rule does not apply to the assignment of a sum of money payable by the government to the personal representatives of a judge after his death. *Ib.* Charges upon ecclesiastical benefices are illegal. 13 Eliz. c. 20. Although this statute was repealed by the 43 Geo. 3, c. 84, the latter statute being repealed by the 57 Geo. 3, c. 99, the first statute was revived. See *Hawkins v. Gathercole*, 6 D. M. & G. 1, 29; also *McBean v. Dean*, 30 Ch. D. 520. But by the 17 Geo. 3, c. 53, incumbents are, in certain cases, authorized to borrow money for the building or repair of the parsonage house. See 21 Geo. 3, c. 66; 1 & 2 Vict. c. 23; 5 & 6 Vict. c. 26, s. 13; 28 & 29 Vict. c. 69. The mortgagee of a share of partnership assets and profits takes subject to all the equities of the co-partners of the mortgagor. *Kelly v. Hatton*, L. R., 3 Ch. 703. As to an account of the mortgagor's share or interest in the partnership, see *Whetham v. Davey*, 30 Ch. D. 574.

Mortgages or Pledges by Factors.] The Factors Acts are, the 4 Geo. 4, c. 83; 6 Geo. 4, c. 94; 5 & 6 Vict. c. 39; and 40 & 41 Vict. c. 39. As to the general operation of these statutes, see 2 Chit. Statutes, p. 1080, 4th edit. The acts are limited to mercantile transactions. *Wood v. Rowcliffe*, 6 Ha. 191.

CHAPTER V.

OF THE USUAL COVENANTS AND PROVISIONS IN MORTGAGES.

<i>To pay Principal and Interest</i>	731	<i>For Title</i>	734
<i>With Two or more</i>	731	<i>Conveyancing Act, 1881</i>	734
<i>Not to call principal in or Pay</i>		<i>Enjoyment by Mortgagor until</i>	
<i>off for a certain Time</i>	731	<i>Default</i>	734
<i>As to reduction of Interest</i>	732	<i>That Mortgagee may enter</i>	
<i>Converting into Principal</i>	732	<i>after Default</i>	734
<i>Under and over Payments</i> ...732, 733		<i>Attornment and Power of Distress.</i>	735
<i>No Covenant to pay Interest</i> ...	733	<i>What Tenancy created</i>	735
<i>Interest on Expenditure</i>	733	<i>Real, not Sham Rent</i>	735
<i>To Insure</i>	733	<i>For what Rent—Distress</i>	735
<i>Conveyancing Act, 1881</i>	733	<i>Proceeds of Distress</i>	735

A MIS-RECITAL of the amount advanced does not bind the mortgagor. *Re Slater's Trusts*, 11 Ch. D. 227.

To pay Principal.] The covenant to pay the mortgage debt (generally six months after the date of the deed) is usually the first covenant. If it is payable by instalments, a proviso that the whole shall become payable on default in payment of *any* instalment, is valid. *Sterne v. Beck*, 1 D., J. & S. 595. The absence of a covenant to pay the mortgage debt is in general immaterial. In the Conveyancing Act, 1881, there are various provisions relating to the execution of deeds, receipts, &c. These are considered *post*, tit. "VENDORS AND PURCHASERS." By the same act, s. 60 (1), covenants and bonds, made with two or more jointly, to pay money, to convey, or to do any other act, to them or for their benefit, shall be deemed to include and imply an obligation to do the act to, or for the benefit of, the survivor or survivors of them, and to, or for the benefit of, any other person to whom the right to sue on the covenant, contract, bond, or obligation devolves. (2) This section extends to a covenant implied by virtue of this act. (3) It applies only if and as far as a contrary intention is not expressed, and shall have effect subject to the covenant or bond, and the provisions therein contained. (4) This section applies only to covenants, &c., made or implied after the commencement of this act (1st January, 1882).

A covenant not to call in the mortgage debt for a certain time is common. A receipt of the interest after it becomes due is a waiver of the breach of covenant, though accepted after notice by the mortgagee that the agreement was no longer binding. *Langridge v. Payne*, 2 J. & H. 423. But see *Keene v. Biscoe*, 8 Ch. D. 201. Where there is a covenant not to call in for a certain time, there is an implied stipulation (if none expressed) that the postponement is conditional

on punctual payment of interest, and, when the property is leasehold, performance of covenants; otherwise the mortgagee's remedies by sale or foreclosure will immediately arise. *Seaton v. Twyford*, L. R., 11 Eq. 591.

This covenant is commonly connected with a corresponding covenant on the part of the mortgagor not to pay off before the time limited for the mortgagee not to call in. Such a covenant by a client with his solicitor extended to twenty years, is, however, unreasonable, and will not be enforced. *Cowdry v. Day*, 1 Giff. 316; and see *Talbot v. Braddill*, 1 Ver. 183. There is generally a covenant to pay interest, but if not expressly reserved, it is payable, unless in certain exceptional cases (see *Thompson v. Drew*, 20 Bea. 49, *post*, p. 733); and it is immaterial whether the mortgage is legal or equitable. *Carey v. Doyne*, 5 Ir. Ch. R. 104; *Ashwell v. Staunton*, 30 Bea. 52. But if the deposit be as a security for a debt not in itself carrying interest, it may be doubtful whether this rule will apply. *Ashton v. Dalton*, 2 Coll. 565. Where the rate of interest is not fixed by the parties, it will be settled by the court at 5*l.* per cent. *Ashwell v. Staunton*, *sup.* There is no rule of law that, upon a contract for the payment of money on a day certain, with interest at a fixed rate, down to that day, a farther contract for the continuance of the same rate of interest is to be implied. *Per* Lord Selborne; *Cook v. Fowler*, L. R., 7 H. L. 27. Where the mortgagor covenanted to pay principal and interest at 10 per cent. at the end of twelve months, there being no further covenant to pay interest, it was limited to 5*l.* per cent. *Goodchap v. Roberts*, 14 Ch. D. 49. Interest runs from day to day. *Wilson v. Harman*, 2 Ves. sen. 672, 673. The usury laws being now repealed (17 & 18 Vict. c. 90), there is no legal restriction as to the rate of interest, except under the Pawnbrokers' Acts. But the repeal of these laws has not affected the right of the court to give relief against unconscionable bargains. See *ante*, p. 689. An agreement for the reduction in the rate of interest on punctual payment is valid, and if not so paid, the higher rate may be enforced (see *Stanhope v. Manners*, 2 Ed. 197); and will be allowed to a mortgagee in possession through the default of the mortgagor; *Stains v. Banks*, 9 Jur., N. S. 1049; reversed on appeal. See *Union Bank of London v. Ingram*, 16 Ch. D. 53. But an agreement for increasing the rate of interest in default of punctual payment is a penalty, and will be relieved against. *Strode v. Parker*, 2 Ver. 316; *Nicholls v. Maynard*, 3 Atk. 520. Obviously the object proposed by the latter method can be effected by the former. A parol agreement subsequent to the mortgage, to take a less rate of interest, has been held to be binding. *Milton v. Edgworth*, 5 P. B. C. 313. The mortgagor and mortgagee may agree that interest shall be converted into principal, but this cannot be done as against later incumbrances, of which the mortgagee has notice. *Digby v. Craggs*, Amb. 612. A covenant that interest in arrear shall be capitalised, and bear interest after the same rate, is valid; and the mortgagee is not limited to six years' interest. *Clarkson v. Henderson*, 14 Ch. D. 348. If less than the agreed interest has been paid by mistake

the amount unpaid may be recovered on the mistake being discovered. *Gregory v. Pilkington*, 26 L. J., Ch. 177. If more than the proper interest has been paid or settled in account under a misapprehension as to the mortgage deed, the account will be re-opened. *Daniel v. Sinclair*, 6 App. C. 180. In the absence of a special agreement, simple interest only is recoverable. *Ib.*

Where there is no covenant to pay interest, and the mortgagee agrees on payment of principal to reconvey, no interest is payable. *Thompson v. Drew*, 20 Bea. 49. If a judgment has been recovered for a sum secured by covenant, the general rule is that the covenant is merged in the judgment. Thus, where there is a covenant to pay a certain sum and interest at a greater rate than a judgment carries, viz., 4 per cent., the covenantee who has obtained the judgment is in general only entitled to interest on it at 4 per cent. *Florence v. Jennings*, 2 C. B., N. S. 454; *Re European Ry. Co.*, 4 Ch. D. 33. It makes no difference that the covenant for payment of principal is followed by the stipulation for payment of interest, so long as the principal shall remain unpaid. *Ex parte Fewings*, *Re Sneyd*, 25 Ch. D. 338; see the Covenants, *ib.*, p. 340; comp. *Popple v. Sylvester*, 22 Ch. D. 98. But if a judgment is expressly given as collateral security for the principal and interest, interest is recoverable at the rate expressly stipulated for by the original security. *Re Agriculturist, &c. Co.*, 4 Ch. D. 34 n.; *Popple v. Sylvester*, 22 Ch. D. *sup.*

If the mortgage deed provides for the case of the mortgagee expending money pursuant to the provisions of the deed, interest is usually made payable on the money so expended. And although there may be no express provision, a mortgagee properly expending money for the support of his security will in general be allowed interest on such money, as where it is laid out in lasting improvements (*Quarrell v. Beckford*, 1 Madd. 269, 281), in supporting the mortgagor's title (*Godfrey v. Watson*, 3 Atk. 518), in keeping up life policies (*Bellamy v. Brickenden*, 2 J. & H. 137), or the like; see, for the limits of this doctrine, *post*, p. 749.

To Insure.—Prior to the 23 & 24 Vict. c. 145 (28th Aug. 1860), in the absence of any express agreement upon the point, a mortgagee could not insure the mortgaged premises and charge the expenses of insurance and premiums against the mortgagor. *Dobson v. Land*, 8 Ha. 216; *Bellamy v. Brickenden*, 2 J. & H. 137. By this statute power to insure was given in the cases mentioned in s. 11, subs. 2. This was repealed by the 44 & 45 Vict. c. 41 (Conveyancing Act, 1881), s. 71. By this act a mortgagee has "power to insure, and keep insured, any building, &c., or property of an insurable nature, whether affixed to the freehold or not, forming part of the mortgaged property, and the premiums paid for any such insurance shall be a charge on the mortgaged property, in addition to the mortgage money and with the same priority, and with interest at the same rate as the mortgage money," s. 19 (1) (ii). These provisions are subject to any

variations in the mortgage deed, *ib.* (2, 3), and apply only to deeds executed after the commencement of the act (1st Jan. 1882).

By s. 23.—(1.) The amount of an insurance so effected shall not exceed the amount specified in the mortgage deed, if none specified, then shall not exceed two-third parts of the amount that would be required, in case of total destruction, to restore the property insured. (2.) An insurance shall not, under the power, be effected by a mortgagee in any of the following cases (namely): (i.) Where there is a declaration in the mortgage deed that no insurance is required: (ii.) Where an insurance is kept up by or on behalf of the mortgagor in accordance with the mortgage deed: (iii.) Where the mortgage deed contains no stipulation respecting insurance, and an insurance is kept up by or on behalf of the mortgagor, to the amount in which the mortgagee is by this act authorised to insure. (3.) All money received on an insurance effected under the mortgage deed or under this act shall, if the mortgagee so requires, be applied by the mortgagor in making good the loss or damage in respect of which the money is received. (4.) Without prejudice to any obligation to the contrary imposed by law, or by special contract, a mortgagee may require that all money received on an insurance be applied in or towards discharge of the money due under his mortgage.

For Title.—The mortgagor's covenants for title are almost invariably unqualified ones, not limited to the acts of himself and persons claiming under him. Under the covenant for further assurance, he must make any further assurance necessary to make good or support the mortgage, but not to release his equity of redemption. *Atkins v. Uton*, 1 Ld. Raym. 36. And if the mortgagor's title be defective at the time of the mortgage, but afterwards becomes good, this will enure to the benefit of the mortgagee. *Smith v. Baker*, 1 Y. C. C. 223. The usual well-known covenants in a mortgage, and in a conveyance by a mortgagee, are now deemed to be included without being expressed, Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41, s. 7, but in deeds only executed after the commencement of the act (1 Jan. 1882). When the statutory form under the act, of mortgage or transfer of mortgage is used, see ss. 26, 27, and s. 28 as to what covenants will be implied, and s. 29 as to the form of re-conveyance of statutory mortgage.

A covenant that the mortgagor shall enjoy the premises until default gives him an interest in the meantime in the nature of a term of years. *Wilkinson v. Hall*, 3 Bing. N. C. 508. Where the mortgagor remains in possession after default, he would seem to be tenant at sufferance (*Thunder v. Belcher*, 3 Ea. 449; Sm. L. C., 8th ed., vol. 1, pp. 577, 591); or, as sometimes described, *tenant at will quodammodo*. *Moss v. Gallimore*, Doug. 279.

A covenant that the mortgagee may enter and take personal chattels after default of payment on demand, does not entitle the mortgagee to seize *immediately* on default, but within a reasonable time. *Brighty*

v. Norton, 3 B. & S. 305; *Toms v. Wilson*, 4 B. & S. 455; *Massey v. Sladen*, L. R., 4 Ex. 13; *Moore v. Shelley*, 8 App. C. 285.

Attornment and Power of Distress.] If the mortgagor attorn tenant to the mortgagee at a rent equivalent to the interest, this enables the mortgagee to distrain. *Morton v. Woods*, L. R., 4 Q. B. 293; *Re Stockton Iron Co.*, 10 Ch. D. 335; *Kearsley v. Philips*, 11 Q. B. D. 621. And if the mortgagor attorn tenant to an agent of, or receiver for, the mortgagee, such agent or receiver, although he may have no reversion in the premises, may distrain. *Jolly v. Arbuthnot*, 4 De G. & J. 224. A tenancy from year to year, and not a tenancy at will, is created by the usual attornment clause. *Ex parte Queen's Ben. B. Soc.*, 16 Ch. D. 274, explaining the observations in *Morton v. Woods*, *sup.*, as to such a tenancy being a tenancy at will. The tenancy thus created is only for the purpose of giving an additional security for the payment of the interest, and the mortgagee does not cease to be a mortgagee because he is made a landlord, and he is entitled as against the trustee in the bankruptcy of the mortgagor to trade fixtures annexed to the public-house after the execution of the mortgage. *Ex parte Punnett*, 16 Ch. D. 226. An attornment by a mortgagor to a second mortgagee is valid, notwithstanding the fact that the mortgagor has already attorned tenant to the first mortgagee of the same property. And if the amount of the rents fixed by the two attornment clauses is a fair rent of the property, so that there is no fraud on the bankrupt law, valid distresses can be levied by both mortgagees after the commencement of the bankruptcy of the mortgagor. *Ib.* An attornment clause in a mortgage deed is valid if it constitutes a real, not a sham, relation of landlord and tenant between the mortgagee and the mortgagor at a real not a sham rent. *Ex parte Williams*, 7 Ch. D. 138; *In re Stockton Iron Furnace Co.*, 10 Ch. D. 335; *Ex parte Jackson*, 14 Ch. D. 725. But it is not easy to say what will be considered a real rent. The test as to this would seem not to be the amount of rent as compared with the amount of the debt and interest upon it, see 14 Ch. D. *per* Thesiger, L.J., p. 743, but rather the amount of rent as compared, at all events approximately, with the annual value of the property, cons. the judgments in the cases cited. See *Morton v. Woods*, L. R., 4 Q. B. 293. The proceeds of a distress for rent levied under an attornment clause in a mortgage deed are, in the absence of any provision to the contrary in the deed, applicable to the payment of principal as well as interest. *Ex parte Harrison*, 18 Ch. D. 127; *Hampson v. Fellows*, L. R., 6 Eq. 575, is *contra*, but not followed. As to giving a right or licence to distrain without attorning tenant, see *Doe v. Goodier*, 10 Q. B. 957; *Freeman v. Edwards*, 2 Ex. 732. Such a licence would seem not to be transferable. *Brown v. Metropolitan Society*, 1 E. & E. 832, 837. The attornment clause does not create such a tenancy as will entitle the mortgagor to notice to quit before the mortgagee brings ejectment or sells under a power of sale, at all events when it is stipulated that no such notice need be given. *Metropolitan, &c.*

Society v. Brown, 4 H. & N. 428. See further as to the operation of the attornment clause, *Walker v. Giles*, 6 C. B. 662; *Pinkhorn v. Souster*, 8 Ex. 763.

CHAPTER VI.

OF THE EQUITY OF REDEMPTION.

<i>Subject to incidents of ordinary Estates</i>	736	<i>Who may redeem</i>	737
<i>To Curtesy—Dower</i>	736	<i>Persons who may redeem</i>	738
<i>Second Mortgage, first concealed</i>	736	<i>In Redemption Action Money must be paid at Day</i>	739
<i>Payment on or before day of Redemption</i>	737	<i>“Just Allowances”</i>	739
<i>Where Six Months’ notice necessary</i>	737	<i>Plaintiff must offer to pay what is due</i>	739
<i>Day of Redemption in Bill of Sale</i>	737	<i>Building Society Mortgages</i> ..	739
<i>Unreasonable Demand</i>	737	<i>Right of Consolidation</i>	740
<i>Agreement to take a less Sum on a particular Day</i>	737	<i>Devolution and Purchase of Equity of Redemption</i>	741
<i>Agreement to release</i>	737	<i>Exoneration</i>	741
		<i>Contribution</i>	741
		<i>Purchase of—Effect</i>	742
		<i>Where several Mortgages</i>	742

Subject to Incidents of ordinary Estate.] Some of the general principles affecting an equity of redemption have already been stated (*ante*, p. 686). They will now be considered more in detail. An equity of redemption may be dealt with and is subject to all the ordinary incidents of an equitable estate, for instance, curtesy (*Casborne v. Scarfe*, 1 Atk. 605). Prior to the Dower Act, a dowress who had joined in a mortgage in fee releasing her right of dower, could not have redeemed when the equity of redemption was reserved to the husband alone. *Dawson v. Bank of Whitehaven*, 6 Ch. D. 218; but otherwise where it was reserved to her as well as to her husband, *ib.*, in which case *Jackson v. Parker*, Amb. 687, and *Jackson v. Innes*, 1 Bli. 104, are explained. See *Swannock v. Lyford*, Amb. 7. Where a widow entitled to dower joined the freeholder in a mortgage to a building society, releasing the land “for the purpose of extinguishing her right,” and the mortgage was paid off and usual receipt endorsed, she was held entitled to dower. *Meek v. Chamberlain*, 8 Q. B. D. 31, explaining *Dawson v. Bank of Whitehaven*, *sup.* By a statute still in force (4 & 5 W. & M. c. 16), it is in substance enacted, that debtors upon judgment statute, &c., voluntarily given, afterwards executing mortgages, and persons mortgaging and mortgaging again without giving notices to the second incumbrancers, are to lose their equity of redemption (ss. 2, 3). The

statute is penal, and will be construed strictly. An equitable mortgagee by deposit of deeds is not a second incumbrancer within the meaning of the act. *Kennard v. Futroyc*, 2 Giff. 81. A bill will not lie against a mortgagor for a forfeiture under the act. *S. C.*

Where the right to redeem is barred by the Statute of Limitations, see *ante*, p. 593.

A mortgagor cannot before the day of redemption redeem by payment of principal and interest up to the day mentioned in the proviso for redemption. *Brown v. Cole*, 14 Sim. 427; *Burrough v. Cranston*, 2 Ir. Eq. 203. See, however, *Talbot v. Braddill*, 1 Ver. 183, and *Harding v. Pingey*, 10 Jur., N. S. 872, case of a trust for sale. And if the mortgagee be not paid off on the day named for redemption, he is entitled to six months' notice of payment (*Shrapnell v. Blake*, 2 Eq. Ca. Ab. 603), and the notice must be clear. *Brown v. Lockhart*, 10 Sim. 420, 424. In default of notice the mortgagee is in general entitled to six months' interest. See *Bartlett v. Franklin*, 36 L. J., Ch. 671; *Letts v. Hutchins*, 6 W. N. 249. In a mortgage of chattels a proviso for redemption on a day named, or *such earlier day* as the mortgagee shall require by notice, must have a reasonable construction, and a notice to pay on the day on which it is served is unreasonable. *Rogers v. Mutton*, 7 H. & N. 733; *Brighty v. Norton*, 3 B. & S. 305. Where the mortgagee agrees to take a portion of the mortgage debt in lieu of the whole upon payment on a given day, the court cannot relieve against the effect of its non-payment on that day. *Ford v. E. of Chesterfield*, 19 Bea. 428; see *Thompson v. Hudson*, L. R., 4 H. L. C. 1. An agreement by a mortgagor in possession to give up possession, and if required to release his equity of redemption, but which is not acted upon for many (in the case cited, twelve) years, the mortgagor continuing in possession, will be considered as waived by mutual consent. *Rushbrook v. Laurence*, L. R., 8 Eq. 25; 5 Ch. 3.

Who may redeem—Redemption Suit.] As a general rule, all persons may redeem who have an interest in the property subject to the mortgage. *Assignees.*—Thus, the assignees of the mortgage may redeem (see *Tomlinson v. Gregg*, 15 W. R. 51; *Winterbottom v. Taylor*, 2 Drew. 279), and assignees (formerly, now the trustee) in bankruptcy. *Ex parte Alsager*, 2 M., D. & D. 328. A creditor, who is plaintiff in a creditors' suit, may, after a decree for sale, redeem. *Christian v. Field*, 2 Ha. 177. The devisee (*Lewis v. Nangle*, 2 Ves. Sen. 431), but not the personal representatives of the mortgagor, may redeem where the mortgage is in fee. *Catley v. Sampson*, 33 Bea. 551.

In cases of *escheat and forfeiture*, where the lands in mortgage have escheated for want of heirs, the superior lord may redeem, if the mortgage is by demise (*Visct. Downe v. Morris*, 3 Ha. 394); but otherwise, formerly, if the mortgage is in fee. *Burgess v. Wheate*, 1 Ed. 210, 256; *Beale v. Symonds*, 16 Bea. 406. But the equity of redemption is assets for payment of the mortgagor's debts. *Ib.*

Where there is a forfeiture for crime, the crown may redeem. *Att.-Gen. v. Crofts*, 4 B. P. C. 136. In a foreclosure suit by an equitable mortgagee of freeholds (*Sutton v. Smith*, 10 Jur., N. S. 557, n.) or leaseholds (*Hancock v. Att.-Gen.*, *ib.*), where the mortgagor has been convicted of felony, the court will direct a sale, the purchase-money to be paid into court, the plaintiff to be satisfied principal, interest and costs, the attorney-general to be at liberty to apply as to the balance. See, now, tit. "ESCHEAT AND FORFEITURE." The heir or customary heir may redeem (*Pym v. Bowreman*, 3 Sw. 241, n.; *Lloyd v. Wait*, 1 Ph. 61); but if the transaction was not in fact a mortgage, but an irrevocable conveyance to trustees to sell and pay debts, with a trust of the surplus for the grantor, his executors or administrators, his heir has no equity. *Griffith v. Ricketts*, 7 Ha. 299. Joint tenants of the equity of redemption. See 1 Powell on Mortgages, by Coventry, 342, n. 7. Jointress. See *Flud v. Flud*, Fr. Ch. 210. Judgment creditors. *Stonehewer v. Thompson*, 2 Atk. 440; see *Neate v. D. of Marlborough*, 3 M. & C. 407; *Jefferys v. Dickson*, L. R., 1 Ch. 183. Under the 27 & 28 Vict. c. 112, s. 1, although there can be no charge until the land is taken in execution by virtue of the writ of *elegit*, and judgments do not affect the land at the date of the decree, judgment creditors are nevertheless entitled to redeem if they acquire a charge by issuing such writs and obtaining a return from the sheriff within six months from the date of the decree. *Mildred v. Austin*, L. R., 8 Eq. 220; see *Thornton v. Finch*, 4 Giff. 515; *Re Cowbridge R. Co.*, L. R., 5 Eq. 413; *Guest v. Cowbridge R. Co.*, L. R., 6 Eq. 619; see *Beckett v. Buckley*, L. R., 17 Eq. 435; *Hatton v. Haywood*, L. R., 9 Ch. 229. Lunatics' committees under an order of the court. See *Ex parte Grimstone*, Amb. 706. Legatees in some cases. See *Faulkner v. Daniel*, 3 Ha. 199; *Batchelor v. Middleton*, 6 Ha. 78. The mortgagor. The mortgagee cannot dispute his right, and on payment of what is due must reconvey. *Tasker v. Small*, 3 M. & C. 63, 70. And if the estate of the wife is mortgaged by her and her husband, the equity of redemption being reserved to her, she may redeem. *Gleaves v. Paine*, 1 D., J. & S. 87. On tender by a person having a partial interest giving a right to redeem, the mortgagee is bound to convey, but the conveyance should reserve the equities of the other persons interested. *Pearce v. Morris*, L. R., 5 Ch. 227. See "RE-CONVEYANCE TO MORTGAGOR," *post*, Ch. 11. Puisne mortgagees. *Fell v. Brown*, 2 B. C. C. 276; *Palk v. Ld. Clinton*, 12 Ves. 48; see *Rhodes v. Buckland*, 16 Bea. 212. A first mortgagee ought, without judicial proceeding, to accept payment of a second mortgagee, and thereupon convey the mortgaged estate to him, with or without the concurrence of the mortgagors. *Smith v. Green*, 1 Coll. 555; cons. *Ramsbottom v. Wallis*, 5 L. J., N. S., Ch. 92. Remainderman or reversioners. *Raffety v. King*, 1 Ke. 601, 617. Tenant in common. *Wynne v. Styant*, 2 Ph. 303, 306. Tenant in tail, who has joined the tenant for life in a mortgage. *Playford v. Playford*, 4 Ha. 546. Tenant for life, but he must hold the equity of redemption upon the

trusts of the instrument creating the life estate. *Wicks v. Scrivens*, 1 J. & H. 215; see *Pawley v. Colyer*, 16 W. R. 114. *Volunteers. Howard v. Harris*, 1 Ver. 193.

In a redemption action the money must be paid *at the day* fixed, or, unless under very special circumstances, the right of redemption is gone for ever (*Novosielski v. Wakefield*, 17 Ves. 417; *Faulkner v. Bolton*, 7 Sim. 319); though, if a redemption bill be dismissed for want of prosecution, the mortgagor may file another. *Hansard v. Hardy*, 18 Ves. 460. It is an established rule of the court that if a mortgagor proceeds for the redemption of a legal mortgage, and it is dismissed for any reason except for want of prosecution, the dismissal operates as a decree for foreclosure against him. *Cholmley v. Ctss. of Oxford*, 2 Atk. 267; *Inman v. Wearing*, 3 De G. & Sm. 729, and *per James, L.J.*; *Marshall v. Shrewsbury*, L. R., 10 Ch. 250, 253. But this rule does not apply where the mortgage is equitable. *Ib.* The mortgagee is entitled to payment of all costs and other monies agreed to be paid by the mortgagor, in addition to principal and interest, and such costs, &c., are recoverable under "*just allowances.*" *Blackford v. Davis*, L. R., 4 Ch. 304. In *Cottrell v. Finney*, L. R., 9 Ch. 541, a transferee was held entitled to interest paid by him before the transfer, to prevent an injurious sale of the mortgaged property, although not included in the transfer deed from the mortgagee.

In a redemption action the plaintiff must offer to pay what is due. *Harding v. Pingey*, 10 Jur., N. S. 872; *Hughes v. Cook*, 34 Bea. 407. If nothing be found due to the mortgagee, he must pay the costs, but not where something is due to him at the time of the filing of the bill. *Barlow v. Gains*, *Morris v. Islip*, 23 Bea. 244; see *National Bank of Australasia v. United, &c., Co.*, 4 App. C. 391. And if the mortgagor makes an unconditional tender of a sum which the mortgagee refuses to accept, he must bear the costs of a suit if the amount tendered was all that was due. *Harmer v. Priestley*, 16 Bea. 569; *Hoskin v. Sincok*, 11 Jur., N. S. 477. When the solicitor of a mortgagor pays off a mortgage, it will be presumed that he did so on behalf of his client. *Ward v. Carttar*, L. R., 1 Eq. 29.

If by the rules of a building society an advanced member may redeem on payment of his subscription up to a certain time, he is entitled to do so, although he may be liable to pay subscriptions after that time (*Sparrow v. Farmer*, 26 Bea. 511; see *Farmer v. Smith*, 4 H. & N. 196; *Handley v. Farmer*, 29 Bea. 362), the terms of redemption depend of course upon the deed, and are not always the same in every society. See other cases of redemption, *Fleming v. Self*, 3 D., M. & G. 997; *Mosley v. Baker*, *ib.* 1032; *Smith v. Pilkington*, 1 D., F. & J. 120. To entitle a mortgagee to redeem, he must pay the reasonable fines imposed by the society. *Parker v. Butcher*, L. R., 3 Eq. 762; see *Ex parte Osborne*, L. R., 10 Ch. 41. In general, new rules of a building society made subsequent to a mortgage, although in terms applicable to all past and future transactions, will not be allowed prejudicially to affect the rights of a

mortgagor seeking to redeem, although he has covenanted to observe all the rules of the society "for the time being." *Smith's Case*, 1 Ch. D. 481; see *Ex parte Osborne*, L. R., 10 Ch. 41.

In cases in which the Conveyancing Act, 1881 (*infra*), does not apply, where there are two or more mortgages of different properties or estates from the same mortgagor to the same mortgagee, the latter may require that *one alone* shall not be redeemed, but that *all* shall be redeemed at the same time. *Ex parte Carter*, Amb. 733; *Jones v. Smith*, 2 Ves. Jun. 376; see *Neve v. Pennell*, 2 H. & M. 170; *Selby v. Pomfret*, 3 D., F. & J. 595. So a person entitled to the equity of redemption in *part* of the mortgaged property cannot separately redeem such part. *Sish v. Hopkins*, Amb. 793; see *Cholmondeley v. Clinton*, 2 J. & W. 1, 134; *Thorneycroft v. Crockett*, 2 H. L. C. 239. And where the mortgages were originally distinct, if at the time of their becoming united in one mortgagee the *equities of redemption* are vested in the same person, the mortgagee may require all the mortgages to be redeemed (*Vint v. Padget*, 2 De G. & J. 611); but otherwise, it has been held, if the equities of redemption are vested in different persons. *White v. Hillacre*, 3 Y. & C., Ex. 597. But the last cited case was disapproved of in *Beevor v. Luck*, *Same v. Lawson* (L. R., 4 Eq. 537), in which two points were decided, (1) that a purchaser of an equity of redemption from the mortgagor would not be permitted to redeem his estate without also redeeming *all other mortgages* by the same mortgagor which had become united in the same person, whether the union had taken place before or after the purchase, and whether the purchaser had or had not notice of the other mortgages; (2) that purchasers of different equities of redemption were entitled to redeem, according to the date of their different purchases, as in the case of first and subsequent mortgagees, following on the last point *Titley v. Davies*, 2 Y. C. C. 399, n., not *Edwards v. Martin*, 4 Jur., N. S. 1044; see *Ld. Kensington v. Bourerie*, 19 Bea. 39. But *Beevor v. Luck*, *sup.*, as to the first point, was itself questioned in *Jennings v. Jordan*, 6 App. C. 698, which decided in effect that the mortgagor cannot give to his mortgagee a right of consolidation as against the assignee of the equity of redemption which does not exist *at the time of the assignment*. In *Jennings v. Jordan*, *sup.*; *White v. Hillacres*, *sup.*, was approved of, and *Tassell v. Smith*, 2 De G. & J., 713, overruled. In the last case, the facts were similar to those in *Jennings v. Jordan*, *sup.*, and the right to consolidate was upheld; and see *Harter v. Colman*, 19 Ch. D. 630; *Cummins v. Fletcher*, 14 Ch. D. 699; *Withall v. Blyton*, W. N., 1885, p. 22. Where the right exists the mortgagee may avail himself of it in a redemption or foreclosure suit (*Watts v. Symes*, 1 D., M. & G. 240; *Selby v. Pomfret*, *sup.*, overruling *Holmes v. Turner*, 7 Ha. 367, n.), and it makes no difference that a transferee, on taking a transfer of the several securities, has notice of a charge subsequent to them. *Vint v. Padget*, 2 De G. & J. 611. The right will prevail against the purchaser of the equity of redemption of one estate, even although he had no notice of the other being mortgaged (*Ireson v. Denn*, 2 Cox,

425); and does not, like the right to tack (*post*, Chap. X.), depend upon the possession of the legal estate. *Neve v. Pennell*, 2 H. & M. 170. The rule does not apply where two or more, as A. and B., mortgage their several and distinct estates, or interests to C., and then one B. mortgages his estate or interest to C., for a further advance to himself, in such a case C. cannot claim to hold as against A. in respect of the further advance to B. *Jones v. Smith*, 2 Ves. jun. 376; *Bowker v. Bull*, 1 Sim., N. S. 29; see *Aldworth v. Robinson*, 2 Bea. 287. There is no right of consolidation of debts where one security has ceased to exist. *In re Raggett*, 16 Ch. D. 117.

By the Conveyancing Act of 1881 (44 & 45 Vict.) c. 41, s. 17, "A mortgagor seeking to redeem any one mortgage, shall, by virtue of this Act, be entitled to do so, without paying any money due under any separate mortgage made by him, or by any person through whom he claims, on property other than that comprised in the mortgage which he seeks to redeem. (1.) This section applies only if and as far as a contrary intention is not expressed in the mortgage deeds or one of them. (2.) This section applies only where the mortgages or one of them are or is made after the commencement of this Act" (1st Jan., 1882).

Devolution and Purchase of Equity and Redemption.] An equity of redemption in real estate, if not devised, descends on the death of the mortgagor intestate, to the heir who would have been entitled had there been no mortgage; for instance, if the lands are borough English or gavelkind, to the heir according to the custom of those lands. *Faucet v. Lowther*, 2 Ves. Sen. 304. Formerly, the heir or devisee of the mortgaged property was, as a general rule, entitled to have it exonerated from the mortgage out of the personal estate of the mortgagor. See now tit. "WILLS," Ch. 32. The equity of redemption of chattels real, and personal estate, devolves upon the personal representatives of the mortgagor, in the same manner, and for the same purposes (subject to the mortgage), as the mortgaged property would have done if there had been no mortgage. After the death of the mortgagor, the mortgagee may bring an action specifically to enforce his security, or for administration generally. *Dighton v. Withers*, 31 Bea. 423; see *Wade v. Ward*, 4 Drew. 602.

Where several estates or properties are subject to one charge or mortgage, and on the death of the mortgagor they devolve on different persons, each estate or property must contribute rateably according to its value. See *Heveningham v. Heveningham*, 2 Ver. 355; *Aldrich v. Cooper*, 8 Ves. 382, 391; *Lipscomb v. Lipscomb*, L. R., 7 Eq. 501. In *Mss. Bute v. Cunynghame*, 2 Russ. 275, 299, Ld. Eldon observed, that in order that a right to contribution may exist the two properties must be "equally liable." See *Averall v. Wade*, Ll. & G. p. 252; *Athill v. Athill*, 16 Ch. D. 211. In *re Dunlop*, 21 Ch. D. 583. And where one property A. is mortgaged for one sum, and then A. and another property B. are mortgaged to secure the same sum and a further advance, A. is primarily liable for the first

sum, and A. and B. rateably for the second sum. *Lipscomb v. Lipscomb*, *sup.*; *De Rochefort v. Dawes*, L. R., 12 Eq. 540, cons. the observations on these cases of Jessel, M.R., *Leonino v. Leonino*, 10 Ch. D. 460, 465 *et seq.* In the case of a mortgagee, who has notice of a mortgage subsequent to his own, purchasing and taking a conveyance of the equity of redemption, or of a person purchasing the equity of redemption and paying off a mortgage, having notice of a subsequent one, the subsequent mortgagee is let in, and the prior mortgage cannot be set up against him (*Mocatta v. Murgatroyd*, 1 P. W. 393; *Toulmin v. Steere*, 3 Mer. 210; *Brown v. Stead*, 5 Sim. 535; *Parry v. Wright*, 5 Russ. 142; see *Tildesley v. Lodge*, 3 Sm. & G. 543; *Chesshyre v. Biss*, 3 Giff. 287; and cons. *Hayden v. Kirkpatrick*, 34 Bea. 645), unless the prior mortgage is kept on foot. *Parry v. Wright*, *sup.*; *Bailey v. Richardson*, 9 Ha. 736; *Cooper v. Cartwright*, Johns. 679. A purchaser of the equity of redemption who pays off a prior mortgage having notice of a subsequent one, may keep the prior debt alive by a declaration that it is to be considered as subsisting for the benefit of the person paying it off. *Stevens v. Mid-Hants R. Co.*, *London Fin. Ass. v. Stevens*, L. R., 8 Ch. 1064, 1069. "The cases of *Mocatta v. Murgatroyd*, &c., *sup.*, perhaps, some day will have to be reconsidered, but it is quite clear that their principle is not to be extended," *ib.*, per James, L.J. See *Anderson v. Pignet*, *ib.* 180, 187. If the surrounding circumstances as to the conveyance sufficiently express an intention to keep the first mortgage alive, that is sufficient; and *Toulmin v. Steere*, *sup.*, will not apply. *Adams v. Angell*, 5 Ch. D. 634. The rule in *Toulmin v. Steere* is not to be extended; and whether that decision is binding on the Court of Appeal, *quære, ib.* A mortgagor who buys the estate sold by his first mortgagee under a power of sale, and takes an assignment of the first mortgage debt to a trustee for himself, cannot set it up against his own second mortgagee. *Otter v. Ld. Vaux*, 6 D., M. & G. 638. Consider, as to the risk of buying or dealing with equities of redemption, *Beevor v. Luck*, L. R., 4 Eq. 537; and the observations, *ib.* p. 549.

It has been mentioned, *ante*, p. 3, that actions for the redemption or foreclosure of mortgages were assigned to the Chancery Division of the High Court, by the Judicature Act of 1873, 36 & 37 Vict. c. 66.

CHAPTER VII.

TRANSFER AND DEVOLUTION OF THE MORTGAGE DEBT AND SECURITY.

<i>Equities of Mortgagor</i>	743	<i>Interest not converted into Principal</i>	744
<i>Transferee, when bound by Payments by Mortgagor</i>	743	<i>Costs of Transfer</i>	744
<i>Want of Consideration in Original Mortgage</i>	743	<i>Devolution of Estate and Debt</i>	744
<i>Assignment of Debt</i>	743	<i>Vendor and Purchaser Act</i>	744
<i>Purchase for less than Amount of Debt</i>	743	<i>Conveyancing Act, 1881</i>	744
		<i>When the Equity of Redemption is barred</i>	744
		<i>Effect of Bankruptcy</i>	745

IN transfers of mortgages to which the mortgagor is not a party, the transferee will be subject to the same equities of the mortgagor as the mortgagee. *Chambers v. Goldwin*, 9 Ves. 264; *Walker v. Jones*, L. R., 1 P. C. 50. The transferee will be bound, therefore, by the state of the account between the mortgagor and mortgagee (*Matthews v. Wallwyn*, 4 Ves. 118); and if the mortgagor has no notice of the transfer, he will be justified in paying to the mortgagee. *Williams v. Sorrell*, *ib.* 389; *Allen v. Ld. Southampton*, 16 Ch. D. 178. These cases must be understood as qualifying the observation of the Master of the Rolls in *Jones v. Gibbons* (9 Ves. 411), "that he who has the estate has the debt, as the estate never can be taken from him except by payment of the debt." Payment, however, to be good against the transferee, must be made to the mortgagee himself or his authorized agent only. *Withington v. Tate*, L. R., 4 Ch. 288. If the original mortgage was obtained without consideration, a transferee by deposit, with notice, will be compelled to deliver up the deed to be cancelled. *Parker v. Clarke*, 30 Bea. 54; or even if without notice, if the deed has been obtained by a fraud upon the mortgagor. *Vorley v. Cooke*, 1 Giff. 230. By a transfer of the mortgage the mortgage debt is assigned in equity, though it may not be specifically mentioned nor specifically assigned. *Jones v. Gibbons*, 9 Ves. 411; *Phillips v. Gutteridge*, 4 De G. & J. 531. Due effect would seem not to have been given to this rule in *Medley v. Horton*, 14 Sim. 226.

Where less than the amount of the mortgage debt is paid for the transfer, the transferee is nevertheless entitled, in general, to be paid the entire debt by the mortgagor (*Williams v. Springfield*, 1 Ver. 476; *Ascough v. Johnson*, 2 Ver. 66); and a first incumbrancer buying a third incumbrance at an undervalue, without notice of a second, is entitled to tack for full value against the second incumbrancer (*Morret v. Paske*, 2 Atk. 54); *secus*, if he bought with notice (*Long v. Clifton*, 1 Ver. 464); and, as will be seen (*post*, Chap. X.), he cannot, *having notice*, tack at all as against such second incumbrancer. An

agent, executor or trustee of the mortgagor, who takes the transfer, will be allowed only what he has paid. *Morret v. Paske*, *sup.* The heir will only be allowed what he has paid as against creditors (*Lancaster v. Evors*, 10 Bea. 154; see *Davis v. Barrett*, 14 Bea. 542) or purchasers. *Long v. Clopton*, 1 Ver. 464. An arrear of interest will not be converted into principal, unless the mortgagor concurs in the transfer (*Ashenhurst v. James*, 3 Atk. 271); and even then not as against subsequent incumbrances, of which the mortgagee has notice. *Digby v. Craggs*, Amb. 612. The costs of a transfer, to which the mortgagor is no party, cannot be charged against him if the interest has been duly paid and the principal has not been called in. *Re Radcliffe*, 22 Bea. 201.

A mortgage being a mere security for a debt, on the death of a mortgagee his personal representatives will be entitled to the money, though formerly the mortgaged estate, if in fee, would have gone to his heir or devisee, who would have been trustees for the personal representatives. *Thornbrough v. Baker*, 1 Ch. Ca. 283; *S. C.*, 3 Sw. 628. By the 4th section of the Vendor and Purchaser Act, 1874, the personal representatives of a deceased mortgagee were empowered to convey the mortgaged estate. But this section was held not to apply to a transfer of a mortgage; and therefore the legal personal representative of a mortgagee of a freehold estate could not, on receiving payment of the mortgage debt, convey the estate to a transferee. *In re Spradbery's Mortgage*, 14 Ch. D. 514. This section was repealed by the 44 & 45 Vict. c. 41 (Conveyancing Act, 1881), s. 30, by which it was enacted: (1.) Where an estate or interest of inheritance, or limited to the heir as special occupant, in any tenements or hereditaments, corporeal or incorporeal, is vested on any trust, or by way of mortgage, in any person solely, the same shall, on his death, notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives or representative from time to time, in like manner as if the same were a chattel real vesting in them or him; and accordingly all the like powers, for one only of several joint personal representatives, as well as for a single personal representative, and for all the personal representatives together, to dispose of and otherwise deal with the same, shall belong to the deceased's personal representatives or representative from time to time, with all the like incidents, but subject to all the like rights, as if the same were a chattel real vesting in them or him; and, for the purposes of this section, the personal representatives, for the time being, of the deceased, shall be deemed in law his heirs and assigns, within the meaning of all trusts and powers. (3.) This section, including the repeals therein, applies only in cases of death after the commencement of this Act (1 Jan., 1882).

When the equity of redemption is barred by time or foreclosure, the debt is extinguished, and the mortgaged estate becomes transmissible, according to its quality, as freehold, copyhold, or leasehold. See *Silberschildt v. Schiott*, 3 V. & B. 45. So where the equity of redemption is purchased by the mortgagee. *Strode v. I. I. Falkland*,

2 Ver. 621; *Yardley v. Holland*, L. R., 20 Eq. 428. But where, at the time of the death of the mortgagee of real estate intestate, there is a right of redemption subsisting, though it may be uncertain in whom, his widow will not be entitled to dower. *Fluck v. Longmate*, 8 Bea. 420. In general, with the exception (formerly) of a mortgage in fee (*supra*), the right to the security follows the right to the debt. But with respect to chattels personal, there is an exception to this rule, if the mortgagor becomes bankrupt *after* the day of default in payment, in which case, if the mortgagee has allowed him to retain possession of them, they will pass to the trustee (assignees formerly), as being in his order and disposition, with the consent of the true owner, within the meaning of the reputed ownership clauses in the several bankruptcy acts. See *Ryall v. Rowles*, 1 Ves. Sen. 348. See the clauses in the two last acts, *ante*, p. 718, and cases cited. It was considered doubtful, however, whether the same rule applied when the bankruptcy took place *before* the day of default, when the possession of the mortgagor was consistent with the deed. It was decided, however, in *Spackman v. Miller* (12 C. B., N. S. 659), that, notwithstanding this, they were in such cases also within the clause, and passed to the assignees. But in *Ashton v. Blackshaw* (L. R., 9 Eq. 510) (in which *Spackman v. Miller* was not cited), it was laid down, that if a bill of sale is duly registered under the 17 & 18 Vict. c. 36, the title of the mortgagee is good against the trustee in bankruptcy, if the mortgagor becomes bankrupt before the day of default, but not if the bill of sale is not registered. But see *Badger v. Shaw*, 2 E. & E. 472, *contra*. *Ashton v. Blackshaw* was followed in *Ex parte Homan*, L. R., 12 Eq. 600. In *Ex parte Harding* (L. R., 15 Eq. 223), the question was again raised, and Bacon, V.-C., decided in conformity with the law as laid down in *Spackman v. Miller*, 12 C. B., N. S. 659, stating that his decision in *Ex parte Homan* (L. R., 12 Eq. 600), had been misunderstood.

CHAPTER VIII.

MORTGAGOR IN POSSESSION—MORTGAGEE IN POSSESSION—RECEIVER.

SEC. 1.—*Mortgagor in Possession.*

<i>Not accountable for Rents</i>	745	<i>May Sue for Possession</i>	746
<i>May exercise Acts of Ownership</i>		<i>Cannot alone grant Leases</i>	746
<i>and distrain for Rent</i>	746	<i>Except under Power</i>	746
<i>Rent Paid in advance</i>	746	<i>Or Conveyancing Act, 1881</i>	746

A mortgagor in possession is not accountable for the rents received by him (*Colman v. D. St. Albans*, 3 Ves. 25; *Ex parte Wilson*, 2

V. & B. 252; see *Hele v. Ld. Bexley*, 20 Bea. 127), and may in general exercise all acts of ownership, not, however, committing such acts of waste as may diminish the value of the security (see *Robinson v. Litton*, 3 Atk. 210; *Humphreys v. Harrison*, 1 J. & W. 581); but he may cut timber if the security of the estate is sufficient without it, not otherwise. *King v. Smith*, 2 Ha. 242; see *Hampton v. Hodges*, 8 Ves. 105; *Simmins v. Shirley*, 6 Ch. D. 173; *Bagnall v. Villar*, 12 Ch. D. 812. When the mortgaged property is let on lease, and the lease is prior to the mortgage, the mortgagor is entitled to the rents until notice of the mortgage has been given by the mortgagee to the tenant. *Moss v. Gallimore*, 1 Doug. 279, 282. But if rent has been paid *in advance* to the mortgagor and then notice is given by the mortgagee to pay the rent to him, the tenant is not discharged by this payment, and is liable to pay over again to the mortgagees. *De Nicholls v. Saunders*, L. R., 5 C. P. 589. But in general the mortgagor is entitled to the rent actually due until notice by the mortgagee, and the former may distrain in the name of the latter. *Trent v. Hunt*, 9 Ex. 14; *Snell v. Finch*, 13 C. B., N. S. 651. By the Judicature Act, 1873, 36 & 37 Vict. c. 66, a mortgagor entitled to possession of any land as to which no notice of his intention to take possession shall have been given by the mortgagee, may sue for such possession, or for the recovery of rents or profits, or to prevent or recover damages in respect of any trespass or other wrong, in his own name only, unless the cause of action arises upon a lease or other contract made by him jointly with any other person, s. 25 (5). A mortgagor in receipt of the rents and profits has a sufficient interest to enable him to maintain an action for an injunction to restrain an injury done to the mortgaged property without joining the mortgagee. *Fairclough v. Marshall*, 4 Ex. D. 37. As to the effect of notice to a tenant to pay his rent to the mortgagees in determining an agreement for a lease made between the mortgagor and tenant, see *Corbett v. Plowden*, 25 Ch. D. 678. This was before the Act of 1881, presently noticed. Where the lease is *after* the mortgage, see *infra*.

He could not formerly, however, alone grant leases binding on the mortgagee (*Keech v. Hall*, Doug. 21; *Thunder v. Belcher*, 3 Ea. 449), unless under a power for that purpose. *Bevan v. Habgood*, 1 J. & H. 222; cons., however, the observations on this case, Sug. Pow. 718. As to leases by a mortgagor and mortgagee, see *Harrold v. Whitaker*, 11 Q. B. 147; *Saunders v. Merryweather*, 3 H. & C. 902.

Now by the Conveyancing Act, 1881, 44 & 45 Vict. c. 41, section 18.—(1.) A mortgagor of land while in possession shall, as against every incumbrancer, have, by virtue of this Act, power to make from time to time any such lease of the mortgaged land, or any part thereof, as is in this section described and authorized. (2.) A mortgagee of land while in possession shall, as against all prior incumbrancers, if any, and as against the mortgagor, have, by virtue of this Act, power to make from time to time any such lease as aforesaid. (3.) The leases which this section authorizes are—(i.) An agricultural or occupation lease for any term not exceeding twenty-

one years; and (ii.) A building lease for any term not exceeding ninety-nine years. (4.) Every person making a lease under this section may execute and do all assurances and things necessary or proper in that behalf. (5.) Every such lease shall be made to take effect in possession not later than twelve months after its date. (6.) Every such lease shall reserve the best rent obtainable without fine. (7.) Shall contain a covenant by the lessee for payment of the rent, and a condition of re-entry on the rent not being paid within a time therein specified not exceeding thirty days. (8.) A counterpart shall be executed of which the execution of the lease by the lessor shall be sufficient evidence. (9.) Every such building lease shall be made in consideration of the erection within not more than five years of buildings, new or additional, or the improvement or repair of buildings, or an improvement for or in connexion with building purposes. (10.) A peppercorn or nominal rent may be made payable for the first five years, or any less period. (11.) On leases by the mortgagor, the counterpart shall within one month be delivered to the mortgagee, or, if more than one, to the mortgagee first in priority. (12.) Contracts to make or accept leases may be enforced. (13.) This section applies only if and as far as a contrary intention is not expressed in the mortgage deed, or in writing, and shall have effect accordingly. (14.) Further or other powers of leasing may be reserved in the mortgage deed. (15.) Leases are to be such only as could have been granted by the mortgagor, with the concurrence of all the incumbrancers. (16.) This section applies only in case of a mortgage made after the commencement of this Act, 1 Jan. 1882, but by agreement may be applied to a mortgage made before this Act, but not so as to prejudicially affect any right of any mortgagee not joining in or adopting the agreement. (17.) These provisions apply, as far as circumstances admit, to any letting, and to an agreement, whether in writing or not, for leasing or letting.

SEC. 2.—*Mortgagee in Possession.*

<i>May give Notice to Tenants to pay</i>		<i>Liable for wilful Default</i>	748
<i>Rent</i>	747	<i>Allowances—Repairs</i>	749
<i>Could not alone grant Leases.....</i>	748	<i>Lasting Improvements</i>	749
<i>May under Conveyancing Act</i>	748	<i>Just Allowances</i>	749
<i>Might appoint Receiver</i>	748	<i>Renewing Leases</i>	750
<i>Occupation Rent</i>	748	<i>Must account.....</i>	750
<i>Speculation with Property.....</i>	748	<i>When with or without Rests</i>	750
<i>Mines—Timber</i>	748	<i>Holding over after he is fully Paid</i>	751

After default the mortgagee may, if so authorized by the provisions of the mortgage, enter into possession or receipt of the rents and profits. And when the lease is prior to the mortgage, may give notice to the tenants to pay the rents to him. *Ante*, p. 746. He cannot, however, when the lease is by the mortgagor and subsequent to the mortgage, *merely by notice* create the relation of landlord and tenant

between himself and the tenant. *Evans v. Elliot*, 9 A. & E. 342, overruling *Pope v. Biggs*, 9 B. & C. 245. But the tenant may, in cases prior to the Act of 1881, it would seem, enter into a new contract of tenancy with the mortgagee (see 1 Sm. L. C., 8th ed. 577), or the mortgagee may bring ejectment. *Keech v. Hall*, Doug. 21. If the tenant in such cases has not paid rent to the mortgagee, the mortgagor may enforce payment of it, but not, it would seem, if it has actually been paid. See *Wilton v. Dunn*, 17 Q. B. 294; *Hickman v. Machin*, 4 H. & N. 716.

A mortgagee could not alone (and in this respect was like a mortgagor) grant leases binding on the mortgagor. *Hungerford v. Clay*, 9 Mod. 1; see *Franklin v. Ball*, 33 Bea. 560. See now Act of 1881, *ante*, p. 746.

A mortgagee might in general appoint a receiver. *Davis v. Dendy*, 3 Madd. 170, *post*, p. 751. But when a mortgagee himself receives the rent he will not be entitled to any commission (*Chambers v. Goldwin*, 9 Ves. 271; *Langstaff v. Fenwick*, 10 Ves. 405; *Nicholson v. Tutin*, 3 K. & J. 159); and when he personally occupies he will be liable for the annual value as an occupation rent. *Wilson v. Metcalfe*, 1 Russ. 530. A mortgagee who remains in possession after his principal and interest have been discharged, must pay interest on the overplus received, with annual rests. *Ib.* Where a mortgagee in possession sold and let the purchaser into possession four months before the appointed day, but did not require him to pay any rent, it was held, that the mortgagee could not be charged with an occupation rent for the four months. Whether in such a case the mortgagee might be charged with wilful default in not requiring a rent, *quære*. *Shepard v. Jones*, 21 Ch. D. 469.

The mortgagee must bear the loss arising from any unsuccessful speculation with the property (*Hughes v. Williams*, 12 Ves. 493; see *Marriott v. Anchor Co.*, 3 D., F. & J. 177; *Palmer v. Hendrie*, 27 Bea. 349. He may open mines and cut timber if necessary, and the other security is insufficient, *aliter*, if sufficient. *Millett v. Davy*, 31 Bea. 470; see *Rowe v. Wood*, 2 J. & W. 553. By the Conveyancing Act, 1881, in mortgages after the commencement of the Act (1 January, 1882), where there is no contrary intention in the deed and subject thereto, a mortgagee in possession may cut and sell timber and other trees ripe for cutting, not being ornamental, s. 19 (1, sub. iv.), (3) (4). Where there is a mortgage of mines, which the mortgagee is to work, he is entitled not only to the expenses of working, but to the interest on moneys so expended. *Norton v. Cooper*, 25 L. J., Ch. 121.

A mortgagee in possession is liable for wilful default, as by letting at a less rent than could fairly have been obtained from a good tenant (*Hughes v. Williams*, 12 Ves. 494), or allowing a tenant to continue in occupation without paying rent. *Brandon v. Brandon*, 10 W. R. 287. So for damage arising from acts in the nature of waste, as from improper demolition of premises, or the like (*Sandon v. Hooper*, 6 Bea. 246); or for suffering, or being party to acts of spoliation on the part of others. *Hood v. Easton*, 2 Giff. 692. And a mortgagee in

possession of a business is accountable not only for what he has received, but for what he might have, or ought to have, received. *Chaplin v. Young*, 33 Bea. 330; see *Parkinson v. Hanbury*, L. R. 2 H. L. 1. A mortgagee is accountable, not merely for his actual receipts whilst in possession of the mortgaged property, but also for whatever is received by those to whom he transfers possession under an arrangement inoperative to transfer title, and in derogation of the rights of the mortgagor. He is also chargeable with the full value of the mortgaged property sold if, from want of due care and diligence, it has been sold at an under value. *Nat. Bank of Australasia v. United, &c. Company*, 4 App. C. 391.

A mortgagee in possession will be allowed for necessary repairs to the premises. *Sandon v. Hooper*, 6 Bea. 246; *Tipton v. Tipton*, *infra*. Notice to the mortgagor is only necessary when the expenditure is unreasonable to show that he acquiesced in it. *Shepard v. Jones*, 21 Ch. D. 469; see *Hardy v. Reeves*, 4 Ves. 480. But he is not bound to lay out more money than is required to keep the property in necessary repair (*Godfrey v. Watson*, 3 Atk. 518); nor to leave the buildings, after a long possession, in as good condition as he found them (*Russel v. Smithies*, 1 Anstr. 96); though he must not commit waste by pulling down buildings (*Sandon v. Hooper*, 6 Bea. 248), unless they are quite ruinous, and to leave them in that condition would entail a forfeiture. See *Hardy v. Reeves*, 4 Ves. 480; *Perry v. Walker*, 1 Jur., N. S. 746. A mortgagee in possession was allowed for insurances if effected in conformity with the covenants in the mortgage, but it would seem not otherwise. *Dobson v. Land*, 8 Ha. 216; *Bellamy v. Brickenden*, 2 J. & H. 137; see now *ante*, p. 733. A mortgagee will also be allowed for lasting improvements if made with the assent or acquiescence of the mortgagor (*Ld. Trimleston v. Hamill*, 1 Ba. & Be. 385; *Powell v. Trotter*, 1 Dr. & Sm. 388), and interest on monies so expended. *Quarrell v. Beckford*, 1 Madd. 269, 281. But not if made without such assent, as this renders it more difficult, sometimes impossible, for the mortgagor to redeem, a proceeding which has been termed *improving a mortgagor out of his estate*. *Sandon v. Hooper*, 6 Bea. 246, 248, unless he makes out a case at the trial. *Tipton, &c. Co. v. Tipton, &c. Co.*, 7 Ch. D. 192.

A mortgagee will also be allowed, under "just allowances," what is necessary for defending the title to the mortgaged property for the benefit of all parties interested. *Godfrey v. Watson*, 3 Atk. 518; see *Pelly v. Wathen*, 7 Ha. 372; *Parker v. Watkins*, Johns. 133. *Dryden v. Frost*, 3 M. & C. 670. See *Horlock v. Smith*, 1 Coll. 287, which is not *contra* as explained in *Wilkes v. Saunton*, 7 Ch. D. 188, 190.

In *Wilkes v. Saunton*, 7 Ch. D. 188, Jessel, M.R., referred (p. 191) to the following cases, in which "just allowances" were held to include "executors' charges and expenses: *Fearn v. Young*, 10 Ves. 184, payments by them in discharge of legacies; *Nightingale v. Lawson*, 1 Cox, 23; deduction for dower out of rents receivable by a widow-trustee; *Graham v. Graham*, 1 Ves. Sen. 262; expenses of managing and carrying on a partnership business; *Brown v. De Tastet*, Jac.

284, 299; *Cook v. Collingridge*, Jac. 607, 621; but not to include setting off taxed costs by a solicitor accountable for rents received by him as steward or agent; *Jolliffe v. Hector*, 12 Sim. 398."

A second mortgagee who is in possession of the mortgaged property and expends money in permanently improving or preserving it, is not entitled as against the first mortgagee to any charge on the property for the money so expended. *Landowners' West of England, &c. Co. v. Ashford*, 16 Ch. D. 411.

If a mortgagee in possession renews a lease it will enure to the benefit of the mortgagor, he paying the cost of it. *Rushworth's case*, Fr. Ch. 12; *Rakestraw v. Brewer*, 2 P. W. 511. So a renewal by a mortgagor makes the renewed lease subject to the mortgage in equity. *Smith v. Chichester*, 1 Con. & Law. 486. A mortgagee entering into possession is bound by the agreements or leases of his mortgagor while in possession, if he takes rent under them. *Mold v. Wheatcroft*, 27 Bea. 510.

A mortgagee taking possession is bound to account, not only to the mortgagor, but to subsequent mortgagees, if he has notice of their incumbrances (*Berney v. Sewell*, 1 J. & W. 647, 650; *Archdeacon v. Boves*, 13 Pri. 353), for the rents and profits received, and if there is no interest due when he takes possession, and the rents exceed the interest, annual rests will in general be directed (*Gould v. Tancred*, 2 Atk. 533; *Shephard v. Elliot*, 4 Madd. 254; see *Horlock v. Smith*, 1 Coll. 287, 297; *Morris v. Islip*, 20 Bea. 654; *Nat. Bank of Australasia v. United, &c. Co.*, L. R. 4 App. C. 391), and that whether he be in actual receipt or in occupation. *Wilson v. Metcalfe*, 1 Russ. 530, and the receipts of his agents must be treated as his own. *Noyes v. Pollock*, 30 Ch. D. 336.

Where the account is taken with rests, the annual surplus over and above the interest goes in reduction of the principal. *Thornycroft v. Crockett*, 2 H. L. C. 239, 256. See, as to the principle and method of taking the accounts in such cases, *Binnington v. Harwood*, T. & R. 477; *Heighington v. Grant*, 5 M. & C. 258; *Thompson v. Hudson*, L. R., 10 Eq. 497. A mortgagee in possession will in general also be liable for all that he might have received but for his wilful default (see *Chaplin v. Young*, 33 Bea. 330; *Ld. Kensington v. Bouverie*, 7 D. M. & G. 134, 156; *Mayer v. Murray*, 8 Ch. D. 424); but it must be shown that he is in possession as mortgagee and not in any other character. *Parkinson v. Hanbury*, L. R., 2 H. L. 1. When there are arrears of interest at the time the mortgagee takes possession, annual rest will not in general be directed (*Finch v. Brown*, 3 Bea. 70; *Wilson v. Chur*, *ib.* 136; *Nelson v. Booth*, 3 D. & J. 119); and will not, it has been held, although the arrears are subsequently paid off. *Davis v. May*, 19 Ves. 383; but see *Wilson v. Metcalfe*, 1 Russ. 530. Annual rests will not always be directed, although no interest is in arrear when the mortgagee takes possession, as in the case of the mortgaged property consisting of leaseholds, and there being a probability that the lessee's covenants will be broken, the mortgagee enters to prevent a forfeiture. *Patch*

v. Wild, 30 Bea. 100. But otherwise where a mortgagee sells part of the mortgaged property and the purchase money exceeds interest and costs, unless the balance is applied in reduction of the principal, if not, the account must be with rests. *Thompson v. Hudson*, L. R., 10 Eq. 497.

A mortgagee in possession who holds over after he has been paid the mortgage debt and all arrears of interest will be charged with the excess received, and, in general, simple interest upon it at 4l. per cent. *Quarrell v. Beckford*, 1 Madd. 269; *Lloyd v. Jones*, 12 Sim. 491. As to costs see *Binnington v. Harwood*, T. & R. 485.

SEC. 3.—Of a Receiver.

<i>Is Agent of Mortgagor</i>	751	<i>Under Conveyancing Act, 1881</i>	752
<i>At whose Instance appointed</i>	751	<i>Powers, Duties, Costs, &c., of</i>	752
<i>In what Cases</i>	751	<i>Possession of Receiver of Court</i>	752

The receiver is, in general, the agent of the mortgagor (*Jefferys v. Dickson*, L. R., 1 Ch. 183; see *Law v. Glenn*, L. R., 2 Ch. 634), and is usually appointed by him with the concurrence of the mortgagee. When a receiver is appointed by the court, he must find sureties to be approved of by the court. See *Manners v. Furze*, 11 Bea. 30; *Tylee v. Tylee*, 17 Bea. 583. A receiver is very rarely appointed at the instance of a legal mortgagee who may take possession (*Berney v. Sewell*, 1 J. & W. 647; see *Acland v. Gravener*, 31 Bea. 482); but is so generally upon the application of a *puisne* mortgagee (*ib.*), unless there is a prior incumbrancer who has taken possession; and, as against him even, a receiver will in general be appointed if the court considers there are grounds for supposing he has been paid all that is due to him. See *Codrington v. Parker*, 16 Ves. 470; *Hiles v. Moore*, 15 Bea. 175. As to the appointment of a receiver at the instance of a judgment creditor, see *Smith v. Hurst*, 1 Coll. 705; *Greenway v. Bromfield*, 9 Ha. 201; cons. now the 27 & 28 Vict. c. 112, *ante*, p. 520. A legal mortgagee of business premises, such as an hotel, who is prevented by the mortgagor from taking possession under the mortgage, may obtain an order for a receiver and manager. *Truman & Co. v. Redgrave*, 18 Ch. D. 547. A receiver may, in some cases, be appointed in respect of personal as well as real estate. As to government salaries and pensions, see *Cooper v. Reilly*, 1 R. & My. 560; *Noad v. Backhouse*, 2 Y. C. C. 529. So a receiver will be appointed of the profits of a college fellowship (*Fristel v. King's Coll., Cam.*, 10 Bea. 491), or of a canonry (*Grenfell v. Dean, &c. of Windsor*, 2 Bea. 544), and of the profits of an ecclesiastical benefice. See *Hawkins v. Gathercole*, 6 D. M. & G. 1; *M'Bean v. Deane*, 30 Ch. D. 520. See the cases *ante*, p. 730. A railway company debenture does not give the holder a charge upon the surplus lands of the company, or the proceeds of the sale of them, or to an order for a receiver.

Gardner v. L. C. & D. Rail. Co., L. R., 2 Ch. 201; *Bowen v. Brecon Rail. Co.*, L. R., 3 Eq. 541; *Hopkins v. Worcester, &c. Proprietors*, L. R., 6 Eq. 437; *Boyle v. Bettus, &c. Co.*, L. R., 2 Ch. D. 726.

By the 23 & 24 Vict. c. 145, the mortgagee or other person entitled to the mortgage debt had a power of appointing or obtaining the appointment of a receiver of the whole or part of the mortgaged property (s. 11, sub-sect. 3). This is repealed by the Conveyancing Act, 1881, 44 & 45 Vict. c. 41, s. 71. By this act s. 19 (iii.), in mortgages by deed executed after the commencement of the Act (1st Jan. 1882), when the mortgage money has become due the mortgagee may appoint a receiver of the income, s. 19 (3), s. 24 (1). By s. 24, the receiver shall be the agent of the mortgagor (2); who shall be solely responsible for his acts, unless otherwise provided. (3.) The receiver shall have power to demand and recover all the income of the property, by action, distress, or otherwise, in the name of the mortgagor or mortgagee. (4.) A person paying money to the receiver shall not be concerned to inquire whether any case has happened to authorise him to act. (5.) The receiver may be removed, and a new one appointed, by the mortgagee by writing. (6.) The receiver shall be entitled to retain a commission of not more than five per centum on the gross amount of all money received, as is specified in his appointment, and if no rate is so specified, then at the rate of five per centum, more if the court thinks fit. (7.) The receiver shall, if directed in writing by the mortgagee, insure any building, or property comprised in the mortgage. (8.) The receiver shall apply all money received by him as follows (namely): (i.) In discharge of all rents and outgoings whatever; and (ii.) In keeping down all annual sums or other payments, and the interest on all principal sums, having priority to the mortgage in right whereof he is receiver; and (iii.) In payment of his commission, and of the premiums on fire, life, or other insurances, payable under the mortgage deed or this act, and the cost of executing proper repairs directed in writing by the mortgagee; and (iv.) In payment of the interest accruing due in respect of any principal money under the mortgage; and shall pay the residue to the person who, but for the possession of the receiver, would have been entitled to receive the income of the mortgaged property, or who is otherwise entitled to that property. Although a mortgagee may under the act appoint a receiver without coming to the court, it is more desirable, where an action is pending, that the appointment should be made by the court under the Judicature Act, 1873. *Tillett v. Nixon*, 25 Ch. D. 238.

The receiver, when appointed by the court, should do nothing which may entail expense on the estate without the sanction of the court or judge in chambers. Therefore, as a general rule, he should neither bring nor defend actions without permission. *Swaby v. Dickon*, 5 Sim. 629; *Ward v. Swift*, 6 Ha. 312; see *Bristow v. Needham*, 2 Ph. 190. He may distrain of his own authority, but for not more than one year's rent, and if more is due the order of the court is necessary. *Brandon v. Brandon*, 5 Madd. 473. The possession of the receiver appointed by the court is the possession of the court, and

its authority must be obtained before such possession or acts done under it can be disputed or interfered with. *Russell v. E. Ang. Rail. Co.*, 3 Mac. & G. 104; *Evelyn v. Lewis*, 3 Ha. 472; *De Winton v. Mayor of Brecon*, 28 Bea. 200.

CHAPTER IX.

OF THE MORTGAGEE'S RIGHTS AND REMEDIES.

<i>Generally—Action on Covenant—</i>		<i>Power of Sale—continued.</i>	
<i>Ejectment</i>	753	<i>Chattels Personal—Stock</i>	759
<i>May pursue all Remedies together</i>	753	<i>Foreclosure and Sale by the Court</i> ..	759
<i>Notice to Tenant subsequent to Mortgage</i>	753	<i>Where Right exists</i>	759
<i>Tenant prior to Mortgage</i>	754	<i>Not where Conveyance is upon Trust to Sell</i>	760
<i>Payment of Principal and Interest into Court</i>	754	<i>Infant Heir</i>	760
<i>Power of Sale</i>	754	<i>Several Mortgages</i>	760
<i>By whom and how may be exercised</i>	754	<i>Debenture Holders</i>	760
<i>Words "Assigns—Heir"</i>	754	<i>Six Months' Notice</i>	761
<i>Joint Account</i>	755	<i>Where Decree may be re-opened</i> ..	761
<i>Trust for Sale</i>	755	<i>Subsequent Mortgages bound</i> ..	761
<i>Notice—when necessary</i>	755, 756	<i>Insufficiency of Property</i>	762
<i>Purchase by Mortgagee void</i> ..	757	<i>Collateral Securities</i>	762
<i>To what Property Power extends</i>	757	<i>Fraud—Mortgagor's Remedy</i> ..	762
<i>Surplus Proceeds</i>	757	<i>Mortgagee of Part not entitled to Decree</i>	762
<i>Conveyancing Act, 1881</i>	758	<i>Sales under 15 & 16 Vict. c. 86</i>	762
		<i>Equitable Mortgages</i>	762, 763
		<i>Conveyancing Act, 1881</i>	763

Generally—Action on Covenant—Ejectment]. As a very general rule, it is competent to the mortgagee to pursue all his remedies at the same time, after default in payment of the mortgage debt. See *Lockhart v. Hardy*, 9 Bea. 349; *Cockell v. Bacon*, 16 Bea. 158; *Palmer v. Hendrie*, 27 Bea. 349, 351. Thus, he may take possession, if, as usually is the case, he is entitled to do so, or may bring an action for the mortgage debt and interest, or may sell under his power of sale if there is one, foreclose, or, if he has the *legal estate* and a right of entry, he may bring ejectment against the mortgagor without any notice (*Doe v. Giles*, 5 Bing. 421; see *Doe v. Day*, 2 Q. B. 147), or his tenant if the mortgagor has demised *since* the mortgage without the consent of the mortgagee, and the latter has not recognised the tenancy. *Keech v. Hall*, Doug. 21; *Rogers v. Humphreys*, 4 A. & E. 313. And a mortgagee having the legal title may take possession, even forcibly it would seem where there is no one to oppose him and hold it against the mortgagor. *Harvey v. Brydges*, 14 M. & W. 442; *Lows v. Telford*, 1 App. C. 414. Notice of the mortgage in such cases to the tenant by the mortgagee will not alone create a tenancy between the tenant and mortgagee without attornment. *Evans*

v. *Elliot*, 9 A. & E. 342; see *ante*, p. 748. But where the tenant claims by title *prior* to the mortgage, a right to oust him must be shown, as if he claim under a tenancy from year to year created before the mortgage it must be determined by notice in the usual way. *Cadle v. Moody*, 30 L. J., Ex. 385.

By the 7 Geo. 2, c. 20, where any action shall be brought on any bond for payment of the mortgage money, or performance of mortgage covenants, or any action of ejectment by a mortgagee, where *no foreclosure or redemption suit* is depending, on the person entitled to redeem paying to the mortgagee, or, in case of his refusal, bringing into court principal, interest and costs, it shall be deemed full satisfaction, and the court shall and may compel the mortgagee to reconvey; but this provision does not extend to cases where the right of redemption is controverted, or the money due is not adjusted, or where subsequent incumbrancers would be prejudiced (ss. 1, 3). These provisions are almost identical with those contained in a later act, the 15 & 16 Vict. c. 76, ss. 219, 220. See *Lawrence v. Hogben*, 26 L. J., Ex. 55. The mortgagor is discharged on paying the money into court under the act, or out of court to the plaintiff's attorney. *Bourton v. Williams*, L. R., 5 Ch. 655, 658.

Power of Sale.] In most mortgages there is, or was, formerly a power of sale similar to the statutory power, *post*, p. 758. A sale under such a power gives a valid title free from the mortgagor's equity of redemption. *Corder v. Morgan*, 18 Ves. 344. Where there is a prior legal mortgage with a power of sale and subsequent equitable mortgages, a purchaser under the power is discharged from all equities under the equitable mortgages. *Re Richardson*, L. R., 12 Eq. 398; see *Re Winter*, L. R., 15 Eq. 156. A transferee of the mortgage has the benefit of the power of sale, and it is valid where the mortgagor concurs, though he covenants to pay a different sum from that specified, and on a different day from that named in the original mortgage. *Young v. Roberts*, 15 Bea. 558. Where the power may be exercised by public or private sale, it may be exercised *in the first instance* by private sale, and the mortgagee may agree to allow a portion of the purchase-money to remain on mortgage. *Davey v. Durrant*, *Smith v. Durrant*, 1 De G. & J. 535; *Thurlow v. Mackeson*, L. R., 4 Q. B. 97. The word *assigns* in the power of sale is material, without it a transferee of the mortgage cannot exercise the power. *Bradford v. Belfield*, 2 Sim. 264. A devisee of a surviving trustee is an assign. *Titley v. Wolstenholme*, 7 Bea. 425; see *Hall v. May*, 3 K. & J. 585; *Ashton v. Wood*, 3 Sm. & G. 436. The administrator of a transferee of a mortgage is an assign, and can exercise a power of sale given to a mortgagee, his heirs, executors, administrators and assigns (*Saloway v. Strawbridge*, 1 K. & J. 371); but a *devisee* would not come under the description of *heir* where the word "assigns" is omitted. *Cooke v. Crawford*, 13 Sim. 91; *Macdonald v. Walker*, 14 Bea. 556; see *Wilson v. Bennett*, 5 De G. & S. 475. The cases above referred to and subsequent to *Cooke v. Crawford*, in which the

principle of the decision in *Cooke v. Crawford* was disapproved of, were commented upon by Jessel, M.R., in *Osborne to Rowlett*, 13 Ch. D. 774, there, real estate was devised to trustees and "their heirs" (omitting "assigns") in trust for sale, his lordship held, disapproving of *Cooke v. Crawford*, *supra*, that the trust must be considered as annexed, not to the person, but to the fee simple estate taken by the trustees, so that the trust could be executed by the devisees of trust estates of the surviving trustee. But in the later case of *In re Morton and Hallett*, 15 Ch. D. 143, James and Baggallay, LL.JJ., expressed an opinion that *Cooke v. Crawford*, *sup.*, was not to be considered as overruled, pp. 149, 150.

A survivor of several may exercise the power where the mortgage money belongs to them on a *joint account*. *Hind v. Poole*, 1 K. & J. 383. First and second mortgagees having powers of sale may join in selling, each giving receipts for his portion of the purchase-money. *McCarogher v. Whieldon*, 34 Bea. 107. Where the mortgagee sub-mortgages, it is doubtful whether his power of sale is not gone. *Cruse v. Nowell*, 25 L. J., Ch. 709. The sale should be in accordance with the power, and for the purpose of recovering the mortgage debt (*Robertson v. Norris*, 1 Giff. 421, 424, affirmed 4 Jur., N. S. 443), and if so exercised *bonâ fide*, will not be set aside or interfered with in equity. *Jones v. Matthie*, *Matthie v. Edwards*, 11 Jur. 504. 761; *Davey v. Durrant*, 1 De G. & J. 535, 557; *Warner v. Jacob*, 20 Ch. D. 220. A mortgagee, however, should not sell after tender of principal and interest where the security is ample, although there may be no tender of the costs, they being unascertained. *Jenkins v. Jones*, 2 Giff. 99. The mortgagee may sell with the usual condition, that if he should be unwilling or unable to answer or comply with any requisition he may rescind the contract. *Falkner v. Eq. Rec. Soc.*, 4 Drew. 352.

A mortgage with a trust for, instead of a power of, sale is, in effect, an ordinary mortgage. *Kirkwood v. Thompson*, 2 D., J. & S. 613; *Locking v. Parker*, L. R., 8 Ch. 30; *Re Alison*, 11 Ch. D. 284; *Warner v. Jacob*, 20 Ch. D. 220. Although the mortgagee may not be able to foreclose. See *Re Alison*, *sup.* But the mortgagee is not a trustee for the mortgagor, and if he has been in possession for twenty years without acknowledgment of the mortgagor's title the right of the latter is barred under the 3 & 4 Will. 4, c. 27, s. 28, and there is no express trust under s. 25. *Ib.* And the mortgagee having been in possession for twenty years may sell and convey under his power of sale, and there is no trust of the surplus purchase money, if any, for the mortgagor. *Re Alison*, *sup.*

An agreement in a mortgage to a building society, that on a sale by the mortgagees they shall retain the amount of all past subscriptions in arrear, and also all *future* subscriptions, is valid and binding on the mortgagor, who will not be entitled, in the event of a sale, to any rebate or discount on such future subscriptions, unless so specially provided for. *Matterson v. Elderfield*, L. R., 4 Ch. 207.

The notice required (if any) should be given. *Forster v. Hoggart*,

15 Q. B. 155; see *Gill v. Newton*, 12 Jur., N. S. 220. Where the remedy for the breach of covenant to sell without notice is expressly confined to damages, and a purchaser is not to be affected by want of notice, the court will not interfere to restrain a sale without notice. *Prichard v. Wilson*, 10 Jur., N. S. 330; see *Anon.*, 6 Madd. 10; as to service of notice, *Major v. Ward*, 5 Ha. 598. The rule that the court will not grant an interlocutory injunction restraining a mortgagee from exercising his power of sale except on the terms of the mortgagor paying into court the sum sworn by the mortgagee to be due for principal, interest, and costs, does not apply where the mortgagee at the time of taking the mortgage was the solicitor of the mortgagor. In such a case the court will look to all the circumstances of the case. *Macleod v. Jones*, 24 Ch. D. 289. It is a common provision that the power shall not be exercised unless notice is given, or some interest is three months in arrear, with the proviso that the want of notice shall not affect a purchaser. In *Cockburn v. Edwards*, 18 Ch. D. 449, a client mortgaged to his solicitor. There was no clause as to notice qualifying the power of sale, and the latter did not explain that this was unusual. The mortgagee sold under his power without giving notice. It was held that he was liable in damages as for an improper sale, unless he could show that some interest was in arrear for three months. Even if he could, whether the absence of explanation did not make the sale improper. *Quere. Ib.* See *Adams v. Scott*, 7 W. R. 213. The power cannot be exercised if a *puisne* mortgagee has offered to redeem. *Rhodes v. Buckland*, 16 Bea. 212. A mortgagee who consents to a sale is not entitled to six months' interest in lieu of notice, in addition to his principal and interest up to the time of being paid off. *Day v. Day*, 8 Jur., N. S. 1166. A notice of intention to sell in default of payment six months from the date, instead of the service, will be good, though not served on the date, if the sale did not in fact take place until after the six months from the service. *Metters v. Brown*, 9 Jur., N. S. 958. The notice may be acted on though given a long time (in the case cited nearly four years) before the sale. *Ib.* When the person entitled to the equity of redemption is an infant, notice may be served on the infant's guardian. *Tracy v. Lawrence*, 2 Drew. 403. A mortgagee who takes legal proceedings and afterwards accepts the usual six months' notice, is bound to take principal, interest, and costs to time of payment, although the notice has not expired. *Re Alcock, Prescott v. Phipps*, 23 Ch. D. 372. A second mortgagee is entitled to notice when it is to be given, and may claim damages in default of its being given. *Hoole v. Smith*, 17 Ch. D. 434.

A mortgagee selling under his power of sale cannot purchase, being a trustee for sale (see *Downes v. Grazebrook*, 3 Mer. 200; *Nat. Bank of Australasia v. United, &c. Co.*, 4 App. C. 391); see *Robertson v. Norris*, 1 Giff. 421; affirmed 4 Jur., N. S. 443. Neither can the solicitor or agent of the mortgagee so selling, purchase. *Martinson v. Clowes*, 21 Ch. D. 857, 860; nor the secretary of a building society selling as mortgagees under a power of sale. *Ib.*

In this case, North, J., considered that the language in *Robertson v. Norris*, *sup.*, went too far in treating the mortgagee "as a trustee," although that expression is used in *Downes v. Grazebrook*, 3 Mer. 200. See *Warner v. Jacob*, 20 Ch. D. 220; *Nash v. Eads*, 25 Sol. J. 95. A mortgagee may purchase of the mortgagor. *Webb v. Rorke*, 2 Sch. & Lef. 673; *Knight v. Marjoribanks*, 2 Mac. & G. 10. No advantage, however, must be taken of the position of the latter (*Ford v. Olden*, L. R., 3 Eq. 461; *Prees v. Coke*, L. R., 6 Ch. 645); and the purchase must be completed and not rest on a mere agreement, the mortgagor remaining in possession. *Rushbrook v. Lawrence*, L. R., 8 Eq. 25. A puisne mortgagee may buy of a first mortgagee who sells under his power of sale. *Shaw v. Bunny*, 2 D., J. & S. 468; *Turner*, L. J., *dub.* This case, however, was followed in *Kirkwood v. Thompson*, 2 D., J. & S. 613.

A power of sale may extend to property of which a lease is afterwards to be granted, where the intention is clear. *Ashworth v. Mounsey*, 9 Ex. 175. Where a mortgagee is one of a firm of auctioneers, and the firm sell for him, they will not be allowed commission (*Matthison v. Clarke*, 3 Drew. 3), but an auctioneer or broker, who is a mortgagee, will be entitled to his commission if he sells under the direction of the court. *Arnold v. Garner*, 2 Ph. 231.

Under a power of sale in a mortgage with the usual proviso that upon any sale, &c., the purchaser should not be bound to inquire whether default had been made, &c., a sale to a *bonâ fide* purchaser without notice is valid, even if the security should prove to have been satisfied. *Dicker v. Angerstein*, 3 Ch. D. 600.

The general rule is that a sale by a mortgagee will be restrained only on payment into court by the mortgagor of the amount which the mortgagee swears to be due to him, but this does not apply where the court can see on the terms of the deed that this amount cannot be due on the security. *Hickson v. Darlow*, 23 Ch. D. 690.

The surplus proceeds of a sale of freeholds or copyholds, are generally made payable to the mortgagor, his *heirs* or *assigns*. If made payable to the mortgagor and his personal representatives, and the sale is made in his lifetime, the surplus is personal estate, but if not made until after his death the surplus is real estate. *Wright v. Rose*, 2 Sim. & S. 323; *Re Clarke's Trusts*, 22 L. J., Ch. 230. If payable to the *heirs, executors* or *administrators*, and the sale is made during the lifetime of the mortgagor, but he dies before the surplus is paid over, it will be payable to the personal representatives (*Re Smith*, 7 Jur., N. S., 903; see *Re Underwood*, 3 K. & J. 745), but not if the sale is after his death. *Bourne v. Bourne*, 2 Ha. 35. As to the application of the surplus where the mortgagee has notice of subsequent incumbrances, see *Rew v. Lane*, 3 Jur., N. S. 125, 128; *Mathison v. Clark*, 25 L. J., Ch. 29.

Where a mortgagor with the concurrence of the first mortgagees, who had notice of a second equitable mortgage, sells, and the balance

of the purchase-money, after payment of the first mortgagees, is handed to the mortgagor, the first mortgagees will be liable to the second mortgagees to the extent of the balance of the purchase-money. *West Lon. Com. Bank v. Rel. Perm. Soc.* 29 Ch. D. 954.

By the 23 & 24 Vict. c. 145, the mortgagee had certain powers of sale, &c., given to him (ss. 11 to 16). These sections were repealed by the Conveyancing Act, 1881, 44 & 45 Vict. c. 41, s. 71. By this act, s. 19 (1), "A mortgagee, where the mortgage is made by deed shall, by virtue of this act, have, *inter alia*, the following powers, as if they had been conferred by the mortgage deed :

- (i.) "A power, when the mortgage money has become due, to sell, or to concur with any other person in selling, the mortgaged property, or any part thereof, either subject to prior charges, or not, and either together or in lots, by public auction or by private contract, subject to such conditions respecting title, or evidence of title, or other matter, as he (the mortgagee) thinks fit, with power to vary any contract for sale, and to buy in at an auction, or to rescind any contract for sale, and to re-sell, without being answerable for any loss occasioned thereby."

(2.) This provision is subject to variations or extensions ; (3) and subject to any contrary intention expressed in the mortgage deed ; (4) and applies only where the mortgage deed is executed after the commencement of the act (1st January, 1882).

20. The power is not to be exercised until—(i.) Notice has been served, and default made, for three months ; or (ii.) Some interest is in arrear for two months ; or (iii.) There has been a breach of some provision by the mortgagor, or some person concurring in the mortgage, other than the covenant for payment of the mortgage money or interest.

21.—(1.) The mortgagee shall have power, by deed, to convey the property sold, freed from all estates to which the mortgage has priority, but subject to all estates which have priority to the mortgage ; in the case of copyholds the legal right to admittance shall not pass by a deed under this section, unless the deed is sufficient otherwise by law, or is sufficient by custom, in that behalf. (2.) After a conveyance in professed exercise of the power, the title of the purchaser shall not be impeachable by reason of impropriety or irregularity, for which any person damnified shall have his remedy in damages. (3.) The purchase money, after discharge of prior incumbrances, if any, or payment into court to meet them, shall be applied in payment of all proper costs of sale or attempted sale, or otherwise ; then in discharge of the mortgage money, interest, &c., under the mortgage ; and the residue to the person entitled to the mortgaged property, or authorized to give receipts for the proceeds of the sale thereof. (4.) The power of sale conferred by this act may be exercised by any person for the time being entitled to receive and give a discharge for the mortgage money. (5.) And shall not affect the

right of foreclosure. (6.) The mortgagee shall not be answerable for any involuntary loss. (7.) Title deeds are to be recoverable.

22.—(1.) The receipt of a mortgagee shall be a sufficient discharge ; and a person paying shall not be concerned to inquire whether any money remains due under the mortgage. (2.) Money received from the proceeds of mortgage securities shall be applied like proceeds of sale, except that the costs payable shall include the proper costs of recovering and receiving the money or securities, and of conversion of securities into money, instead of those incident to sale.

A power of sale is frequently specially given in mortgages of personal property. Where it is not, the mortgagee may in general sell after default in payment of the principal. See *Tucker v. Wilson*, 1 P. W. 261 ; *Pigot v. Cubley*, 15 C. B., N. S. 701. At all events, in equity, the court will in general decree a sale. See *Dyson v. Morris*, 1 Ha. 413.

Where a mortgagee of stock sells during the currency of the loan, and then replaces the stock at a profit, he is accountable to the mortgagor for the profit thereby realized. *Langton v. Waite*, L. R., 4 Ch. 402 ; see *ante*, p. 728.

Where there was a power of sale in a mortgage, and in a transfer of it a declaration that the power had not been and was not intended to be exercised, it was held to be still subsisting when the debt was transferred with all powers and remedies for recovering the same. *Boyd v. Petrie*, L. R., 7 Ch. 385. In this case there was a power of sale in the transfer to arise on certain events, the mortgagees covenanting that no sale should take place until after a certain notice, &c., had been given. It was considered that the old power was subsisting, subject as to its exercise to the new provisions and covenant in the transfer.

Foreclosure—Sale by the Court.] See now Conveyancing Act, 1881, stated *post*, p. 763. Notwithstanding there may be a power of sale, a mortgagee has in general a right to apply to the court for a decree of foreclosure or for a sale. *Wayne v. Hanham*, 9 Ha. 62 ; *Hutton v. Sealy*, 27 L. J., Ch. 263. The right subsists though the mortgagee has recovered part of the debt, if he is not *fully* paid. *Lockhart v. Hardy*, 9 Bea. 349 ; *Palmer v. Hendrie*, 27 Bea. 349, 351. Where there are prior incumbrancers, he must offer to redeem them. *Inman v. Wearing*, 3 De G. & S. 729. And a mortgagee who has expressly reserved the benefit of the security may foreclose, though he has assigned the mortgage debt. *Morley v. Morley*, 25 Bea. 253. If the principal, interest and costs are not paid on the day named, a final order for foreclosure is obtained, which, when enrolled, bars the equity of redemption and gives the estate to the mortgagee. See *Lechmere v. Clamp*, 31 Bea. 578. Subject to the decree being opened in the cases hereafter mentioned. It is immaterial that the person who attends on behalf of the mortgagee has no power of attorney to receive the money if no one attends for the mortgagee to pay it. *Cox v. Watson*, 7 Ch.

D. 196. But a conveyance *upon trust to sell*, and out of the proceeds to pay off the loan, does not entitle the mortgagee to this decree. *Jenkin v. Row*, 5 De G. & S. 107; *Sampson v. Pattison*, 1 Ha. 535; *Locking v. Parker*, L. R., 8 Ch. 30. But a mortgage with trust for, instead of power of sale, is in effect an ordinary mortgage (*ib.*), although the mortgagee cannot have a foreclosure decree. *Kirkwood v. Thompson*, 2 H. & M. 392; and see L. R., 8 Ch. p. 39. A decree of foreclosure will not be made where one of the persons entitled to the equity of redemption is abroad. *Caddick v. Cook*, 32 Bea. 70. A mortgagee of two estates for distinct sums from the same mortgagor can in a foreclosure suit consolidate both mortgages. *Watts v. Symes*, 1 D., M. & G. 240; overruling *Holmes v. Turner*, 7 Ha. 367, n. See now as to consolidation in redemption suits, Conveyancing Act, 1881, s. 17, *ante*, p. 741. A decree will be made against an infant heir where the security is insufficient. *Croxon v. Lever*, 10 Jur., N. S. 87; see Set. Dec., 4th ed., 714. In an action by an equitable mortgagee, without any memorandum of deposit of title deeds, against the widow and infant heir-at-law of the mortgagor for foreclosure, the defendants not appearing, the infant heir will be ordered to convey the estate when he attains twenty-one, and he must have a day to show cause in the usual way. *Mellor v. Porter*, 25 Ch. D. 158; see *Price v. Carver*, 3 My. & Cr. 157. As a general rule, one of several co-mortgagees cannot maintain an action to foreclose the mortgage, making the other co-mortgagees defendants, even though they do not oppose the foreclosure. *Luke v. South Kensington Hotel Co.*, 7 Ch. D. 789. But *semble*, that such an action might be maintained if the plaintiff's co-mortgagees were colluding with the mortgagor, or if it were necessary that the court should act in haste to protect the mortgaged property. *Ib.* The plaintiff in a foreclosure action is as a general rule entitled to an account of only principal and interest due to him on his mortgage, and of the costs of the action. To entitle him to an account of any other costs he must make out a special case. *Bolingbroke v. Hinde*, 25 Ch. D. 795. In a suit by a legal mortgagee for a sale and general administration of the deceased mortgagor's estate, the court refused to vary the minutes by directing, in case of deficiency of assets, the costs of suit of the executors and devisees of the mortgagor to be paid in priority to the mortgagee's costs of sale. *Pinchard v. Fellows*, L. R., 17 Eq. 421. See *Armstrong v. Storer*, 14 Bea. 535; *Cook v. Hart*, L. R., 12 Eq. 459; *Spensley's Estate*, L. R., 15 Eq. 16. The form of foreclosure decree in the case of a mortgage to a building society does not differ from that in the case of an ordinary mortgage. *Prov. Perm. Build. Soc. v. Greenhill*, 9 Ch. D. 122.

A debenture holder of a railway company is not entitled to a decree of foreclosure or sale against the company, which has public duties to perform. *Furness v. Caterham Rail. Co.*, 25 Bea. 614; see *Gardner v. L. C. & D. Rail. Co.*, L. R., 2 Ch. 201. On a security upon railway shares with power of sale, under which the shares were transferred to the lenders, it was held, that the lender was entitled to foreclosure.

General Credit and Discount Co. v. Glegg, 22 Ch. D. 549; see *Carter v. Wake*, 4 Ch. D. 605.

On a bill of foreclosure a mortgagor is entitled to six months to redeem (Set. Dec. 364, No. 1). As to an application for an account in a foreclosure action, see *Blake v. Harvey*, 29 Ch. D. 827. A foreclosure is not complete until the final order has been made, and the final order cannot be obtained against the mortgagor if rents have been received by the mortgagee since the account was taken. *Prees v. Coke*, L. R., 6 Ch. 645. But it may against a puisne mortgagee. *Webster v. Patteson*, 25 Ch. D. 626. The time will be extended on application on sufficient grounds (*Jones v. Creswicke*, 9 Sim. 304; *Nanny v. Edwards*, 4 Russ. 124); even, under special circumstances, after an order absolute, signed and enrolled. *Thornhill v. Manning*, 1 Sim., N. S. 451; *Finch v. Shaw*, 20 Bea. 555. Sometimes, even after the mortgagee has been in possession under the decree, it may be opened under special circumstances (*Burgh v. Langton*, 5 B. P. C. 213); or for fraud. *Loyd v. Mansell*, 2 P. W. 73.

Subsequent mortgagees of the equity of redemption, though not parties, are bound by the decree. *Bishop of Winchester v. Paine*, 11 Ves. 194. Where in a foreclosure action there are several puisne mortgagees defendants, an order will be made with one term of redemption for all the puisne mortgagees without prejudice to the rights of the several defendants *inter se*. *Bartlett v. Rees*, L. R., 12 Eq. 395; *General Credit, &c. Co. v. Glegg*, 22 Ch. D. 549; *Smith v. Olding*, 25 Ch. D. 462. But this will not, it seems, be done in the absence of the mortgagor. *Sweet v. Combley*, *ib.*, 463 (n.); and as to *Smith v. Olding*, *sup.*, see *Mutual Life A. Soc. v. Langley*, 26 Ch. D. 686, 692. Cons. *Platt v. Mendel*, 27 Ch. D. 246. In a foreclosure judgment against the mortgagor and subsequent incumbrancers, only one period for redemption will be fixed where none of the defendants appear on the motion for judgment; whether it is alleged by the statement of claim that the subsequent incumbrancers are "entitled," or only that they "claim to be entitled" to charges upon the mortgaged premises. *Doble v. Manley*, 28 Ch. D. 664. In taking the account in a foreclosure action between first mortgagee and second mortgagee and mortgagor, an attornment clause in his mortgage deed will not render the first mortgagee liable to account on the footing of mortgagee in possession in respect of the rent reserved by the attornment clause. *Stanley v. Grundy*, 22 Ch. D. 478. When a judgment for foreclosure is given against a puisne mortgagee, the plaintiff is not entitled to delivery up of deeds, of subsequent date to his own mortgage, dealing only with the title to the equity of redemption. *Greene v. Foster*, 22 Ch. D. 566. A defendant to a foreclosure action, who was originally properly made a party, is entitled to his costs incurred subsequently to his making a proper offer to disclaim. *Ib.* In a foreclosure action the mortgagor can redeem after the order for foreclosure absolute and notwithstanding that, after the order, the mortgagee may have disposed of his interest to a purchaser; but whether or not he shall be allowed so to

redeem lies in the discretion of the court, and depends on the circumstances of each particular case. *Campbell v. Holyland*, 7 Ch. D. 166. The court will not open a decree in a foreclosure suit merely because the mortgagee has devised the estate as money. *Tooke v. Bishop of Ely*, 5 B. P. C. 181. And after possession for some years by the mortgagee, and acquiescence by the mortgagor under a foreclosure decree, a parol agreement by the mortgagee to allow the redemption will not be enforced. *Wichalse v. Short*, 3 B. P. C. 559. On motion to make a foreclosure decree absolute, it is not necessary that the person attending on behalf of the mortgagee had no authority to give a receipt, if no one attended on behalf of the mortgagor to pay the money. *London, &c. Society v. Brown*, 16 W. R. 782.

When a mortgagee forecloses, and then brings an action for the deficiency, he opens the foreclosure. But if he sells he cannot sue on the covenant in his mortgage deed for any deficiency. *Lockhart v. Hardy*, 9 Bea. 349; see *Perry v. Barker*, 13 Ves. 198. In general, where a mortgagee has collateral securities, he endeavours to realize them first, and then proceeds to foreclose the mortgage for so much of the debt as remains unsatisfied. See *Dyson v. Morris*, 1 Ha. 413, 423.

It would seem that a mortgagee could not impeach the mortgage on the ground of fraud in a foreclosure suit, but was compelled to file a bill (*Eddleston v. Collins*, 3 D., M. & G. 1; see *Vorley v. Cooke*, 1 Giff. 230); and, if anything was due under it, to offer to redeem on payment of what was due. See *Crenver Mining Co. v. Willyams*, 35 Bea. 353. See now Judicature Act.

A person entitled to part only of the money due on a mortgage could not alone file a bill of foreclosure (*Lowe v. Morgan*, 1 B. C. C. 368; *Palmer v. E. of Carlisle*, 1 S. & S. 423); though in the case of *Montgomerie v. Marq. of Bath* (3 Ves. 560), this was allowed. See now Act of 1881, *post*.

A bill of foreclosure lies for a reversionary interest in stock. *Slade v. Rigg*, 3 Ha. 35. The court will not in a foreclosure suit by a first mortgagee order a second mortgagee to deliver up the title deeds which have been deposited with him without notice of the first mortgage, but will leave the first mortgagee to avail himself of his legal title (if any) to them. *Kendall v. Hulls*, 11 Jur. 864.

Formerly by the 15 & 16 Vict. c. 86, s. 48 (repealed by Act of 1881, *post*), the court could in a foreclosure suit, at the request of mortgagor, mortgagee, or any subsequent incumbrancer or persons claiming under them, direct a sale instead of a foreclosure. But a reference to some cases decided upon it may still be useful. The court exercised its power for the benefit of all parties interested. See *Hurst v. Hurst*, 16 Bea. 372. The concurrence of the mortgagor was unnecessary. *Neuman v. Selfe*, 33 Bea. 522. See *Corsellis v. Patman*, L. R., 4 Eq. 156; *Greenough v. Littler*, 15 Ch. D. 93; and, as to the costs of the several mortgagees, *Berry v. Hebblethwaite*, 4 K. & J. 80; *Dighton v. Withers*, 31 Bea. 423; *Ward v. Mackinlay*, 2 D., J. & S. 358. Where there was an equitable mortgage by deposit, accompanied by a memorandum to execute a legal mortgage,

the court would not decree a sale, but execution of a legal mortgage, with due provisions for foreclosure. *Yeatman v. Reed*, 36 L. J., Ch. 136. In a prior case, however, it was held that the equitable mortgagee was not bound to take a legal mortgage, but had a right to enforce a sale (*Matthews v. Goodday*, 31 L. J., Ch. 282) when there was no memorandum accompanying the deposit, by which the mortgagor agreed to execute a legal mortgage. *London Money Advance Co. v. Brown*, 13 W. R. 490; see *Tuckley v. Thompson*, 1 J. & H. 126; on app., 29 L. J., Ch. 548. An equitable mortgagee was entitled, if he desired it, to a conveyance and decree for foreclosure, unless the mortgagor required a sale and made the required deposit. *Underwood v. Joyce*, 7 Jur., N. S. 566. Foreclosure, and not sale, was the remedy of an equitable mortgagee of a share in a mining company. *Redmayne v. Forster*, L. R., 2 Eq. 467. See *Backhouse v. Charlton*, 8 Ch. D. 444; *Lees v. Fisher*, 22 Ch. D. 283.

Now by the Conveyancing Act, 1881, s. 25, (1.), any person entitled to redeem may have a judgment or order for sale instead of for redemption. (2.) In any action, whether for foreclosure, or for redemption, or for sale, or for the raising and payment in any manner of mortgage money, *the court*, on the request of the mortgagee, or of any person interested either in the mortgage money or in the right of redemption, and, notwithstanding the dissent of any other person, and notwithstanding that the mortgagee or any person so interested does not appear in the action, and without allowing any time for redemption or for payment of any mortgage money, *may, if it thinks fit*, direct a sale of the mortgaged property, on such terms as it thinks fit. (3.) The court may direct the plaintiff to give security for costs, and may give the conduct of the sale to any defendant, and may give directions as to costs. (4.) The court may direct a sale without previously determining the priorities of incumbrancers. (5.) This section applies to actions brought either before or after the commencement of this Act. (6.) Relates to repeals. (7.) Does not extend to Ireland. Under this section the court has power in a redemption action to order a sale of the mortgage property on an interlocutory application made before the trial of the action by a person interested in the equity of redemption. *Woolley v. Colman*, 21 Ch. D. 169. In this case there were several mortgagees, some of whom supported while others opposed the application. Where a decree for successive redemptions and foreclosures has been obtained in an action by a second mortgagee against the first mortgagee and several successive incumbrancers, and the second mortgagee redeems the first, and then applies for a sale of the mortgaged property, the court has jurisdiction under this section to order a sale of the mortgaged property in a foreclosure or redemption action at any time before the suit is concluded by foreclosure absolute. *Union Bank of London v. Ingram*, 20 Ch. D. 463. In *Green v. Biggs*, W. N. 1885, p. 128, a sale was ordered, but not to take place until three months after the date of the certificate.

CHAPTER X.

OF PRIORITY AND TACKING.

SEC. 1.—*Priority and Possession of the Legal Estate, or by Possession of Title Deeds.*

<i>Legal Estate, its Effect in general .</i>	764	<i>Effect of Possession of Deeds as</i>	
<i>Where Equities equal, Legal Estate</i>		<i>between equitable Mortgages.....</i>	767
<i>prevails</i>	764	<i>Mortgagee by Deposit</i>	767
<i>Where it does not give Priority .</i>	764, 765	<i>Notice of Deeds of Equities</i>	768
<i>Fraud or gross Negligence in not</i>		<i>Conveyancing Act, 1882</i>	768
<i>procuring or parting with Title</i>		<i>Mortgagee and unpaid Vendor</i>	768
<i>Deeds</i>	765	<i>Trustee Mortgagee</i>	769
<i>Mortgagor making no Inquiry... 765, 766</i>		<i>Denial or Concealment of Mortgage</i>	769
<i>Fraud by Mortgagee</i>	766	<i>Marshalling</i>	769

IRRESPECTIVE of the *legal estate*, mortgages rank in general according to their respective dates (*Frere v. Moore*, 8 Pri. 475; see *Rooper v. Harrison*, 2 K. & J. 86), and their priorities are not affected by the giving, or omitting to give, notice to the party in whom the legal estate is vested. *Wilmot v. Pike*, 5 Ha. 14. When two deeds relating to the same subject-matter are executed on the same day the Court will inquire which of them was executed first. But if there is anything in the deeds themselves to shew an intention either that they shall take effect *pari passu*, or that one should take effect in priority to the other, the Court will presume that they were executed in such an order as to give effect to the manifest intention. *Gartside v. Silkstone, &c. Co.*, 21 Ch. D. 762. But this order of priority may be disturbed where a subsequent equitable mortgagee obtains the legal estate, for it is a fundamental principle that, *where the equities are equal* (see *Rice v. Rice*, 2 Drew. 73; *Cave v. Cave*, 15 Ch. D. 639), the possession of the legal estate *primâ facie* gives priority. *Rooper v. Harrison*, *sup.* p. 108; see *Lloyd v. Attwood*, 3 De G. & J. 614; *Young v. Young*, L. R., 3 Eq. 801. In *Shropshire, &c. Co., v. The Queen*, L. R., 7 H. L. 496, 506, Lord Cairns, C., observed in substance “that a pre-existing equitable title may be defeated by a supervening legal title obtained by transfer, also by conduct, representation, or misstatements of a character which would operate to forfeit the pre-existing equitable title.” This principle applies to real property of every kind and chattels real. Thus with reference to copyholds, a mortgagee by conditional surrender presented, but not enrolled, has priority over a subsequent surrenderee without notice, whose surrender is enrolled. The first mortgagee in such a case has the legal estate notwithstanding the want of enrolment. *Horlock v. Priestley*, 2 Sim. 75; S. C., 6 B. & C. 484. But a mortgagee of

copyholds by grant, not surrender, is postponed to an actual surrenderee without notice. *Oxwith v. Plummer*, 2 Ver. 636.

The mortgagor himself cannot give priority to a subsequent over a prior incumbrancer by conveying the legal estate to the former (see *Sharples v. Adams*, 32 Bea. 213, 216, and as to that case, *Maxfield v. Burton*, L. R., 17 Eq. 15, 19; comp. *Goodtitle v. Morgan*, 1 T. R. 755; *Right d. Jefferys v. Bucknell*, 2 B. & Ad. 278; see *Carter v. Carter*, 3 K. & J. 617; *Pilcher v. Rawlins*, L. R., 7 Ch. 259); and if the legal estate be vested in a trustee for a prior incumbrancer, a subsequent incumbrancer without notice at the time of his loan gains no priority by taking a conveyance of it with notice. *Allen v. Knight*, 5 Ha. 272; affirmed 11 Jur. 527; *Mumford v. Stohwasser*, L. R., 18 Eq. 556, or as it would seem even without notice. See the observations of Jessel, M.R., *ib.*, 562, 563; also *Wilmot v. Pike*, 5 Ha. 22. An equitable mortgagee does not acquire priority by getting in the legal estate from a bare trustee after notice of a prior incumbrance. *Harpham v. Shacklock*, 19 Ch. D. 207. A trustee who has the legal estate and takes from his *cestui que trust* an assignment of the equitable interest by way of security for money advanced to the *cestui que trust*, can avail himself of the legal estate as a protection against a prior incumbrance of which he had no notice. *Newman v. Newman*, 28 Ch. D. 674, correcting the note in Sugden's Vendors and Purchasers (14th ed., p. 379) on *Browne v. Savage* (4 Drew. 635). As to the priority of a *puisne* mortgagee who takes an assignment of a reversionary term of a few days left in the mortgagor subject to a prior legal mortgage, see *Russell Road Purchase Monies*, L. R., 12 Eq. 78.

Again, the possession of the legal estate by a mortgagee will not confer priority, if there has been gross negligence on his part either in not procuring, or having procured, in afterwards parting with, the title deeds. But there must be such negligence or fraud. *Tourle v. Rand*, 2 B. C. C. 650; *Evans v. Bicknell*, 6 Ves. 174; *Barnett v. Weston*, 12 Ves. 129; *Martinez v. Cooper*, 2 Russ. 198; *Hewitt v. Loosemore*, 9 Ha. 449; *Agra Bank v. Barry*, L. R., 7 H. L. 135; *Espin v. Pemberton*, 4 Drew. 333; *Hopgood v. Ernest*, 3 D., J. & S. 116; see *Dowle v. Saunders*, 2 H. & M. 242. If he has some of the title deeds, relying not unreasonably upon the assurance of the depositor that they are all, he will not be postponed, to a subsequent mortgagee or purchaser, who has been induced to lend or purchase upon the faith of other and material deeds. *Roberts v. Croft*, 2 De G. & J. 1; *Dixon v. Muckleston*, L. R., 8 Ch. 155. Where A., a solicitor, mortgaged two estates to B., and gave him a parcel of deeds which purported to be the deeds of both properties, but in fact were those of one only, and then A. sold the other estate to C. and handed him over the deeds of it; it was held that B. had not lost its priority over C. by reason of his not having the deeds. *Hunt v. Elmes*, 2 D., F. & J. 578. *Colyer v. Finch*, 5 H. L. C. 905; *Ratcliffe v. Barnard*, L. R., 6 Ch. 652.

In some cases a mortgagee will be postponed who makes no inquiry

after the title deeds. If a mortgagee has no deeds, and makes no inquiry after them, it will be gross negligence on his part. *Carter v. Carter*, 3 K. & J. 617; *Worthington v. Morgan*, 16 Sim. 547; *Clarke v. Palmer*, 21 Ch. D. 124. The negligence or omission to inquire after title deeds, "may be evidence if it is not explained of a design inconsistent with *bonâ fide* dealing to avoid knowledge of the true state of the title," per Ld. Selborne, *Agra Bank v. Barry*, L. R., 7 H. L. C. 135, 157. "In other words, what you require is evidence showing a desire or fixed purpose to avoid knowing more," per Fry, J., *Kettlewell v. Watson*, 21 Ch. D. 685, 706; see *Spencer v. Clarke*, 9 Ch. D. 137. In *Maxfield v. Burton*, L. R., 17 Eq. 15, there was a deposit of deeds by A. with bankers and memorandum to execute deeds necessary for carrying out the security. On A.'s marriage he agreed to settle the property comprised in the deeds, and stated to the solicitor of his intended wife that the deeds were at his bankers and unencumbered. He afterwards conveyed the property to the trustees of the settlement. It was held that the solicitor had not made sufficient inquiry and that the bankers had priority over the trustees. See *Spencer v. Clarke*, *sup.* In *Manners v. Mew*, 29 Ch. D. 725, A. a legal mortgagee had asked for the deeds which the mortgagor, who was his solicitor, made excuses for not giving to him. The mortgagor afterwards deposited the deeds with another mortgagee as security for money advanced without notice of the legal mortgage, it was held that A. had not been guilty of fraud or negligence amounting to fraud, and that he could not be postponed to the mortgagee by deposit by reason of any negligence short of that, and that he was entitled to recover the deeds from the mortgagee by deposit, notwithstanding he was a purchaser for value without notice: and that sect. 25, sub-sect. 11, of the Judicature Act, 1873, *ante*, p. 3, did not alter the rule of law on the subject. In *North. Counties, &c. Co. v. Whipp*, 26 Ch. D. 482, it was laid down that the Court will postpone a legal mortgage to a subsequent equitable security: (1) where the legal mortgagee has assisted in or connived at the fraud which led to the creation of the subsequent equitable estate, of which assistance or connivance the omission to use ordinary care in inquiring after or keeping the title deeds may be sufficient evidence where such conduct cannot otherwise be explained; or (2), where the legal mortgagee has made the mortgagor his agent with authority to raise money, and the security given for raising such money has by misconduct of the agent been represented as the first estate. But not on the ground of any mere carelessness or want of prudence on the part of the legal mortgagee. A *cestui que trust* is in no better position than his trustee who has omitted to inquire for the title deeds. *Lloyd's Banking Co. v. Jones*, 29 Ch. D. 221.

If a first mortgagee leaves the deeds with the mortgagor, to enable him to raise more money, but subject to the first mortgage, and the mortgagor by means of the deeds effects another mortgage, suppressing the fact of the first, the second mortgagee having the deeds will be entitled to priority. *Briggs v. Jones*, L. R., 10 Eq. 92; see

Perry-Herrick v. Attwood, 2 De. G. & J. 21; *Waldron v. Sloper*, 1 Drew. 193. And after him subsequent incumbrancers who have made inquiry into the matter have been misled, and have acted in the belief that the mortgagee obtaining the deeds is the first mortgagee. *Clarke v. Palmer*, 21 Ch. D. 124. The onus of proving gross negligence rests upon the person seeking to postpone the prior mortgagee who has not the deeds. *Carter v. Carter*, 3 K. & J. 617.

The question as to priority by possession of the title deeds sometimes arises between *equitable* mortgagees, of whom a later one in the order of time has obtained them. In *Layard v. Maud* (L. R., 4 Eq. 397), it was laid down "that where there is merely an equitable mortgage, unaccompanied by the legal estate, in every case where the equitable mortgagee either omits to get, or having got, gives up possession of, the deeds, he must always be postponed." *Ib.* p. 406. In the later case of *Thorpe v. Holdsworth* (L. R., 7 Eq. 139), Giffard, V.-C., in commenting on *Layard v. Maud* (*sup.*) observed (p. 146, 147), "though it was much urged that the mere custody of the deeds was enough to give the defendants priority, I am of opinion that this is not so, nor can I take *Layard v. Maud* to be an authority for such a proposition,—there must be some act or default on the part of the first mortgagee to have this effect." See *Hunter v. Walters* (L. R., 11 Eq. 292, affirmed L. R., 7 Ch. 75, also the observations of Lord Cairns, L. C., in *Pease v. Jackson*, L. R., 3 Ch. 581. This case was decided upon another point, but his lordship attached great importance to the fact that a third mortgagee, on paying off a first mortgagee (without notice of the second), and making a further advance, obtained possession of the title deeds, and appears to have considered that, apart from any question depending upon the legal estate, the possession of the deeds gave the better equity over the second mortgagee. Where A., through his solicitor, contributed £500 and the solicitor £300 to a loan of £800 on deposit of deeds, and the solicitor subsequently took a mortgage to himself for the £800, and afterwards deposited the title deeds of the mortgaged property with a bank as security for a loan of £400: it was held that the plaintiff had priority for his £500 over the security to the bank. *Bradley v. Riches*, 9 Ch. D. 189. In *Keate v. Phillips*, 18 Ch. D. 560, an equitable mortgagee by deposit of title deeds without notice was held to be entitled to priority over innocent persons claiming as prior mortgagees of fictitious leases purporting to be granted by persons as owners of the property, but who had no interest, in pursuance of schemes on the part of the mortgagors and others to defraud. A mortgagee, by deposit of the deeds of one estate, will not be deprived of them at the instance of a subsequent legal mortgagee of that and another estate, to whom deeds purporting to be the title deeds of both estates have been delivered by the mortgagor. *Barnard v. Bywater*, 17 W. R. 71; see *Joyce v. De Moleyns*, 2 J. & L. 374; *Stackhouse v. Ly. Jersey*, 1 J. & H. 721. In *Newton v. Newton* (L. R., 6 Eq. 135, 141), the M. R. observed that if the equitable owner of an estate creates a first charge on it in favour of A., a second in

favour of B., and a third in favour of C., to whom he delivers the deeds, and that their priorities are established in this order, the deeds will not be taken from C. See *S. C.* on appeal, L. R. 4 Ch. 143, 146, reversed on the question of fact only. See *Thorpe v. Holdsworth*, L. R. 7 Eq. 139. A mortgagee, who, by his negligence in executing deeds and signing receipts for the mortgage debt, enables the person in whose favour the deed is executed and receipt given to commit a fraud must be bound by the consequences. *Hunter v. Walters*, L. R., 7 Ch. 75.

Notice that deeds are in the hands of a third person was in general notice of his equities. *Hiern v. Mill*, 13 Ves. 114; see *Bozon v. Williams*, 3 Y. & J. 150. By the Conveyancing Act, 1882, 45 & 46 Vict. c. 39, s. 3.—(1.) “A purchaser (including mortgagee, s. 2) shall not be prejudicially affected by notice of any instrument, fact, or thing unless—

- (i.) It is within his own knowledge, or would have come to his knowledge if such inquiries and inspections had been made as ought reasonably to have been made by him; or (ii.) In the same transaction with respect to which a question of notice to the purchaser arises, it has come to the knowledge of his counsel, as such, or of his solicitor, or other agent, as such, or would have come to the knowledge of his solicitor, or other agent, as such, if such inquiries and inspections had been made as ought reasonably to have been made by the solicitor or other agent.

(2.) This section shall not exempt a purchaser from any liability under, or any obligation to perform or observe, any covenant, condition, provision, or restriction contained in any instrument under which his title is derived, mediately or immediately; and such liability or obligation may be enforced in the same manner and to the same extent as if this section had not been enacted. (3.) A purchaser shall not by reason of anything in this section be affected by notice in any case where he would not have been so affected if this section had not been enacted. (4.) This section applies to purchases made either before or after the commencement of this Act; save that, where an action is pending at the commencement of this act, the rights of the parties shall not be affected by this section.” Notice of a suit is notice of the rights of a solicitor in the suit. *Faithfull v. Ewen*, 7 Ch. D. 495. Cons. now the above Act, s. 3, *sup.*

A mortgagee by deposit will be preferred to an unpaid vendor who has parted with the deeds, including the conveyance from himself, with the receipt for the purchase money indorsed (*Rice v. Rice*, 2 Drew. 73; *Smith v. Evans*, 28 Bea. 59; see *Wilson v. Keating*, 4 De G. & J. 588; *Worthington v. German*, *Fraser v. Hill*, 16 W. R. 187. On the other hand, an unpaid vendor who retains them will be preferred to sub-purchasers and others claiming under the purchaser, who have omitted to inquire into his title. See *Worthington v. Morgan*, 16 Sim. 547; *Peto v. Hammond*, 30 Bea. 495; *Wrout v. Dowes*, 25 Bea. 369; *Rose v. Watson*, 10 H. L. C. 672. In *Head v. Eger-*

ton (3 P. W. 280), where one person had the legal estate without the deeds, and another the deeds without the legal estate, both being purchasers for value, the court refused to interfere between them. See *Hunter v. Walters*, L. R., 11 Eq. 292, 318, aff. L. R., 7 Ch. 75.

Sometimes a question arises as to the equities of an equitable mortgagee and a *cestui que trust*, where money has been advanced to the trustee by the mortgagee without notice of the trust and on the deposit of deeds. In *Newton v. Newton* (L. R., 6 Eq. 135), a trustee advanced trust money to A., taking an ordinary legal mortgage in his (the trustee's) own name, and afterwards deposited the deeds with bankers to secure an advance to himself, the *legal estate* being still in him. It was held by the M. R., on the evidence, that the money lent was trust money, and that the bankers, the equitable mortgagees, though without notice, must deliver up the mortgage deeds to the trustee having the legal estate, to be held in trust for the *cestui que trust* of the money. This case was reversed on appeal (L. R., 4 Ch. 143), not upon the question of law, in which the court above agreed with the M. R., but differed from his lordship on the question of fact as to the money being trust money.

Priority may be lost by the prior mortgagee denying his own security, on inquiries being made by an intending mortgagee, who states at the same time that he is about to lend money on the same security. *Ibbotson v. Rhodes*, 2 Ver. 554; *Berrisford v. Milward*, 2 Atk. 49; see *Stronge v. Hawkes*, 4 D., M. & G. 186; *S. C.*, 4 De G. & J. 632.

As mentioned generally in a previous title, "ASSETS," the doctrine of marshalling applies to mortgages. Thus, as between mortgagees, if two properties, X. and Y., are mortgaged to A., and X. only is afterwards mortgaged to B., B. is entitled to have the securities marshalled, so as to throw A.'s mortgage in the first instance on Y. *Gibson v. Seagrim*, 20 Bea. 614; see *Tidd v. Lister*, 3 D., M. & G. 861; *South v. Bloxam*, 2 H. & M. 457; *Broadbent v. Barlow*, 3 D., F. & J. 570; *Ex parte Alston*, L. R., 4 Ch. 168; *Heyman v. Dubois*, L. R., 13 Eq. 158; *Trumper v. Trumper*, L. R., 14 Eq. 295.

SEC. 2.—*Tacking.*

<i>The general Doctrine</i>	770	<i>Tacking by first or prior Mortgagee—continued.</i>	
<i>Nature of Tacking</i>	770	<i>Subsequent Charge may be for antecedent Debt</i>	772
<i>Tacking by first or prior Mortgagee</i>	770	<i>No Tacking after Decree</i>	772
<i>Tacked Mortgage must be in his own Right</i>	770	<i>Tacking by puisne Mortgagee</i>	772
<i>Effect of Notice</i>	770	<i>Must not have had Notice at Time of his Mortgage</i>	772
<i>What may be tacked by first or prior Mortgagee</i>	771	<i>Legal Estate under satisfied Mortgage</i>	773
<i>Further Advances</i>	771	<i>Legal Estate bound by a Trust</i>	773
<i>Judgments under 1 & 2 Vict. c. 110</i>	771	<i>Subsequent charge whether on the Land or not</i>	773
<i>Under 23 & 24 Vict. c. 38</i>	771	<i>Sureties for Mortgagor</i>	773
<i>Under 27 & 28 Vict. c. 112</i>	771		
<i>As to Specialty and Simple Contract Debts</i>	771		

General Doctrine.] The principles of the preceding cases, and the general rules which have been considered as to the effect of the legal estate in giving priority, are important with reference to the doctrine of *tacking*. By the 37 & 38 Vict. c. 78, s. 7, priority by tacking and possession of the legal estate was not allowed. But this section was repealed as from the commencement by the 38 & 39 Vict. c. 87, s. 139. The following cases are still authorities therefore. Tacking must be to the *legal estate*, and by means of the possession of it. *Clarke v. Abbot*, Barn. Ch. 462. The word is used to indicate, *first*, the annexing by a first or prior mortgagee, having the legal estate, of some subsequent mortgage or charge of his own, thereby postponing to both the incumbrances, which are *mesne* between them (*Brace v. Duchess of Marlborough*, 2 P. W. 494 (4th point); *Baker v. Harris*, 16 Ves. 397; *Lloyd v. Attwood*, 3 De G. & J. 614; *secondly*, the getting in by a puisne *equitable* mortgagee of the legal estate, thereby gaining priority over equitable mortgages prior to his own. For a subsequent title, which is both legal and equitable, has priority over a prior title which is equitable only. *Hagshaw v. Yates*, 1 Str. 240; *Hasket v. Strong*, 2 Str. 689.

Tacking by first or prior Mortgagee.] Tacking can only be effected under *certain conditions*. Thus, the first or prior mortgagee must be entitled to his subsequent mortgage or charge in his own right, and not as executor or trustee (*Barnet v. Weston*, 12 Ves. 130); though he may tack if he is a trustee under a deed providing for payment of his own debt as well as the debts of others. *Spencer v. Pearson*, 24 Bea. 266.

Again, he must have had *no notice* of the *mesne* incumbrance at the time of his subsequent mortgage or charge. *Brace v. Duchess of Marlborough*, 2 P. W. 495 (6th point); *Sish v. Hopkins*, Amb. 793; *Shepherd v. Titley*, 2 Atk. 352; *Lloyd v. Attwood*, 3 De G. & J. 614. Even if there is a first mortgage extending to *future advances*, and a

second mortgage with notice of the first, the first mortgagee cannot, as against the second mortgagee, tack advances made by him after notice of the second mortgage (*Hopkinson v. Rolt*, 9 H. L. C. 514 (overruling *Gordon v. Graham*, 7 Vin. 52, pl. 3); *Dawn v. City of London Brewery Co.*, L. R., 8 Eq. 155; *London and County Banking Co. v. Ratcliffe*, L. R., 6 App. C. 722; *Bradford Bank Co. v. Briggs*, 29 Ch. D. 149; comp. *New Lon. &c. Bank v. Brocklebank*, 21 Ch. D. 302; *Miles v. New Zealand, &c. Co.*, W. N. 1885, p. 142; nor is this rule affected by any custom between publicans, brewers and distillers in London. *Menzies v. Lightfoot*, L. R., 11 Eq. 459. See, as to an agreement for increased interest between mortgagor and first mortgagee with notice of a second mortgage, *Law v. Glenn*, L. R., 2 Ch. 634. Where a legal mortgage is executed in pursuance of a memorandum of agreement and deposit of deeds, to secure monies due at the date of the memorandum and future advances, it has relation back, and gives priority to such advances over mesne incumbrances, if such advances are made without notice of the mesne incumbrances. *Cooke v. Wilton*, 29 Bea. 100. The right to tack against the sureties of the mortgagor is co-extensive with the right to tack against the mortgagor himself. *Williams v. Owen*, 13 Sim. 597; *Fairbrother v. Wodehouse*, 23 Bea. 18; see *Bowker v. Bull*, 1 Sim., N. S. 29. The principle of tacking is, that the creditor shall not be deprived of his security without payment of all sums which form a *specific* or *general* lien upon it, to the exclusion of mesne incumbrances of which he had no notice at the time of his mortgage or charge. Therefore not only further advances, which must be evidenced by some writing (*Ex parte Hooper*, 1 Mer. 7), but a judgment, even before the 1 & 2 Vict. c. 110, could be tacked against subsequent incumbrancers, for although it passed no present interest in the land, it was a lien on it (*Brace v. Duchess of Marlborough*, 2 P. W. 491 (4th point); *Shepherd v. Titley*, 2 Atk. 352); *à fortiori* it could be tacked under this statute, which made the judgment an actual charge on the land. See *Mayor of Brecon v. Seymour*, 26 Bea. 548. But if the mortgage was satisfied before the judgment was obtained there was no right to tack. *Ib.* Under the 23 & 24 Vict. c. 38, *ante*, p. 519, it was held that a judgment was not a charge upon the land at all unless execution was issued. *Wallis v. Morris*, 10 Jur., N. S. 741. Under the 27 & 28 Vict. c. 112, *ante*, p. 520, the judgment will not be a charge until execution is issued and the debtor has got a return from the sheriff. *Guest v. Cowbridge Rail. Co.*, L. R., 6 Eq. 619. It would seem, therefore, that a judgment entered up only, under these acts cannot be tacked against subsequent incumbrancers as heretofore, when it was an actual lien or charge upon the land. Cons. also the recital of the act; see *Fisher on Mortgages*, 4th ed. p. 571.

Bonds, specialty or simple contract debts, not being charges on the estate, cannot be tacked as against the mortgagor (*Challis v. Casborn*, Pr. Ch. 407; *Coleman v. Winch*, 1 P. W. 775; see *Elvy v. Norwood*, 5 De G. & Sm. 240, 243); nor against his creditors' assignees for value, or devisees in trust for payment of debts (*Heams v. Bance*, 3

Atk. 630; *Jones v. Smith*, 2 Ves. jun. 376; *Adams v. Claxton*, 6 Ves. 226; *Irby v. Irby*, 22 Bea. 217; nor the assignee of his heir. *Coleman v. Winch*, 1 P. W. 775. But, in order to prevent circuity of action, bond and specialty debts may be tacked against the heir himself (*Morrit v. Paske*, 2 Atk. 53; *Jones v. Smith*, 2 Ves. jun. 372; *Thomas v. Thomas*, 22 Bea. 341), and devisees taking beneficially (*Heams v. Bance*, 3 Atk. 630), volunteers (*Troughton v. Troughton*, 3 Atk. 659), and the executors in cases of mortgages of leaseholds (*Coleman v. Winch*, 1 P. W. 776); and, since the 3 & 4 Will. 4, c. 104, simple contract debts may be tacked against the heir or devisee, but not as against specialty creditors. *Rolfe v. Chester*, 20 Bea. 610; *Thomas v. Thomas*, 22 Bea. 341. A mortgagee who is the executor of the mortgagor, cannot, under an executor's general right of retainer or preference, tack a simple contract debt, to the prejudice of a creditor of a higher degree, whether the debt is due to himself individually or to a partnership of which he happens to be a member. *Talbot v. Frere*, 9 Ch. D. 568. And simple contract debts cannot, it would seem, be tacked against the representatives of a deceased mortgagor's estate, there being other creditors. *Talbot v. Frere*, 9 Ch. D. 568. The cases of *Spalding v. Thompson*, 26 Bea. 637; *In re Haselfoot's Estate*, L. R., 13 Eq. 327; and *Ex parte National Bank*, L. R., 14 Eq. 507, are *contra*.

It is not necessary to enable a first mortgagee with the legal estate to tack a subsequent charge that the latter should be for an advance made at the time of the charge, it may be for an antecedent debt. *Spencer v. Pearson*, 24 Bea. 266. But this rule does not prevail where a *puisne* mortgagee gets in the legal estate, and thus gains priority. See *infra*. As to tacking where separate interests in property have been mortgaged to several mortgagees, see *Thorneycroft v. Crockett*, 2 H. L. C. 239. As to tacking costs of proceedings, see *South v. Bloxam*, 2 H. & M. 457; and money laid out for improvements, *Hipkins v. Amery*, 2 Giff. 292. The right to tack is at an end after a decree settling priorities. *Ex parte Knott*, 11 Ves. 619. The right to tack by a first mortgagee of personal estate may also exist, even where nothing is said at the time of the further advance as to its being on the security of the mortgaged property. *De Maimbray v. Metcalf*, 2 Ver. 691, 698; *Adams v. Claxton*, 6 Ves. 229; see *Vanderzee v. Willis*, 3 B. C. C. 21.

Tacking by puisne mortgagee.—A *puisne* mortgagee without notice at the time of advancing his money may always get in (though then having notice) the legal estate (his *tabula in naufragio*, according to the well-known phrase), and thus obtain priority by squeezing out, as it has been termed, a prior incumbrancer, as where a third mortgagee gets in the legal estate of the first mortgagee, thus gaining priority over the second. *Marsh v. Lee*, 2 Vent. 337; *Edmunds v. Povey*, 1 Ver. 187; *Brace v. Duchess of Marlborough*, 2 P. W. 491; *Bates v. Johnson*, Johns. 304; *Rooper v. Harrison*, 2 K. & J. 86. This may be done even pending a redemption suit by the second

mortgagee (2 P. W. 491), and it makes no difference that the first mortgagee had notice of the mesne incumbrance (*Peacock v. Burt*, 4 L. J., N. S. 33; Coote on Mortgages, 3rd ed., App. 569), though this was doubted in the earlier case of *Mackreth v. Symons*, 15 Ves. 335; cons. *Carter v. Carter*, 3 K. & J. 639. But the principle of *Peacock v. Burt*, *sup.* (if law) will not be extended. *West Lon. Com. Bank v. Rel. Perm. B. Soc.*, 29 Ch. D. 954.

But if the subsequent incumbrancer at the time he advances his money has notice of the prior equitable charge, though he obtain the legal estate, he will not thereby gain priority (*Brace v. Duchess of Marlborough*, 2 P. W. 495 (6th point)); for in such a case the equities are not equal. See *Rice v. Rice*, 2 Drew. 73, 78. And if the prior equitable mortgagee has a power of sale, and sells, a subsequent mortgagee, with notice of and subject to the first, who has obtained the legal estate, is a trustee of it for the purchaser. *Leigh v. Lloyd*, 35 Bea. 455. And a contract by a first mortgagee to give priority to a third mortgagee, who advances his money with notice of the second, is inoperative as against the latter. *Brotherton v. Hatt*, 2 Ver. 574. See *Kettlewell v. Watson*, 21 Ch. D. 685. As to what amounts to notice, see tit. "VENDOR AND PURCHASER," and *ante*, p. 768.

Where, as ordinarily is the case, the legal estate is procured from a first mortgagee, it will not give priority if *his* mortgage is *satisfied* and he *has notice* of mesne incumbrances. *Carter v. Carter*, 3 K. & J. 617; *Prosser v. Rice*, 28 Beav. 68, 74; cons. *Peacock v. Burt*, 4 L. J., N. S. 33, *supra*. And a trustee cannot give his own incumbrancer priority over the *cestui que trust* by conveying the legal estate to the former after he has had notice of the trust. *Baillie v. McKewan*, 35 Bea. 177. There is a distinction between the case in which a first mortgagee tacks a subsequent charge and that in which a subsequent mortgagee procures a prior legal estate. In the former case, as already mentioned *ante*, p. 771, it is not necessary that the subsequent charge should have been strictly a charge on the land, if it might have been made one, as where it was a judgment. In the latter case it is necessary that the subsequent mortgagee should have lent his money *upon the security of the land* to enable him to tack it on getting in a prior legal mortgage. *Brace v. Duchess of Marlborough*, 2 P. W. 491; *Ex parte Knott*, 11 Ves. 617; *Lacey v. Ingle*, 2 Ph. 413; cons. now as to judgments *ante*, p. 771. Where all the mortgages are *equitable* they rank in the order of time, and a first mortgagee, who is also third, cannot tack. *Clarke v. Abbot*, Barn Ch. 462; *Brace v. Duchess of Marlborough*, 2 P. W. 495 (7th point); *Frere v. Moore*, 8 Pri. 475. If, indeed, one equitable mortgagee has a better equity than another to call for the legal estate, he will be entitled to priority. *Ex parte Knott*, 11 Ves. 618; *Foster v. Cockerell*, 3 Cl. & F. 456. The first paragraph of the marginal note of the last case is apt to mislead. See the true doctrine upon the subject stated in the judgment in *Wilmot v. Pike*, 5 Ha. 14.

A surety for a mortgagor in a first mortgage, who pays off part of

the mortgage debt, has to the extent of the money so paid priority over a second mortgagee with notice, who has obtained a transfer of the legal estate. *Drew v. Lockett*, 32 Bea. 499.

SEC. 3.—Priority by Registration.

<i>Registration Acts</i>	774	<i>Negligence affects priority</i>	775
<i>What Instruments must be regis-</i>		<i>Bankruptcy—Trustee</i>	775
<i>tered</i>	774	<i>Judgment Creditors</i>	775
<i>Agreements to Mortgage</i>	774	<i>Register not Notice in general</i>	776
<i>Mortgage by Deposit</i>	774	<i>Operation of unregistered Instru-</i>	
<i>Further Charge</i>	774	<i>ments—Notice</i>	776
<i>Registration in Yorkshire</i>	775	<i>Tacking, when Valid</i>	776, 777
<i>Registration not necessary to give</i>		<i>English—Irish Act</i>	777
<i>Validity against Grantor</i>	775	<i>Undiscovered Will</i>	777

The operation of the various County Registration Acts, with regard to judgments, has already been adverted to, *ante*, p. 516. By the acts there referred to, memorials of deeds, conveyances and wills affecting hereditaments in these places respectively are required to be duly registered, or they will be void against subsequent purchasers or mortgagees for value who register. The act applying to Ireland is the 6 Anne, c. 2 (Irish Act). The acts do not extend to copyhold estates, leases at rack rent, leases not exceeding twenty-one years, where the actual possession and occupation go with the lease, and the Middlesex Act does not extend to chambers in Serjeants' Inn nor to the Inns of Court and Chancery (s. 17); and it is considered that the last-mentioned act does not extend to the city. *Sug. Vend. & Pur.* 732, 14th ed. The Middlesex Act does not apply to the proceeds of the sale of land. *Arden v. Arden*, W. N. 1885, p. 61. When the title to land has been and continues to be registered under the Land Titles and Transfer Act, 38 & 39 Vict. c. 87, the acts in force at the time of its passing relating to registration in Yorkshire and Middlesex do not apply (s. 127). The Yorkshire Registries Act, 47 & 48 Vict. c. 54 (1884), is later than, but does not refer to, the Land Titles and Transfer Act.

In *Wright v. Stanfield* (27 Bea. 8), it was held that an agreement to mortgage did not come within the Middlesex Registry Acts. But this does not seem consistent with the later cases of *Moore v. Culverhouse*, *ib.* 639, and *Nere v. Pennell*, *Hunt v. Nere*, 2 H. & M. 170.

In the two last-cited cases it was held that prior registration by a subsequent mortgagee by deposit, without notice, gave priority over a prior equitable mortgagee, who afterwards registered. *Nere v. Pennell*, *Hunt v. Nere*, 2 H. & M. 170; see *Bradley v. Riches*, 9 Ch. D. 189. Under the West Riding Registry Act, in force prior to the Act of 1884, a memorandum of *further charge* in favour of the first mortgage of lands subject to the act, required registration as much as the original mortgage, and in the absence of registration would have been postponed to a second registered mortgage without notice of such further charge. *Credland v. Potter*, L. R., 10 Ch. 8. And now, by s. 16 of the Act

of 1884, protection by possession of the legal estate and tacking is not allowed. The West Riding Act did not apply to a mere equitable mortgage by deposit of deeds only, and the depositary was not postponed to a subsequent registered mortgage. *Smyther v. Cooper*, 2 B. & Ad. 223; see *Kettlewell v. Watson*, 21 Ch. D. 685. Now by the Act of 1884, s. 7 (in force 1st January, 1885), "Where any lien or charge on any lands within any of the three ridings is claimed in respect of any unpaid purchase-money or by reason of any deposit of title deeds, a memorandum of such lien or charge, signed by the person against whom such lien or charge is claimed, may be registered by any person claiming to be interested therein. Every such memorandum shall state—

- (a.) "The date from which such lien or charge is claimed;
- (b.) "The name, and description of the residence and occupation of the landowner whose lands are charged therewith;
- (c.) "A description of all the lands within the riding affected by such lien or charge, and the names of all the parishes wherein the same are situate;
- (d.) "The nature of the lien or charge claimed on or in such lands;
- (e.) "The name, and a description of the residence and occupation of the person registering such memorandum;

and no such lien or charge shall have any effect or priority as against any assurance for valuable consideration which may be registered under this act, unless and until a memorandum thereof has been registered in accordance with the provisions of this section."

Registration will not give priority, where there has been negligence in inquiring after deeds which have been deposited with a prior mortgagee who has omitted to register. *Wormald v. Maitland*, 35 L. J., Ch. 69. Consider the Yorkshire Registries Act, 1884, *supra*, s. 14, amended by 48 & 49 Vict. c. 26, s. 4.

Registration is not necessary to give validity to a deed as against the grantor, or formerly his assignees in bankruptcy. *Jones v. Gibbon*, 9 Ves. 407. But by the Bankruptcy Acts in force prior to the last acts it was enacted, that where the conveyance was required to be registered in any registry office in England, Wales or Ireland, the certificate of the appointment of the assignees should be registered. 12 & 13 Vict. c. 106, s. 143, which section was not repealed by the 24 & 25 Vict. c. 134. And by the 32 & 33 Vict. c. 71, "the certificate of appointment of a trustee shall, for all purposes of any law in force in any part of the British dominions requiring registration, enrolment, or recording of conveyances or assignments of property, be deemed to be a conveyance or assignment of property, and may be registered, enrolled and recorded accordingly" (s. 83, sub-sect. 8, Act of 1869). This is re-enacted *verbatim* by the 46 & 47 Vict. c. 52, s. 54 (4) (Act of 1883).

Though, as between mortgagees and judgment creditors, formerly (where the judgment was a charge under the 1 & 2 Vict. c. 110) the rule applied, that where there was notice of the prior unregistered judgment or mortgage, registration gave no priority, this rule did not apply as between judgment creditors themselves, and the first *regis-*

tered judgment creditor, though with notice, had priority over a prior but unregistered judgment. *Benham v. Keane*, 3 D., F. & J. 318. Cons. now the operation of the 23 & 24 Vict. c. 38, and 27 & 28 Vict. c. 112, as to the time when a judgment becomes a charge upon land by virtue of those acts; and see the cases cited *ante*, p. 519. Registration under the Yorkshire Registries Act (*infra*) gives priority notwithstanding actual or constructive notice (s. 14), amended 48 & 49 Vict. c. 26, s. 4.

The register is not notice, but was made so by the Yorkshire Registries Act, 1884, 47 & 48 Vict. c. 54, s. 15. But this section was repealed by the later act, 48 & 49 Vict. c. 26, s. 5. A purchaser or mortgagee, who obtains the legal estate, will not be affected by a prior registered equitable incumbrance of which he had no notice. *Morecock v. Dickins*, Amb. 678; *Underwood v. Ld. Courtown*, 2 Sch. & Lef. 64. At law the first registered instrument prevails, but in equity a purchaser or mortgagee, with notice at the time of consideration paid or given of a prior unregistered instrument, takes subject to it. *Le Neve v. Le Neve*, 3 Atk. 646; Amb. 436; *Sheldon v. Cox*, Amb. 626; *Tunstall v. Trappes*, 3 Sim. 301. See Yorkshire Act, 1884, s. 14.

In *Wyatt v. Barwell* (19 Ves. 435), it was held that actual notice must be clearly proved. But the notice may be, apparently, constructive only by the employment of a solicitor. *Marjoribanks v. Hovenden*, 1 Drur. 11. Notice by the employment of the same solicitor is sufficient. *Rolland v. Hart*, L. R., 6 Ch. 678. Indeed such notice is considered as actual not constructive. *Ib.* In *Chadwick v. Turner*, L. R., 1 Ch. 310, 319, on the East Riding Act, 6 Anne, c. 35, it was laid down that a title which had been registered could only be affected by clear notice, amounting in fact to fraud in registering. As to constructive notice, see Conveyancing Act, 1882, 45 & 46 Vict. c. 39, ss. 2 (2), 3. See further as to notice, tit. "VENDOR AND PURCHASER." A subsequent incumbrancer, however, without notice at the time of taking his security, may afterwards, though then having notice of another security, gain priority by registering his deed first. *Essex v. Baugh*, 1 Y. C. C. 620; see *M'Neill v. Cahill*, 2 Bli. 228; *Elsev v. Lutyens*, 8 Ha. 159. In *Ford v. White* (16 Bea. 120) there were mortgages of the same property, first to A., secondly to B., thirdly to C., with notice of B.'s mortgage. A.'s mortgage was not in question. C. registered before B., and assigned to D. without notice of B.'s mortgage. It was held, that, the interests being equitable, D. had no priority over B. Cons. as to this case *Chadwick v. Turner*, L. R., 1 Ch. p. 319. It has been held on the Irish Act (6 Ann. c. 2, Ir.), that if A. conveys to B., who does not register, and then to C., who does not register, and C. conveys to D., who does register, B.'s deed, though unregistered, has priority over D.'s, though registered, as A., after the grant to B., had nothing to convey except by a registered deed executed by himself. *Jack v. Armstrong*, 1 Hud. & Br. 727; *Fury v. Smith*, *ib.* 735; see *Mill v. Hill*, 3 H. L. C. 828.

Under the English acts (except the last Yorkshire Act, *ante*, p. 775), a prior legal mortgagee with registered mortgage may tack a further

advance against a registered *mesne* mortgage, if he has no notice at the time of the further advance. *Wrightson v. Hudson*, 2 Eq. Ca. Ab. 609; *Bedford v. Backhouse*, *ib.* 615.

Under the Irish Registration Act, however (6 Ann. c. 2), the legal estate conveyed by a first mortgage duly registered cannot be made available by means of tacking, to give priority to a thirdly-registered mortgage over a secondly-registered one, for by sect. 4 of that act, deeds, &c., are *good and effectual* according to the priority of registration, but there is no corresponding provision in the English acts. *Bushell v. Bushell*, 1 Sch. & L. 90; *Thompson v. Simpson*, 1 Dr. & W. 459, 486.

On the East Riding Act (6 Ann. c. 35), it was held, that the mortgagee of the *heir* who registered first had priority over the devisee who registered last, but after the time prescribed by the act, although his omission to register according to the provisions of the act was occasioned by the will not having been discovered. *Chadwick v. Turner*, L. R., 1 Ch. 310. As to the rights of persons claiming under registered deeds, and others claiming adversely under non-registered wills, under other English acts, see *ib.* p. 318.

See now as to Yorkshire registration and priorities, the 47 & 48 Vict. c. 54, s. 14, amended 48 & 49 Vict. c. 26, s. 4.

CHAPTER XI.

DISCHARGE OF MORTGAGE—RE-CONVEYANCE.

<i>Rights of Mortgagor and Mortgagee</i>	777	<i>Building Societies — Fines — Receipts</i>	779
<i>Incorrect Recitals</i>	778	<i>Presumption of Re-conveyance</i>	779
<i>Where there are Trusts of Mortgage Debt</i>	778	<i>In general Mortgagor Pays Costs</i>	779
<i>Assignment of Mortgage Debt, Conveyancing Act, 1881</i>	778	<i>Where Mortgagee Pays</i>	780
<i>Copyholds</i>	778	<i>Costs of Several Mortgagees</i>	780
<i>To whom made</i>	779	<i>Under Trustee Act</i>	780
		<i>Deeds must be returned</i>	780
		<i>Effect of Loss of Deeds</i>	780

THE usual termination of a mortgage transaction is a re-conveyance of the mortgaged property on the repayment of the mortgage debt, interest, and costs, if any.

Every mortgagor has a right to have the property re-conveyed, and collateral securities (if any) delivered up, on payment of what is due to the mortgagee. *Walker v. Jones*, L. R., 1 P. C. 50. On the other hand, a mortgagee cannot be compelled to re-convey until the money due is actually in his hands; payment into court is not sufficient. *Postlethwaite v. Blythe*, 3 Madd. 242; see *Wetherell v. Collins*, *ib.* 255. Under just allowances a mortgagee is only entitled to the ordinary inquiry whether anything and what is due to him for any and what

costs, charges and expenses properly incurred by him in respect of his mortgage security. *Rees v. Met. B. Works*, 14 Ch. D. 372.

A mortgagee cannot be required to execute a deed containing incorrect recitals, but he cannot object to a deed of re-conveyance, because it contains no recitals at all; and is not entitled to have all the dealings with the equity of redemption stated in the deed. *Hartley v. Burton*, L. R., 3 Ch. 365.

If the mortgagee has declared trusts of the mortgage debt and transferred the mortgages, these deeds must be handed over on a re-conveyance, or attested copies must be furnished at his expense, and a covenant for production of the originals entered into. *Dobson v. Land*, 4 De G. & S. 575.

The mortgagee was not bound to assign the mortgage debt to the mortgagor. *Dunstan v. Patterson*, 2 Ph. 341, 345.

Now by the Conveyancing Act, 1881, s. 15 (1), a mortgagor entitled to redeem has power to require the mortgagee, instead of re-conveying, to assign the mortgage debt and convey the mortgaged property to any third person, as the mortgagor directs; and the mortgagee shall be bound to assign and convey accordingly. (2) This section does not apply in the case of a mortgagee being or having been in possession. (3) This section applies to mortgages made either before or after the commencement of this act (1st January, 1882), and shall have effect notwithstanding any stipulation to the contrary.

By the Amendment Act, 1882, 45 & 46 Vict. c. 39, s. 12, the right of the mortgagor, under the foregoing section, to require a mortgagee, instead of re-conveying, to assign the mortgage debt and convey the mortgaged property to a third person, shall belong to and be capable of being enforced by each incumbrancer, or by the mortgagor, notwithstanding any intermediate incumbrance; but a requisition of an incumbrancer shall prevail over a requisition of the mortgagor, and, as between incumbrancers, a requisition of a prior incumbrancer shall prevail over a requisition of a subsequent incumbrancer.

The "mortgagor entitled to redeem" means a mortgagor, or person claiming under the mortgagor, who has a right to require a re-conveyance from the mortgagee; and no other person can take advantage of the act. *Teevan v. Smith*, 20 Ch. D. 724; cons. *West Lon. Com. Bank v. Rel. Perm. B. Soc.*, 29 Ch. D. 954. A tenant for life of mortgaged premises who has failed to keep down the interest and who has obtained the usual order permitting him to redeem the mortgage, is not of right entitled under s. 15 of the Act of 1881, to require the mortgagee to transfer the mortgage debt and premises to a third person. *Alderson v. Elgey*, 26 Ch. D. 567.

On a re-conveyance of copyholds, if the surrenderee has not been admitted, the mortgage is vacated by a memorandum of satisfaction being entered on the court rolls; where he has been admitted, which however is unusual, and the condition of repayment is performed, according to the terms of the surrender, the mortgagor may re-enter without any fresh admittance, but not where the condition is broken, the money not being paid at the day. 1 Scriv. Cop. 4th ed. 194.

The mortgage deed states to whom the re-conveyance of the mortgaged property is to be made. It is in general to the mortgagor, his heirs or assigns, or to him, his executors, administrators or assigns, according to the nature of the property. In the case of a mortgage by a husband of his wife's estate, see tit. "HUSBAND AND WIFE," Chap. VIII.

In mortgages to building societies, fines secured by covenant in the mortgage form part of the principal in taking the account of principal, interest, and costs, and are payable with interest. *Prov. Perm. B. S. v. Greenhill*, 9 Ch. D. 122. In mortgages to building societies, when the mortgage is paid an indorsed receipt revests the legal estate in the mortgagor. Act of 1874, s. 42, and in previous Act. In *Prosser v. Rice* (28 Bea. 68), it was held that the act did not operate to vest the legal estate in the person who first paid off the building society, who were the first mortgagees. See *Pease v. Jackson*, L. R., 3 Ch. 576; *Carlisle B. Co. v. Thompson*, 28 Ch. D. 398. The effect of the receipt is to vest the legal estate in the person who in equity is best entitled to call for it, and not necessarily in the person who actually pays off the mortgage. Thus, where there are successive equitable mortgagees, and the society is paid off by the mortgagor, the effect of the statutory receipt is to vest the legal estate in the equitable mortgagee who is *first* in point of *time*; unless the society is paid off by an equitable mortgagee who had no notice of prior incumbrances, in which case the legal estate vests in that mortgagee, notwithstanding that there are incumbrances prior to his in point of date. *Fourth City Mut. &c. Soc. v. Williams*, *Marson v. Cox*, 14 Ch. D. 140; see *Sangster v. Cochrane*, 28 Ch. D. 298; *Robinson v. Trevor*, 12 Q. B. D. 423. The indorsed receipt estops the society from questioning the sufficiency of the payment. *Harvey v. Mun. Perm. Invest. Soc.*, 26 Ch. D. 273.

A re-conveyance will be presumed where there has been no demand of principal and interest for years, and the mortgage deeds have long been in the possession of the mortgagor and those claiming under him. *Cooke v. Saltau*, 2 S. & S. 154; see *Hillary v. Waller*, 12 Ves. 239. See *Sands to Thompson*, 22 Ch. D. 614. But the mere delivery up of mortgage deeds does not cancel the debt. *Hurst v. Beach*, 5 Madd. 351.

In general a mortgagor must pay the full costs (*Ramsden v. Langley*, 2 Ver. 536) of all legal and equitable proceedings taken by the mortgagee to enforce his securities (*Ellison v. Wright*, 3 Russ. 458; *Nat. Pr. Bank Eng. v. Games*, W. N. 1885, p. 201), and also the costs of those claiming under him (*Wetherell v. Collins*, 3 Madd. 255), and costs arising from his having settled or otherwise dealt with the mortgage money. *Bartle v. Wilkin*, 8 Sim. 238. But where mortgagees declare trusts of the mortgage monies and transfer the mortgages by the same deeds, such deeds, or attested copies of them, must be delivered to the mortgagor at the expense of the mortgagees. *Dobson v. Land*, 4 De G. & S. 575. A mortgagee on redemption is not entitled to the costs of an attempted sale, rendered abortive in

consequence of his misdescription of the property. *Peers v. Ceeley*, 15 Bea. 209. And he may be made to pay costs where he has improperly opposed a claim to redeem, or has otherwise improperly acted. *Harvey v. Tebbutt*, 1 J. & W. 197; *Tanner v. Heard*, 23 Bea. 555. A mortgagee will not be deprived of his costs in a redemption suit, merely because he has by mistake overstated the amount due to him, the matters and accounts being honestly in controversy between him and the mortgagor. *Cotterell v. Stratton*, L. R., 8 Ch. 295. So where he refuses a tender of all that is due. *Skuttleworth v. Lowther*, cited 7 Ves. 586; *Morley v. Bridges*, 2 Coll. 621; *Hosken v. Sincock*, 11 Jur., N. S. 477. But a tender must be made. *Hodges v. Croydon Can. Co.*, 3 Bea. 86. As to the costs of a solicitor mortgagee, who acts for himself in a redemption suit, see *Price v. M'Beth*, 10 Jur., N. S. 579.

In general where there are several mortgagees, the costs of each are added to his security under whatever rank or order it stands, and are united to and form part of it; but if he institutes an administration suit, his costs are those of a plaintiff in such a suit. *Wright v. Kirby*, 23 Bea. 463.

If a mortgagee consents to a sale, by direction of the court in an administration suit, the proceeds of the sale being directed to be paid to him, it would seem that the costs of the suit incurred in the sale ought not to be first deducted before payment to him. *Ward v. Mackinlay*, 2 D., J. & S. 358; see *Hepworth v. Heslop*, 3 Ha. 485; *Langton v. Langton*, 7 D., M. & G. 30. But if he originates the suit, the costs must be paid in the first place. *Kenebel v. Scrafton*, 13 Ves. 370; see *White v. Bp. of Peterborough*, Jac. 402; comp. *Tipping v. Power*, 1 Ha. 405.

The costs of obtaining a vesting order, under the Trustee Act, 1850 (*post*, Chap. XII.), rendered necessary by the lunacy of the heir of the mortgagee, must be borne by the mortgagor or his estate, where the mortgage debt has been paid, and the petition is by the mortgagor. *Re Stuart*, 4 De G. & J. 317; *Re Jones*, 2 D., F. & J. 554. In other cases the rule does not seem quite settled. *Ex parte Wheeler*, 1 D., M. & G. 434; *Hawkins v. Perry*, 8 D., M. & G. 439; *Re Rowley*, 1 D., J. & S. 417; *Re Phillips*, L. R., 4 Ch. 629. The rule that the mortgagor pays costs, is the same where the mortgaged estate has been devised to trustees (*King v. Smith*, 6 Ha. 473), or has descended upon an infant heir. *Ib.*; *Ex parte Ommaney*, 10 Sim. 298.

Until the mortgage was paid off, the mortgagee could not, in general, be compelled to produce the title deeds (*Greenwood v. Rothwell*, 7 Bea. 291. See now *ante*, p. 703). On the mortgage being paid off, the title deeds must be handed back, and, in general, such other deeds exclusively affecting the property as have been executed since the original mortgage, and are in the mortgagee's possession. *Hudson v. Malcolm*, 10 W. R. 720; see *Capper v. Terrington*, 1 Coll. 103; *Weeks v. Stourton*, 11 Jur., N. S. 278.

If the mortgagee has lost the deeds, the mortgagor must nevertheless pay the mortgage debt on a re-conveyance, with an indemnity

against the loss of the deeds (*Stokoe v. Robson*, 3 V. & B. 51, 54, n.; see *Ld. Middleton v. Eliot*, 15 Sim. 531; *Shelmardine v. Harrop*, 6 Madd. 39, 41, n.), and compensation for the loss thereby sustained. In *Hornby v. Matcham* (16 Sim. 325), the mortgagee, who had accidentally burnt some of the deeds, was directed to make compensation for the damage done to the mortgagor's estate. See *Brown v. Sewell*, 11 Ha. 49; *Baskett v. Skeel*, 11 W. R. 1019. *James v. Rumsey*, 11 Ch. D. 398.

As to re-conveyance by the representatives of a deceased mortgagee, see *ante*, p. 744.

CHAPTER XII.

TRUSTEE ACTS, 1850, 1852.

<i>Definitions of Words in Acts</i>	781	<i>Where Trustees Disclaim</i>	782
<i>Lands—Stock</i>	781	<i>Persons jointly seised with others</i> ...	782
<i>Seised—Possessed</i>	781	<i>Orders as to Stock and Choses in</i>	
<i>Contingent Right</i>	781	<i>Action</i>	783
<i>Convey—Assign—Transfer</i>	781	<i>Mortgagor not in Possession</i>	783
<i>Trust</i>	782	<i>Copyholds</i>	784
<i>Lunatic—Infant—Devisee</i>	782	<i>On whose Application Orders made</i>	784
<i>Mortgage</i>	782	<i>Money Payable to Infants and</i>	
<i>In what cases Vesting Orders may</i>		<i>Lunatics</i>	784
<i>be made</i>	782	<i>Mortgage of Leaseholds by Demise</i>	
<i>Lands</i>	782	<i>—Last Days</i>	784
<i>Death of Mortgagee in Possession</i> .	782	<i>Powers of the Court</i>	784

THE Trustee Act, 1850 (13 & 14 Vict. c. 60), and Trustee Extension Act, 1852 (15 & 16 Vict. c. 55), contain various important provisions relating to trusts and mortgages. By the interpretation clause in the former (s. 2) it is in substance declared, that *lands* shall comprise all hereditaments, corporeal or incorporeal, of every tenure and whatever the interest therein; *stock* means every transferable fund, annuity or security, including shares in joint stock companies (*Re Angelo*, 5 De G. & Sm. 278); *seised* applies to any vested estate for life, or greater estate, at law and in equity, in possession or futurity, in lands; *possessed* applies to any vested estate less than a life estate, in possession or expectancy, in lands; *contingent right*, as applied to lands, means a contingent or executory interest, a possibility coupled with an interest, and a right of entry immediate, future, vested or contingent; *convey*, *assign* and *transfer* refer to the execution of suitable assurances or acts of transfer for conveying lands and transferring stock, including acts to be performed by married women and tenants in tail, in accordance with the 3 & 4 Will. 4, c. 74. A vesting order of an infant's estate tail in remainder, with the protector's consent, bars the entail and all remainders over. *Powell v. Matthews*, 1 Jur., N. S. 973. *Trust* is not to mean the duties

incident to an estate conveyed by way of *mortgage*; but, with this exception, it includes implied and constructive trusts, and includes cases where the trustee has some beneficial interest (see *Gardner v. Cowles*, 3 Ch. D. 304), and extends to and includes the duties incident to the office of personal representative of a deceased person. Where a trustee of property held in trust for A. absolutely, has become lunatic, the court will not make an order that the property may be vested in A., but that a new trustee ought to be appointed and the property vested in him. *In re Holland*, 16 Ch. D. 672. *Lunatic* means a person so found by inquisition; *person of unsound mind*, one, not an infant, not found a lunatic, but incapable, from infirmity of mind, of managing his affairs. See *Re Walker*, Cr. & Ph. 147. *Devisee*, in addition to its ordinary signification, means the heir of a devisee and the devisee of an heir, and generally any person claiming an interest in the lands of a deceased person not as heir, but by a title dependent solely upon devise and descent; *mortgage* is applicable to every estate, interest or property in lands or personal estate which would in a court of equity be deemed merely a security for money (s. 2). Some of the clauses are applicable to mortgagees only, others to mortgagees and trustees, others again to trustees only; the provisions of the first and second class alone are referred to under the present title.

The Lord Chancellor (or Lords Justices, 15 & 16 Vict. c. 87, s. 15), in cases of lunacy and unsoundness of mind, and the Court of Chancery in other cases, and the Duchy and Palatine Courts of Lancaster and Durham, where they have jurisdiction (s. 21), may make orders that lands of which a lunatic or person of unsound mind or an infant is seised or possessed upon any trust or by way of mortgage be vested in such person, in such manner and for such estate as shall be directed (ss. 3, 7). See *Re Lowry's Will*, L. R., 15 Eq. 78. The contingent rights in lands of infants, lunatics and persons of unsound mind, entitled upon any trust or by way of mortgage, may be ordered to be released (ss. 4, 8). When a person solely seised or possessed of any lands upon any trust is out of the jurisdiction of the court, or cannot be found, the court may make a vesting order (s. 9).

This section refers in terms to trustees only, but on the death of a mortgagee who has entered into possession, his heir is a trustee for his personal representatives within the section. *Re Skitter*, 4 W. R. 791; see *Re Hughes*, 2 H. & M. 695. Where the mortgagee has not entered into possession, see s. 19, *post*, p. 784. If trustees disclaim an estate the heir is a trustee within this section and section 23. *Wilks v. Groom*, 6 D., M. & G. 205. When any person is seised or possessed of any lands jointly with another out of the jurisdiction, or who cannot be found, an order may be made vesting the lands in the person so jointly seised, &c., or in him and any other person; the order has the same effect as if the trustee out of the jurisdiction, &c. had conveyed (s. 10). The words "seised jointly" in sect. 10 of the Trustee Act, 1850, are not limited strictly to a legal joint tenancy, but are used in the widest sense, and they include the case of land vested in coparceners, one of whom is out of the jurisdiction of the

court. *In re Greenwood's Trusts*, 27 Ch. D. 359. See *In re Templer's Trusts*, 4 N. R. 494; and *McMurray v. Spicer*, L. R., 5 Eq. 527. This section appears somewhat confused, the first part of it would be applicable to *all* cases of joint tenancy, but for the restriction at the end to cases of trustees. If one of the co-heirs of a mortgagee be out of the jurisdiction, he is a trustee within this section. *Re Templer*, 4 New. Rep. 494; see *Re Hughes*, *sup.* In the case of stock and choses in action to which lunatics and persons of unsound mind are entitled upon any trust or by way of mortgage *solely*, or *jointly* with others, the right to transfer and receive dividends and sue may be ordered to vest, in the former case, in any person, in the latter solely in the persons so entitled with the lunatics, &c., or in such persons so entitled *and* any other person (s. 5). Although, where one of the trustees of a trust fund becomes lunatic, the Court will not in general (see, however, *Re Watson*, 19 Ch. D. 384, where this was done, *Re Nash*, 16 Ch. D. 503, *contra*) vest the right to deal with the trust funds in the trustees of sound mind, but will require a new trustee to be appointed in the place of the lunatic, an order vesting the right to the fund in the trustees of sound mind will be made where the fund is immediately divisible. *In re Martyn, a Lunatic*. *In re Toutt's Will*, 26 Ch. D. 745. When stock is standing in the name of a deceased person whose personal representative is a lunatic or person of unsound mind, or a chose in action is vested in such lunatic, &c. as such representative, an order may be made vesting in any person the right to transfer the stock, receive dividends or sue for such chose in action (s. 6). The effect of vesting and releasing orders as to lands is the same as if the person seised or possessed had been under no disability, and had duly conveyed or released. See last paragraphs of ss. 3, 4, 7, 8, 9, 10.

The vesting order as to stock confers a right on the person appointed under the order to transfer stock and receive dividends, and indemnifies companies and persons acting in obedience to such order (s. 26). Act of 1852, ss. 6, 7. The vesting order as to choses in action confers on the person appointed a right to sue in his own name. Sect. 27, Act of 1850. The court may direct how rights to stock and choses in action may be exercised (s. 31).

On the death of a mortgagee who has not entered into possession, if the mortgage money has been paid to the person entitled to receive it, or he consents to an order for re-conveyance, a vesting order may be made, (1) when an heir or devisee of such mortgagee shall be out of the jurisdiction of the court or cannot be found; (2) when an heir or devisee of such mortgagee refuses in writing to convey, or does not within twenty-eight days after tender of a deed of re-conveyance convey (see *Rowley v. Adams*, 14 Bea. 130; *In re Walker's Mortgage Trusts*, 3 Ch. D. 209; comp. *In re Osborn's Mortgage Trusts*, L. R., 12 Eq. 392); (3) when it is uncertain which of several devisees of such mortgagee was the survivor; (4) when it is uncertain as to the survivor of several devisees of such mortgagee, or as to the heir of such mortgagee, whether he be living or dead; (5) when such mortgagee

shall have died intestate as to such lands and without an heir, or shall have died and it shall not be known who is his heir or devisee. The orders of the court are as effectual as conveyances by the proper parties (s. 19). The personal representatives of a mortgagee in fee who has not taken possession may obtain a vesting order where the legal estate has descended to the heir. *Re Boden*, 1 D., M. & G. 57.

In every case in which an order would operate as a conveyance, assignment or release, a person may, if more convenient, be appointed to convey, release or transfer (s. 20). Orders made with the consent of the lord of the manor, vesting copyhold lands, are effectual without surrender or admittance; and if a person is appointed to convey (which may be without the lord's consent), he may do all necessary acts, and the lord must perfect the assurance, subject to the customs of the manor and usual payments (s. 28). The court may make a vesting order without the lord's consent, but in this case the person in whom the estate is vested by the order must be admitted in the usual way; so where he takes the estate by conveyance under an order of the court. See *Re Hey's Trust*, 9 Ha. 221; *Ayles v. Cox*, 17 Bea. 585; *Paterson v. Paterson*, L. R., 2 Eq. 31.

Orders under any previous provisions of the act concerning property in mortgage may be made on the application of any person beneficially interested in the equity of redemption or mortgage debt (s. 37).

Money payable to infants and lunatics in discharge of property dealt with by the court under the act may be paid into court (s. 48). The court may make a decree in the absence of a trustee who is *merely such* and cannot be found (s. 49). Costs may be ordered to be paid out of the trust property (s. 51).

Under a covenant to surrender copyholds, coupled with a *declaration of trust* in favour of the covenantee, the covenantor is a trustee within the meaning of the Trustee Act. *Re Collingwood*, 6 W. R. 536. The same principle would seem to apply to a mortgage of leaseholds by demise, reserving the last few days, or last day, where the mortgagor declares that he will stand possessed of them in trust for the mortgagee (see Dart, Ven. & Pur., 5th ed., p. 589); but not where there is a mere covenant to assign. See *Re Propert*, 22 L. J., Ch. 948. And even where there is a mere covenant to assign, it would seem doubtful whether this does not make the mortgagor a trustee, the contract being executed. See *Re Cuming*, L. R., 5 Ch. 72.

The powers of the Court of Chancery in England extend to lands and personal estate within the Queen's dominions and the colonies, except Scotland (s. 54). The court consequently may make vesting orders as to lands in Ireland (*Re Hewitt*, 6 W. R. 537) or the colonies. *Re Groom*, 11 L. T., N. S. 336. The powers given by the act to the Lord Chancellor of Great Britain extend to property within any of the Queen's dominions except Scotland and Ireland (s. 56). He cannot, therefore, sitting *in lunacy*, make orders as to lands and personal estate in Ireland. *Re Davies*, 3 Mac. & G. 278. The powers of the Lord Chancellor of Great Britain and Court of Chancery in England may be exercised by the Lord Chancellor of, and Court of Chancery in,

Ireland respectively, with respect to lands and personal estate there (ss. 55—57). See the other sections of this and the Extension Act, tit. "TRUSTS."

It will be seen that I have not followed the order of sections in the acts. I thought it would be practicable to present a clearer general view of the acts by deviating from this order, and by sometimes combining together two or more sections.

As to limitations to suits relating to or affecting mortgages, see *ante*, tit. "LIMITATIONS TO SUITS."

As to services of notices under the Conveyancing Act, 1881, see s. 67 ; and as to orders of the court and procedure, see s. 70.

END OF VOL. I.

